846 P.2d 307

UNITED TECHNOLOGY AND RESOURCES, INC., a New Mexico corporation, Plaintiff–Appellant,

v.

DAR AL ISLAM, a New Mexico corporation, and Crescent Leasing & Development Corp., Defendants–Appellees.

No. 20312.

Supreme Court of New Mexico.

Jan. 12, 1993.

Thomas L. Kalm, Albuquerque, for plaintiff-appellant.

White, Koch, Kelly & McCarthy, M. Karen Kilgore, Janet Clow, Santa Fe, for defendants-appellees.

OPINION

MONTGOMERY, Justice.

United Technology and Resources, Inc. ("U.T.R."), plaintiff below, appeals from a judgment of the district court confirming an arbitration award in its favor. The award provided that U.T.R. should recover from defendants, Dar Al Islam and Crescent Leasing & Development Corporation (collectively, "Crescent"), the entire amount of compensatory damages sought by U.T.R. for Crescent's breach of a construction contract, plus costs of the arbitration, but denied U.T.R.'s request for attorney's fees and recommended that no punitive damages be assessed in U.T.R.'s favor. U.T.R.'s appeal is based on its assertions that the court should have awarded attorney's fees under NMSA 1978, Section 48–2–14 (Repl.Pamp.1987), and that the court should have conducted a jury trial on

U.T.R.'s claim for punitive damages, notwithstanding the arbitrators' recommendation that the claim not be allowed. We hold that U.T.R. failed to contest the arbitrators' award regarding attorney's fees in a timely manner and that the district court acted properly in adopting the arbitrators' recommendation on punitive damages. We therefore affirm the court's judgment.

I. FACTS

On August 30, 1984, U.T.R. contracted with Crescent to build a motel, retail shopping facility, and restaurant complex in Abiquiu, New Mexico. U.T.R. agreed to construct the project for approximately $722,000. Work began on the construction contract in September 1984 and continued until June 1985, at which time U.T.R. considered the project to be substantially completed. Upon completion of the work, U.T.R. claimed that Crescent owed it $163,976.40 for the balance due on the original contract plus amounts for additional work provided and materials delivered and incorporated into the project. U.T.R. filed a mechanic's lien for this amount in September 1985 and sued to foreclose on the lien in October. The suit also stated a claim for punitive damages, based on Crescent's alleged bad faith breach of contract.

In March 1989, in accordance with the procedure for settlement of disputes agreed to in the construction contract, Crescent filed a motion to compel arbitration under Section 44–7–2 of the Uniform Arbitration Act as adopted in New Mexico, NMSA 1978, Sections 44–7–1 to –22 (Orig. Pamp. & Cum.Supp.1992), and to stay the action pending arbitration. The district court granted the motion in June of that year and entered findings of fact and conclusions of law finding generally that, despite Crescent's inactivity since filing of the lawsuit three and one-half years before, Crescent had not waived its right to demand arbitration of disputes arising under the contract. The court's order reserved "jurisdiction over those matters not subject to arbitration, including but not limited to the issue of punitive damages, if any, ... which shall be resolved in a trial on the merits, with those issues triable by jury presented to a jury for resolution."

In August 1990, the parties conducted an arbitration administered by the American Arbitration Association, and in October 1990 the three-member panel issued its award. The panel awarded U.T.R. compensatory damages in the amount of $170,000.00 and required Crescent to pay an additional $11,476.74 as the costs of the arbitration proceeding. Crescent paid both amounts in full shortly after the award was issued.

On the subject of attorney's fees, the arbitrators stated: "We can find no legal basis in New Mexico for the award of attorney's fees in this arbitration, which proceeded upon a claim of 'bad faith breach of contract'." Accordingly, the award provided: "Any request for an award of attorney's fees is denied."

With respect to punitive damages, the arbitrators held: "We are not authorized to rule on Claimant's request for an award of punitive damages, however, it is recommended to the court that no punitive damages be assessed in this matter."

On July 22, 1991, Crescent applied for confirmation of the award pursuant to Section 44–7–11. In its response to the application, U.T.R. stated that it had "no problem with confirmation of the arbitration award," but claimed that the issue of punitive damages remained to be resolved by a jury trial. On November 7, 1991, the district court issued its judgment confirming the award and adopting the recommendation of the arbitration panel that no punitive damages be assessed against Crescent. At the hearing on presentment of the judgment earlier that day, U.T.R. raised, for the first time in over a year since the arbitrators' entry of their award, the issue of attorney's fees.

U.T.R. appeals, raising two points. First, it argues that it is entitled to an award of reasonable attorney's fees under Section 48–2–14 for its enforcement of the mechanic's lien against Crescent. Second, U.T.R. argues that it is entitled to a jury trial on the issue of punitive damages for bad faith breach of contract because the

issue was not susceptible to resolution by arbitration.

II. ANALYSIS

A. *Attorney's Fees*

U.T.R. contends that the district court abused its discretion by failing to award it attorney's fees incurred in enforcing its mechanic's lien. The general rule in New Mexico, of course, is that absent statutory or other authority each party to litigation is responsible for its own attorney's fees. *Montoya v. Villa Linda Mall, Ltd.*, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990). U.T.R. finds statutory authority for an award of attorney's fees in the New Mexico statutes governing mechanics' and materialmen's liens, NMSA 1978, Sections 48–2–1 to –17 (Repl.Pamp.1987 & Cum.Supp. 1992). Section 48–2–14 provides that in actions to enforce a mechanic's lien, "[t]he court may also allow ... reasonable attorney's fees in the district and supreme courts." *See Measday v. Sweazea*, 78 N.M. 781, 786, 438 P.2d 525, 530–31 (Ct.App. 1968) (legislative intent in mechanic's lien statute was to authorize allowance of attorney's fees in trial and appellate courts). U.T.R. maintains that since it won its action to enforce its mechanic's lien in full and Crescent's counterclaim was denied in its entirety, U.T.R. is entitled to its attorney's fees incurred in enforcing the lien.

Crescent raises two arguments in response to U.T.R.'s claim, one of which we find dispositive of this issue.[1] That argument is that U.T.R. failed to make a timely motion to vacate, modify, or correct the award and is thereby barred from challenging the arbitrators' refusal to award attorney's fees.

Under the Uniform Arbitration Act, a written agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable, except on such grounds as may exist for revocation of the contract. Section 44–7–1. The legislature and the courts of New Mexico "have expressed a strong policy preference for resolution of disputes by arbitration." *Dairyland Ins. Co. v. Rose*, 92 N.M. 527, 530, 591 P.2d 281, 284 (1979). The legislative intent in establishing the Arbitration Act, and the policy of the courts in enforcing it, is to reduce caseloads in the courts. *Daniels Ins. Agency, Inc. v. Jordan*, 99 N.M. 297, 299, 657 P.2d 624, 626 (1982). In the interest of judicial economy, challenges to arbitration awards are severely limited by the Act. *Guaranty Nat'l Ins. Co. v. Valdez*, 107 N.M. 764, 767, 764 P.2d 1322, 1325 (1988). Once an arbitration panel has entered an award, "the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances." *Melton v. Lyon*, 108 N.M. 420, 422, 773 P.2d 732, 734 (1989) (citing *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146–47 (10th Cir.), *cert. denied*, 459 U.S. 838, 103 S.Ct. 84, 74 L.Ed.2d 79 (1982)).

The district court's review of an arbitration award is narrowly limited by the statutory grounds established in the Act. *State ex rel. Hooten Constr. Co. Inc. v. Borsberry Constr. Co. Inc.*, 108 N.M. 192, 193, 769 P.2d 726, 727 (1989). Section 44–7–11 of the Act provides:

> Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sec-

1. Crescent's other argument is that there is no statutory authority for the award of attorney's fees in this case because U.T.R. recovered damages under the arbitration clause of the contract and not as a result of foreclosing its mechanic's lien. We question the soundness of this contention. The statute provides for an award of reasonable attorney's fees in an action to enforce a mechanic's lien. *Lenz v. Chalamidas*, 109 N.M. 113, 118, 782 P.2d 85, 90 (1989). Section 48–2–14 does not require that a mechanic or materialman actually complete foreclosure on the lien in order to be eligible for recovery of attorney's fees; rather, it allows for recovery in actions taken *to enforce the lien*. Had U.T.R. properly preserved its claim for attorney's fees, we might well be inclined to hold that such fees may be recovered in actions taken (including an arbitration pursued) to enforce a lien, even though actual foreclosure of the lien may be rendered unnecessary, as it was in this case, by the lienee's payment of the amount due prior to entry of a decree of foreclosure.

tions 12 [44-7-12 NMSA 1978] and 13 [44-7-13 NMSA 1978].

Thus, the district court's review of an arbitration award is limited to the statutory grounds for vacating, modifying, or correcting it as specified in Sections 44-7-12 and 44-7-13. *Hooten Constr. Co.*, 108 N.M. at 193, 769 P.2d at 727. The language of the Act mandates that, in the absence of any of these statutory grounds, "the court shall confirm an award." Section 44-7-11.

Under Section 44-7-13, an award may be modified or corrected if the dissatisfied party applies to the appropriate court for such relief within a specified time period and establishes the grounds outlined in the section, which provides in relevant part:

> A. Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> (1) there was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> (2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) the award is imperfect in a matter of form, not affecting the merits of the controversy.

Any challenge to an award made by an arbitration panel must be made under the grounds listed in Sections 44-7-12 [2] or 44-7-13, either through a motion to vacate or a motion to modify or correct the award. Any motion to vacate, modify, or correct, however, must be made within the time limitations established by the Act. The time limit for modifying or correcting an award under Section 44-7-13 is the same as that for vacating the award under Section 44-7-12: "within ninety days after delivery of a copy of the award to the applicant."

The short time period for moving courts to vacate, modify, or correct an award is consistent with the policy of encouraging arbitration "as a means of conserving the time and resources of the courts and the contracting parties." *K.L. House Constr. Co. v. City of Albuquerque*, 91 N.M. 492, 493, 576 P.2d 752, 753 (1978) (quoting *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 371 N.Y.S.2d 463, 465, 332 N.E.2d 333, 335 (1975)). The award is given finality within a short time by means of the ninety-day limitation on raising objections to the award. *See* Martin Domke, *Domke on Commercial Arbitration* § 33.01, at 464 (Gabriel M. Wilner ed., rev. ed. 1984) ("The relative brevity of the period assures that any challenge to the award will be promptly made; this is necessary in order to effect the speed and dispatch that is so essential a part of the arbitration process.")

The arbitrators issued their award in this case on October 18, 1990. Crescent intimates in its brief that the award was delivered on October 31, 1990, and U.T.R. does not object to this intimation, so we assume that U.T.R. received a copy of the award on or about that date. It is clear, however, that U.T.R. did not raise any objection to the award until November 7, 1991, at the hearing on presentment of the order confirming the award—over a year after it was delivered. At that hearing, U.T.R. briefly asserted that the district court had jurisdiction to award attorney's fees under Section 48-2-14.

As noted previously, the arbitration panel awarded on the issue of attorney's fees,

2. The grounds for vacating an award as specified in Section 44-7-12(A) are: "(1) [T]he award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator appointed as neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 [44-7-5 NMSA 1978], as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 [44-7-2 NMSA 1978] and the party did not participate in the arbitration hearing without raising the objection."

denying any such request and finding that there was no legal basis in New Mexico for an award of attorney's fees in the arbitration. Since the arbitrators' award contained a ruling on the issue of attorney's fees, the district court could not properly grant the fees on its own accord. Before the court could consider the question of whether U.T.R. should recover its attorney's fees in the arbitration, a timely motion to correct the arbitration award should have been made.

U.T.R. conceivably could have moved, within ninety days after delivery of the award, to modify or correct it pursuant to Section 44–7–13(A)(2) as an award upon a matter not submitted to the panel. Had such a motion been granted, U.T.R. could then have asked the court to award attorney's fees under the authority in Section 48–2–14. U.T.R., however, made no objection to the award for over a year after the award was signed and delivered. Courts applying the Uniform Arbitration Act have consistently held that parties to arbitration who fail to present their substantive defenses within the statutory time limit are barred from later asserting those defenses.[3] By failing to file a motion to modify or correct within ninety days after delivery of the arbitrators' award, U.T.R. waived its right to present its substantive defenses to confirmation of the award. As the Tenth Circuit noted in construing Colorado's version of the Arbitration Act, "To permit a party to forego a timely challenge to the validity of an award and then raise its objections in an otherwise summary confirmation proceeding would be contrary to the policy of promoting quick and final resolution of [civil] disputes." *International Bhd. of Elec. Workers, Local Union No. 969 v. Babcock & Wilcox,* 826 F.2d 962, 966 (10th Cir.1987).

In the absence of timely presentation of any defense by U.T.R. to confirmation, the district court was required to confirm the award pursuant to Section 44–7–11, including the portion of the award denying attorney's fees. The trial court does not abuse its discretion when it acts in conformity with mandatory statutory requirements. *See Escobedo v. Agriculture Prods. Co.,* 86 N.M. 466, 474, 525 P.2d 393, 400–01 (Ct. App.1974) (finding no abuse of discretion where mandatory statutory provisions were followed). We find no abuse of discretion in the district court's refusal to award attorney's fees to U.T.R.

B. Punitive Damages

U.T.R.'s second argument raises the issue whether the district court erred in

3. For further discussion of the strict application of the 90–day limitation on raising defenses to an arbitration award, *see* the following cases interpreting the Uniform Arbitration Act: *Local 2, Int'l Bhd. of Elec. Workers v. Anderson Underground Constr., Inc.,* 907 F.2d 74 (8th Cir.1990) (applying Missouri law); *International Bhd. of Elec. Workers, Local Union No. 969 v. Babcock & Wilcox,* 826 F.2d 962 (10th Cir.1987) (applying Colorado law); *Service Employees Int'l Union, Local No. 36 v. Office Center Servs., Inc.,* 670 F.2d 404 (3d Cir.1982) (applying Pennsylvania law); *Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co.,* 628 F.2d 1023 (7th Cir.1980) (applying Indiana law), *cert. denied,* 449 U.S. 1125, 101 S.Ct. 942, 67 L.Ed.2d 111 (1981); *Hatch v. Double Circle Ranch,* 22 Ariz.App. 124, 524 P.2d 958 (1974); *State Farm Mut. Auto. Ins. Co. v. Cabs, Inc.,* 751 P.2d 61 (Colo.1988); *Jaffe v. Nocera,* 493 A.2d 1003 (D.C.1985); *Schroud v. Van C. Argiris & Co.,* 78 Ill.App.3d 1092, 34 Ill.Dec. 428, 398 N.E.2d 103 (1979); *School City of East Chicago, Ind. v. East Chicago Fed'n of Teachers, Local #511,* 422 N.E.2d 656 (Ind.Ct. App.1981); *Nick-George Ltd. Partnership v. Ames-Ennis, Inc.,* 279 Md. 385, 368 A.2d 1001 (1977) (applying Maryland law with 30–day time limitation for raising defenses to arbitration award); *Bernstein v. Gramercy Mills, Inc.,* 16 Mass.App. 403, 452 N.E.2d 231 (1983) (applying Massachusetts law with 30–day time limitation for raising defenses to arbitration award); *Component Sys., Inc. v. Murray Enters. of Minn., Inc.,* 300 Minn. 21, 217 N.W.2d 514 (1974); *Hart v. Metzger,* 834 S.W.2d 236 (Mo.Ct.App.1992); *Nix v. Spector Freight Sys., Inc.,* 62 N.J.Super. 213, 162 A.2d 590 (1960); *Levy v. Allstate Ins. Co.,* 63 A.D.2d 982, 406 N.Y.S.2d 109 (1978); *Emporium Area Joint Sch. Auth. v. Anundson Constr. & Bldg. Supply Co.,* 402 Pa. 81, 166 A.2d 269 (1960); *T & M Properties v. ZVFK Architects & Planners,* 661 P.2d 1040 (Wyo.1983). *See also* the following cases applying Section 12 (which prescribes a three-month limitation) of the Federal Arbitration Act, 9 U.S.C. §§ 1 to 14 (1982); *Taylor v. Nelson,* 788 F.2d 220 (4th Cir.1986); *Florasynth, Inc. v. Pickholz,* 750 F.2d 171 (2d Cir.1984); *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Celotex Corp.,* 708 F.2d 488 (9th Cir.1983).

denying U.T.R. a jury trial on the question of punitive damages. U.T.R. argues that the issue of punitive damages had been reserved for jury trial, noting that such a trial had been demanded and the fee paid. U.T.R. asserts that, since the arbitrators have no authority to award punitive damages, *see Shaw v. Kuhnel & Assocs., Inc.*, 102 N.M. 607, 609, 698 P.2d 880, 882 (1985), the issue of punitive damages was not before the arbitration panel and thus should have been presented to a jury for resolution. On the facts of this case, we disagree.

As noted previously, the arbitrators, while not making a ruling one way or the other on the issue of punitive damages, did make a recommendation that the court not assess punitive damages in the case. This recommendation was prompted, at least in part, by U.T.R.'s vigorous submission of the issue to the arbitrators. In its written "Closing Argument" to the arbitrators, U.T.R. argued that the panel should recommend an award of $500,000 in punitive damages, based on Crescent's asserted bad faith breach of contract, and that

> where the arbitration clause contains language whereby the parties have agreed to arbitrate any potential claims or disputes arising out of their relationship by contract or otherwise, that arbitration agreement is entitled to be broadly construed and interpreted to incorporate all controversies within the arbitration proceeding unless the contractual language limits arbitration to specific areas or matters.

Although it qualified its request to the arbitrators as a request for a "recommendation," U.T.R. unquestionably asked the arbitrators to pass upon its claim for punitive damages. The arbitrators did so, making a recommendation unfavorable to U.T.R.'s position. U.T.R. did not thereafter seek to modify or correct the award as ruling upon a matter not submitted to the arbitrators, nor did it move to vacate the award under Section 44-7-12(A)(3) as exceeding the arbitrators' powers. Had the arbitrators' recommendation gone the other way, U.T.R. undoubtedly would have sought to make use of the recommendation in the post-arbitration jury trial that it now contends was required. Having bitten once at the arbitration apple, U.T.R. cannot now take a second bite from the judicial one. *See Stewart v. State Farm Mut. Auto. Ins. Co.*, 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986) (trial court's decision, while acknowledging advisory nature of arbitrators' recommendation, clearly indicated consideration of and agreement with assessment of the arbitrators, who were the fact finders, on question and amount of punitive damages).

The district court had before it the recommendation of the arbitration panel that no punitive damages be awarded, as well as the panel's apparent finding that there was no basis for a claim of bad faith breach of contract. These facts were sufficient to support the court's ruling effectively dismissing U.T.R.'s claim for punitive damages. We hold that the court properly dismissed U.T.R.'s claim for punitive damages by confirming the arbitration award.

For the foregoing reasons, the district court's judgment confirming the award is affirmed.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

846 P.2d 312

STATE of New Mexico, Plaintiff-Appellee,

v.

Ralph HERNANDEZ, Defendant-Appellant,

No. 19728.

Supreme Court of New Mexico.

Jan. 14, 1993.

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Robert J. Jacobs, Taos, for defendant-appellant.

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

OPINION

BACA, Justice.

Defendant Ralph Hernandez appeals his conviction on charges of first degree felony murder, aggravated burglary, attempted robbery, and battery. Because Defendant was sentenced to life imprisonment for the

first degree murder conviction,[1] we note jurisdiction under SCRA 1986, 12–102(A)(2) (Repl.Pamp.1992).

Defendant raises numerous issues that he contends mandate a reversal including: (1) Whether he was denied effective assistance of counsel; (2) whether the trial court erred when it refused to grant Defendant's motion for a continuance in order to allow additional time for his trial counsel to prepare; (3) whether the trial court erred by failing to exclude testimony of a prosecution witness who was present during other prosecution witnesses' testimony; (4) whether the trial court erred when it admitted various photographs and a videotape; (5) whether the trial court erred by denying Defendant's motion for recusal; (6) whether the trial court erred when it refused to order the sheriff to bring a potential juror to court for jury duty; (7) whether the trial court erred when it denied Defendant's motion for a change of venue; (8) whether the trial court erred when it denied Defendant's challenges for cause of various potential jurors; (9) whether the trial court erred when it informed the jury that the State would not seek the death penalty; (10) whether the trial court erred when it gave the felony murder instruction to the jury; (11) whether the trial court erred when it qualified one of the State's expert witnesses; (12) whether the trial court erred when it denied Defendant's motion in limine and motion for a continuance based on prosecutorial misconduct; (13) whether the trial court erred when it failed to rule on the sufficiency of the evidence prior to submitting the case to the jury; (14) whether there was sufficient evidence to convict Defendant; and (15) whether Defendant was denied his right to a fair trial because of cumulative error. We find no merit to any of Defendant's arguments and affirm.

I

On April 18, 1989, officers from the Silver City Police Department discovered a woman's body in an apartment in Silver City. The body, which was later identified as that of Peggy Brown, was found lying on the bedroom floor of the apartment. Dark hairs that did not appear to match Brown's hairs were found in her mouth and on the bed. The police also found blood on her bed, pillows, sheets, and clothing. Brown's purse and its contents were scattered about on the living room floor. Brown's body had a black eye, a bloody nose, several bruises, and a cut lip. The bedroom was in a state of disarray that suggested that a struggle had ensued before Brown's death. The police took pictures of the position and condition of the body and of the interior and exterior of the apartment and recorded a videotape of the apartment. In addition, the police lifted fingerprints and palmprints from the apartment and Brown's purse.

On August 8, 1989, David Salaiz contacted the police with information regarding Brown's murder. Salaiz told the police that he had been drinking with Defendant when Defendant related the following story to Salaiz. According to Salaiz, Defendant stated that he had needed money to purchase drugs, entered Brown's apartment looking for something that he could sell, encountered Brown, who began to scream, struggled with Brown, and suffocated Brown with a pillow. Defendant then told Salaiz that no one else knew of his involvement in the murder, and that, consequently, he would have to kill Salaiz. Salaiz claimed that Defendant pulled a knife, and a fight, in which Salaiz was cut, ensued. Salaiz eluded Defendant and contacted the police, who investigated Salaiz's story. The police found blood at the location where Salaiz claims that Defendant attacked him.

The police then contacted Defendant and, with his permission, obtained a hair sample from him. This sample was sent to the FBI and compared with the hairs found in

1. In addition to the life sentence for murder, defendant was sentenced to 9 years imprisonment plus two years enhancement for the aggravated burglary, eighteen months imprisonment for the attempted robbery, and six months imprisonment for the battery. The aggravated burglary sentence runs consecutively with the murder sentence and the other sentences run concurrently with the murder sentence.

Brown's apartment. The FBI determined that the hairs found in Brown's apartment had been forcibly removed and were a microscopic match with the hair sample taken from Defendant. On the basis of Salaiz's statement and the hair analysis, the Silver City police obtained a warrant for Defendant's arrest and, after his arrest, he was charged with murder, aggravated burglary, attempted robbery, and battery regarding the incident at Brown's apartment and aggravated battery of Salaiz. A lawyer was appointed to represent Defendant, who was indigent.

Prior to trial, defense counsel made numerous motions, the most important of which was his motion for a continuance. In making this motion, defense counsel contended that he and Defendant's expert witnesses needed additional time to prepare for trial. Defendant also moved to exclude the testimony of Detective Bruce, contending that Bruce's testimony was tainted because he was allowed, over objection, to listen to other witnesses' testimony at a preliminary hearing. In addition, Defendant moved to exclude the photographs and videotape of Brown's apartment, contending that the prejudicial nature of this evidence outweighed its probative value. Over two months prior to trial, the trial court heard these motions and, with the exception of excluding some of the photographs as cumulative, denied Defendant relief.

One week prior to trial, Defendant again moved for a continuance to allow his counsel and expert witness additional time to prepare for trial. Defense counsel claimed that the Public Defender's office had not provided the necessary funds to hire co-counsel familiar with scientific evidence, a forensics expert, or a hair analysis expert. Defense counsel also claimed that he needed additional time to locate two witnesses who he claimed could provide Defendant with an alibi. In addition, Defendant wanted to delay his trial until after the DNA analysis from another murder case was available. After the trial court denied this motion, Defendant moved to recuse the judge, whose mother was a friend of the victim. This motion was also denied.

Defendant's trial began on October 29, 1990. Prior to voir dire and over objection of defense counsel, the court informed the jury venire that the State would not be seeking the death penalty. During voir dire, many of the potential jurors indicated that they had heard publicity regarding the case; however, most said that they could not remember what they had heard. After voir dire, Defendant moved for a change of venue, and the trial court denied the motion.

At trial the following evidence, viewed in the light most favorable to upholding the verdict, *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988), was introduced. Medical testimony indicated that Brown had been killed on either Sunday night, April 16, 1989, or the following morning and that Brown had probably died from suffocation. The State's main witness, David Salaiz, testified that Defendant had admitted to him (Salaiz) that he (Defendant) had entered Brown's apartment to find something to sell to enable Defendant to purchase drugs, encountered Brown, who screamed, and killed Brown by suffocating her with a pillow. Salaiz testified that after Defendant finished telling the story, he became violent and attacked Salaiz with a knife. Salaiz testified that he subdued Defendant, went to the police, gave details about Defendant's story, and submitted a signed statement. On cross-examination, Salaiz testified that he had been given a reward for coming forward with information regarding the murder. In addition, he testified that he had previously been convicted of attempted criminal sexual contact of a minor, possession of cocaine, and larceny and that other charges were currently pending against him. Salaiz's testimony was partially corroborated by Silver City police officer Hall, who testified that he found a trail of blood in the Murray Hotel where Salaiz claims that Defendant attacked him.

The State also introduced hair identification evidence, which linked Defendant to Brown's murder. Arnold Bentz, who, over Defendant's objection, was qualified as an expert witness based on job experience,

testified that he had separated the hairs collected at the crime scene into those matching the victim's hair and those not matching the victim's hair. Doug Diedrick, an expert in hair identification, testified that the hair samples taken from Defendant microscopically matched the hairs collected at Brown's apartment. Both Bentz and Diedrick testified on cross-examination that hair identification could not positively identify someone.

The State also introduced forensic evidence collected at Brown's apartment. James Bell, a forensic serologist, testified that numerous items found in Brown's apartment tested positive for the presence of blood. On cross-examination, Bell testified that the blood had not been type checked or compared to the blood of Brown, Defendant, or any other suspect. The State also introduced evidence that DNA testing was inconclusive.

At the close of the State's evidence, Defendant offered testimony that attacked Salaiz's credibility. In addition, Defendant offered testimony that attempted to establish an alibi for Sunday night, April 16. Further, Defendant offered testimony that tended to rebut Salaiz's account of Defendant's assault on him.

After Defendant rested and prior to the jury being instructed, Defendant objected to the felony murder instruction, arguing that this charge was not supported by the evidence. The trial court overruled the objection and instructed the jury on first degree willful and deliberate murder, first degree felony murder, second degree murder, aggravated burglary, attempted robbery, battery, and aggravated battery. The jury found Defendant guilty of felony murder, aggravated burglary, attempted robbery and battery and not guilty of aggravated assault of Salaiz. This appeal ensued.

II

The most important issue that Defendant raises in this appeal is whether he was denied effective assistance of counsel in violation of the Fourteenth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. A closely related issue, which we address first, is whether the trial court erred when it failed to grant Defendant a continuance to allow his counsel more time to prepare his defense and to obtain expert witnesses.

A

Defendant contends that the trial court erred when it denied his motion for a continuance. Prior to trial, Defendant's trial counsel sought a continuance to obtain an expert on hair analysis, to obtain co-counsel knowledgeable in scientific evidence, to develop a defense based on a DNA analysis in another pending murder case, and to allow his expert witness more time to prepare forensic evidence. Citing *Peralta v. State,* 111 N.M. 667, 808 P.2d 637 (1991), Defendant argues that the trial court erred in denying his motion for a continuance to allow his counsel and forensics expert more time to prepare because their failure to be prepared was not chargeable to Defendant. Defendant also cites *March v. State,* 105 N.M. 453, 734 P.2d 231 (1987), to support his contention that the trial court's denial of his motion for a continuance deprived him of a potential avenue of defense. Finally, Defendant cites *State v. Brazeal,* 109 N.M. 752, 790 P.2d 1033 (Ct.App.), *cert. denied,* 109 N.M. 631, 788 P.2d 931 (1990), for the proposition that the denial of his motion for a continuance created a presumption of ineffective assistance of counsel.

Defendant first contends that he was deprived of a potential avenue of defense because his forensic expert witness did not have adequate time to prepare her evidence and testimony. Defendant asserts that he was unable to obtain an expert witness prior to moving for a continuance because, until just before he made his motion for a continuance, the public defender's office had failed to provide funding for the expert witness. Citing *Peralta,* Defendant argues that the public defender's office failure to fund a forensics expert should not be imputed to him.

Defendant's reliance on *Peralta,* however, is misplaced. In *Peralta,* the defendant was convicted in metropolitan court of driving under the influence of alcohol and other related traffic violations. The defendant appealed his conviction to the district court, which, after refusing to grant the defendant's motion for a continuance, dismissed the appeal when the defendant and his counsel appeared at the hearing and were not prepared to proceed. On appeal, we reversed, holding that "justice and fairness preclude dismissal [of an appeal as of right] based upon a court appointed public defender's lack of preparedness." *Peralta,* 111 N.M. at 668, 808 P.2d at 638. The issue in *Peralta* was not whether the trial court abused its discretion by denying the motion for a continuance, but whether the trial court erred in dismissing the appeal for a lack of the preparedness of the defendant's counsel. *Id.* In *Peralta,* we suggested that reversal of a conviction is not necessarily required when appointed counsel, who claimed to be inadequately prepared, proceeded to trial and presented an effective defense. *See Peralta,* 111 N.M. at 668–69, 808 P.2d at 638–39 (citing *State v. Lucero,* 104 N.M. 587, 725 P.2d 266 (Ct.App.1986) (affirming denial of motion to dismiss appointed counsel where representation found to be effective); *State v. Maes,* 100 N.M. 78, 665 P.2d 1169 (Ct.App. 1983) (same)). Like the defendants in *Lucero* and *Maes,* Defendant in the instant case proceeded to trial and presented an adequate defense. *See* Section II–B, *infra.* Thus, *Peralta* is inapposite to the case at bar.

Defendant also contends that the trial court erred when it failed to grant his motion for a continuance because it denied him effective assistance of counsel. As Defendant concedes, the denial of a motion for a continuance rests within the sound discretion of the trial court. *State v. Pruett,* 100 N.M. 686, 687, 675 P.2d 418, 419 (1984). The burden of establishing an abuse of discretion rests with Defendant. *See March,* 105 N.M. at 455, 734 P.2d at 233. Only in extraordinary instances will the denial of a continuance create a presumption of ineffective assistance of counsel. *See Brazeal,* 109 N.M. at 756, 790 P.2d at 1037 (" '[O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' " (quoting *Morris v. Slappy,* 461 U.S. 1, 11–12, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983))).

> [A]ppellate courts will not presume denial of effective assistance of counsel because of the trial judge's refusal to grant a continuance unless, under the circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

Id. (quoting *United States v. Cronic,* 466 U.S. 648, 659–60, 104 S.Ct. 2039, 2047–48, 80 L.Ed.2d 657 (1984)).

In determining whether the denial of a continuance raises a presumption of ineffective assistance of counsel, we examine the circumstances surrounding the continuance motion to determine whether the defendant would have necessarily been prejudiced by the denial. *Id.* 109 N.M. at 756–57, 790 P.2d at 1037–38. Factors that we consider include, but are not limited to, the amount of time available to prepare a defense, the complexity of the issues involved in the case, the experience of trial counsel, and the reasons proffered by trial counsel for requesting a continuance. *Id.* If the denial of a continuance precludes the defendant from raising a potential avenue of defense, a presumption of prejudice is appropriate. *See March,* 105 N.M. at 455–56, 734 P.2d at 233–34; *see also Brazeal,* 109 N.M. at 757, 790 P.2d at 1038.

Defendant contends that the trial court's denial of his motion for a continuance deprived him of a likely defense, thereby raising a presumption of ineffective assistance of counsel. Defendant asserts that, in the absence of a continuance, his counsel was unable to obtain an expert witness on hair analysis or to obtain co-counsel familiar with scientific evidence. Defendant also contends that the denial of his continuance motion deprived his forensic expert witness

of the opportunity to analyze the evidence and prepare for trial. Defendant asserts that assistance in these areas was especially critical to his defense because the only evidence introduced to convict him was the testimony of Salaiz and the hair analysis. Defendant claims that forensic evidence could have disproved Salaiz's story and that a hair expert could have discredited the State's hair evidence, which linked Defendant to Brown's murder. In addition, Defendant contends that, because his motion for a continuance was denied, he was unable to obtain DNA results from another murder case in which Amy Sanchez, an elderly woman, was raped and killed. His defense theory was that whoever had raped and murdered Sanchez had also murdered, and possibly raped, Brown. Defendant, citing *March,* concludes that the trial court's denial of his continuance motion deprived him of a potential avenue of defense.

In *March,* defense counsel, who had been appointed less than one month earlier, moved for a continuance on the day before the defendant's second trial for burglary to permit a forensic evaluation to determine whether or not the defendant could raise the defense of a lack of capacity to form specific intent. At a hearing regarding the continuance motion, defense counsel presented evidence that, at the time of the burglary, the defendant had suffered from uncontrollable behavioral outbreaks and schizophrenia. Additional evidence showed that the defendant suffered from hypoglycemia and had had a cancerous brain tumor surgically removed three months prior to the trial date. This evidence suggested that the defendant may have had the tumor when he allegedly committed the burglary. The trial court denied the defendant's continuance motion, ruled that the medical evidence presented at the continuance hearing would be inadmissible at trial, and granted the State's motion to exclude any reference to schizophrenia and the brain tumor. *March,* 105 N.M. at 454–56, 734 P.2d at 232–34. After the defendant was convicted, he appealed. We reversed, holding that "[t]he end result of the trial court's rulings was to completely deprive defendant of any potential defense of incapacity," thereby denying the defendant his right to due process. *Id.* at 456, 734 P.2d at 234.

The instant case, however, is distinguishable from *March.* Unlike the defendant in *March,* Defendant in the instant case was not deprived of a potential avenue of defense. Defense counsel in the instant case was appointed one year prior to trial and had adequate time and opportunity to prepare a defense. While Defendant complains that, in the absence of a hair identification expert, his counsel was unable to refute the State's hair identification evidence, the record shows that counsel adequately attacked that evidence. During cross-examination of the State's expert witnesses on hair identification, defense counsel established that hair analysis could not absolutely prove identity. Thus, defense counsel adequately placed the State's identification evidence into question.

Defendant also asserts that the denial of his continuance motion precluded him from exploring other possible defenses requiring the expertise of a forensic expert. Perhaps Defendant's forensics expert, Dr. Griest, could cast doubt on Salaiz's testimony that he had had an altercation with Defendant after confessing to the murder by analyzing the blood splatters at the scene of the altercation, the Murray Hotel. Perhaps Griest could narrow the time when the victim was murdered to a period of time during which Defendant had an alibi. Perhaps the DNA testing from the Sanchez case would exonerate Defendant in that case and allow him to argue that whoever raped and killed Sanchez had also killed Brown. Unlike the defendant in *March,* however, Defendant in the instant case was unable to show, after nearly a year of investigation, that any of these defense theories had any reasonable possibility of success. Thus, the instant case is distinguishable from *March,* in which the trial court rulings completely deprived the defendant of a potential avenue of defense, incapacity. 105 N.M. at 456, 734 P.2d at 234.

Defendant also contends that the trial court erred in denying his continuance motion because his inexperienced trial counsel needed more time to prepare and required assistance from more experienced counsel due to the complex issues involved in this case. He asserts that an examination of the factors enunciated in *Brazeal* support his conclusion that his counsel should be presumed to be ineffective. A close examination of *Brazeal,* however, shows that it supports the opposite conclusion. As in *Brazeal,* we consider factors such as the amount of time available to prepare a defense, the complexity of the issues involved in the case, the experience of trial counsel, and the reasons proffered by trial counsel for requesting a continuance. 109 N.M. at 756–57, 790 P.2d at 1037–38.

In beginning this inquiry, we again note that defense counsel in the instant case had adequate time, almost one year, to prepare his case. *See id.* (appointment of counsel less than one week prior to trial, without more, insufficient to raise presumption of ineffective assistance of counsel).[2] While Defendant contends that his trial counsel was inexperienced and needed co-counsel to adequately prepare a defense, we have never held that a defendant was constitutionally entitled to more than one attorney. *See State v. Chamberlain,* 112 N.M. 723, 733–34, 819 P.2d 673, 683–84 (1991) (refusing to hold that more than one attorney constitutionally required even in complex case carrying serious consequences for the defendant if convicted). Moreover, even though Defendant's trial counsel was inexperienced, we cannot conclude that, under the circumstances of this case, " 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.' " *Brazeal,* 109 N.M. at 756, 790 P.2d at 1037 (quoting *Cronic,* 466 U.S. at 659–60, 104 S.Ct. at 2047). Thus, a presumption of ineffective assistance is not raised by the trial court's denial of Defendant's motion for a continuance. In addition, the trial court did not abuse its broad discretion in denying the motion for a continuance. *See Pruett,* 100 N.M. at 687, 675 P.2d at 419.

B

Because Defendant has failed to show that his trial counsel's performance should be presumed to be ineffective, he must show that his counsel's actual performance at trial was ineffective. *See Brazeal,* 109 N.M. at 757, 790 P.2d at 1038. For many of the same reasons that he asserted that the denial of his continuance motion was error, Defendant asserts that his trial counsel was ineffective: (1) the Public Defender failed to provide funds to hire expert witnesses prior to trial; (2) his trial counsel was inexperienced and unprepared for trial; and (3) his trial counsel was unable to obtain co-counsel to assist in analyzing scientific evidence and prepare for cross-examination of expert witnesses. He asserts that these errors and omissions, taken together, show that his trial counsel failed to exercise the skill, judgment, and diligence of a reasonably competent attorney.

To prevail on his claim of ineffective assistance of counsel, however, Defendant bears the burden of showing both that his attorney's performance fell below that of a reasonably competent attorney, and that, as a result of his attorney's incompetence, he suffered prejudice. *State v. Gonzales,* 113 N.M. 221, 229–30, 824 P.2d 1023, 1031–32 (1992). Absent a showing of both incompetence and prejudice, counsel is presumed competent. *State v. Jett,* 111 N.M. 309, 315, 805 P.2d 78, 84 (1991). On re-

2. *Brazeal* cites numerous cases supporting this conclusion, including *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940) (capital conviction affirmed where defense counsel appointed less than three days before trial); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (counsel not ineffective even though defendant did not meet him until minutes before retrial); *United States v. Rodgers,* 755 F.2d 533 (7th Cir.) (no presumption of prejudice when counsel appointed two days before jury selection and four days before trial), *cert. denied,* 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985); *State v. Nieto,* 78 N.M. 155, 429 P.2d 353 (1967) (conviction upheld even though continuance denied when counsel employed six days prior to trial).

view, we need not consider the two prongs of the test in any particular order.

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies * * *. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Brazeal, 109 N.M. at 758, 790 P.2d at 1039 (alterations in original) (quoting *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)).

In determining whether a defendant suffered prejudice for any acts or omissions of his trial counsel, we examine the record to see if there is "a reasonable probability that 'but for' counsel's unprofessional error, the result of the proceeding would have been different." *State v. Taylor,* 107 N.M. 66, 73, 752 P.2d 781, 788 (1988) (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068), *overruled on other grounds, Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 731, 779 P.2d 99, 108 (1989). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Brazeal,* 109 N.M. at 758, 790 P.2d at 1039 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068).

Defendant points to numerous acts and omissions of his trial counsel related to the trial court's failure to grant his continuance motion that he contends establish ineffective assistance of counsel: defense counsel failed to obtain an expert witness on forensics, hair analysis, or fingerprints; defense counsel and the Public Defender's Office failed to provide co-counsel knowledgeable about scientific evidence; defense counsel was inexperienced and unprepared for trial; and defense counsel had not adequately investigated the case. Defendant, however, has not demonstrated, nor have we discerned, prejudice resulting from these alleged deficiencies by trial counsel.

Defendant first complains that his trial counsel failed to employ experts in the area of hair analysis, forensics, and fingerprint analysis. Assuming arguendo that competent trial counsel would have employed experts in these areas, Defendant has not shown that "that 'but for' counsel's unprofessional error, the result of the proceeding would have been different." *Taylor,* 107 N.M. at 73, 752 P.2d at 788. In regards to the hair identification evidence, Defendant's trial counsel was able to discredit the State's hair identification evidence by eliciting on cross-examination of the State's expert witnesses that hair analysis could not conclusively establish identity. Defendant does not explain how a hair analysis expert would be able to cast further doubt on this evidence.

Regarding the forensics expert, Defendant claims that a forensics expert could have assisted his defense in three areas: (1) she could have analyzed the blood spatters at the Murray Hotel and cast doubt on Salaiz's testimony; (2) she could have re-examined the State's forensics evidence and somehow linked the murder of Brown to the rape and murder of Sanchez; and (3) she could narrow the time when Brown was killed to a two to three hour period for which Defendant had an alibi. Again, however, Defendant fails to show that any of these contentions would probably change the outcome of the case. As to Defendant's first claim, that analysis of the blood spatters at the Murray Hotel would discredit Salaiz's testimony, defense counsel had already discredited Salaiz's testimony by calling several witnesses who described him as a liar. In spite of this testimony, the jury chose to believe him regarding Defendant's "confession" to Brown's murder and to not believe him regarding the aggravated assault.

Defendant's second contention is that a re-examination of the State's forensics evidence could exonerate Defendant by showing that whoever had killed Brown had also killed Sanchez. Defendant wanted his forensics expert to examine the blood in Brown's apartment and slides taken from Brown. The blood in Brown's apartment had not been tested to see if it came from the victim or the perpetrator and, consequently, did not implicate Defendant in Brown's murder. During his closing argu-

ment, defense counsel was able to capitalize on the State's failure to perform this blood analysis. The slides indicated that Brown had not been raped and in no way implicated Defendant in her murder. Defendant has failed to show that a re-examination of these slides could establish a link between Brown's murder and Sanchez's murder. Moreover, establishing a link would be helpful to the defense only if Defendant could show that he was not the perpetrator of Sanchez's murder. However, this avenue was eliminated because the State had compared samples from Defendant to samples from the Sanchez case. The record is not clear as to whether these DNA samples identified Defendant as Sanchez's rapist or whether the results were too inconclusive to eliminate Defendant as a suspect. In addition, Defendant has not shown that a fingerprint analysis could have linked any other suspect with Brown's murder.

Defendant's third contention is that his forensics expert could narrow the time of Brown's death to a two to three hour period for which Defendant had an alibi. On appeal, however, Defendant does not show that his forensics expert could have narrowed the time of death to such a period of time. In addition, Defendant presented alibi testimony at trial. We cannot say that but for counsel's failure to employ a forensics expert the result of Defendant's trial would have been different.

Defendant's other contentions regarding ineffective assistance of counsel are related and will be considered together. Defendant asserts that his trial counsel was inexperienced and unprepared for trial, that defense counsel and the Public Defender's Office failed to provide co-counsel knowledgeable about scientific evidence, and that defense counsel had not adequately investigated the case. Our review of the record, however, indicates that Defendant was adequately represented. Trial counsel adequately cross-examined the State's witnesses, including its expert witnesses, and offered witnesses to attack the credibility of Salaiz. Moreover, we do not inquire as to how many attorneys are employed to represent a criminal defendant but rather examine whether he was adequately represented. *Chamberlain,* 112 N.M. at 733–34, 819 P.2d at 683–84. While trial counsel failed to locate two witnesses that Defendant argues were critical to establish his alibi defense, Defendant has failed to demonstrate that the potential witnesses were willing to testify and would have given favorable evidence. *United States v. Rodgers,* 755 F.2d 533, 541 (7th Cir.), *cert. denied,* 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985); *Brazeal,* 109 N.M. at 758, 790 P.2d at 1039. Furthermore, counsel introduced other alibi witness testimony. Our review of the record satisfies us that Defendant was not denied effective assistance of counsel.

III

The next issue that we address is whether the trial court erred when it allowed Detective Bruce to testify after he remained in the courtroom during other witnesses' testimony at the preliminary hearing and then again at trial. At trial, Defendant moved to exclude Bruce's testimony. Citing SCRA 1986, 11–615; *State v. Hovey,* 106 N.M. 300, 304, 742 P.2d 512, 516 (1987); and *State v. Reynolds,* 111 N.M. 263, 268–70, 804 P.2d 1082, 1087–89 (Ct.App.1990), *cert. denied,* 111 N.M. 164, 803 P.2d 253 (1991), Defendant contends that, by allowing Bruce to hear the testimony of other witnesses, his testimony was tainted and that the trial court abused its discretion by failing to exclude Bruce's testimony. We disagree.

Under SCRA 1986, 11–615, a party may request that the trial judge exclude witnesses from the courtroom while other witnesses are testifying. However, the rule does not allow the trial judge to exclude "a person whose presence is shown by a party to be essential to the presentation of his cause." *Id.* The trial court has broad discretion in the application of Rule 11–615. *Hovey,* 106 N.M. at 304, 742 P.2d at 516. We will not disturb the decision of the trial court absent a clear abuse of this discretion and prejudice to the complaining party. *State ex rel. State Hwy. Dep't v.*

First National Bank in Albuquerque, 91 N.M. 240, 242, 572 P.2d 1248, 1250 (1977).

In the instant case, we find neither an abuse of discretion nor prejudice to Defendant. Bruce was the police officer charged with investigating this murder case. As part of his duties as the investigating officer, Bruce had on prior occasions interviewed all of the witnesses and already knew what they would say. If hearing the testimony of the other witnesses caused Bruce to change his testimony at trial, defense counsel could impeach that testimony with Bruce's investigative reports and testimony from the pre-trial hearing. In addition, as the investigating officer, Bruce remained at counsel table to assist the State in presenting its case. While exclusion of similar testimony may be appropriate under different circumstances, under the facts of this case the trial court did not abuse its discretion.

IV

The next issue that we address is whether the trial court erred when it admitted various photographs and a videotape of the victim's apartment. Prior to trial, Defendant moved to exclude the videotape and photographs contending that the probative value of this evidence was outweighed by its prejudicial effect. *See* SCRA 1986, 11-403. Defendant argues that the photographs and videotape showed "numerous images of the body of the victim" that made this evidence prejudicial and inflammatory. In addition, Defendant argues that the evidence was not relevant because the condition and position of the body as well as the fact that the victim's death was not accidental were not at issue in the case. *See* SCRA 1986, 11-402 (irrelevant evidence is inadmissible). Defendant concludes that the trial court abused its discretion by failing to exclude this evidence.

The trial court may, in its discretion, exclude relevant evidence, such as photographs and videotapes, if the evidence is "calculated to arouse the prejudices and passions of the jury and [is] not reasonably relevant to the issues of the case." *State v. Boeglin*, 105 N.M. 247, 253, 731 P.2d 943, 949 (1987). We will not disturb the trial court's decision in the absence of an abuse of discretion. *Id.* (upholding admission of photograph of victim's wound even though fact that defendant had inflicted wound not at issue).

We have viewed the videotape and studied the photographs and cannot say that the trial court abused its discretion in admitting either into evidence. Most of the photographs and a majority of the videotape show the exterior and interior of Brown's apartment. Of the nine photographs admitted into evidence, only one gives a view of the victim's body. In the approximately twenty minute videotape that the jury viewed, the victim's body was in view for approximately one minute. Defendant objected to any view of the victim's body because "[t]he condition and position of the body were not issues, nor was the fact that death was not accidental." We disagree. Defendant was charged with first degree willful and deliberate murder, NMSA 1978, Section 30-2-1(A)(1) (Repl. Pamp.1984), thereby making intent to kill an issue in the case.[3] Pictures of the condition and position of the body as well as the disarray in the bedroom and blood on the bed would allow the jury to draw the inference that a struggle had ensued prior to the victim's death and, thus, are relevant to show that Defendant had the requisite intent to kill. Moreover, Defendant was charged with felony murder, Section 30-2-1(A)(2), aggravated burglary, NMSA 1978, Section 30-16-2 (Repl.Pamp.1984), attempted robbery, NMSA 1978, Section 30-28-1 (Repl.Pamp.1984), and battery, NMSA 1978, Section 30-3-4 (Repl.Pamp.1984). Pictures of the possible places of entry into the apartment, the overturned purse and its contents, and the victim's bruised and bloodied face are relevant to these charges. Thus, the photographs and videotape were highly relevant to the charges against De-

3. In addition, our recent decision in *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991), makes intent to kill an issue in felony murder. *See* Section VI-E, *infra*.

fendant. *See Boeglin,* 105 N.M. at 253, 731 P.2d at 949.

Moreover, we do not believe that Defendant suffered any undue prejudice by the admission of the photographs and videotape. The trial court minimized possible prejudice to Defendant by ordering the State to edit the videotape prior to trial and exercising control over the presentation of the tape at trial. *See id.* In addition, the State was not allowed to admit all of the available still photographs at trial. Further, the photographs and videotape were not "calculated to arouse the prejudices and passions of the jury." *State v. Bell,* 90 N.M. 134, 139, 560 P.2d 925, 930 (1977). Because the probative value of this evidence outweighed the possible prejudice to Defendant, we find no abuse of discretion.

V

The next issue that we address is whether the trial court erred when it denied Defendant's motion for recusal. Early on in this case, the judge offered to recuse himself because his mother was a friend of the victim. At that time, Defendant declined the judge's offer. After the judge denied Defendant's motion for a continuance, in part because the judge stated that such a continuance would be unfair to the victims, Defendant moved to recuse the judge. Citing SCRA 1986, 5–106(E) (Repl.Pamp.1992), Defendant now argues that the trial judge erred by failing to recuse himself because, under the facts of this case, his impartiality could be called into question.

While we agree with Defendant that a district judge should voluntarily enter a recusal in any case where his or her impartiality could reasonably be questioned, SCRA 1986, 5–106(E), such recusal is within the sound discretion of the trial judge. *State v. Fero,* 105 N.M. 339, 343, 732 P.2d 866, 870 (1987). Voluntary recusal is reserved for compelling constitutional, statutory, or ethical reasons because "[a] judge 'has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified.*' " *Gerety v. Demers,* 92 N.M. 396, 400, 589 P.2d 180, 184 (1978) (quoting *Laird v. Tatum,* 409 U.S. 824, 837, 93 S.Ct. 7, 14, 34 L.Ed.2d 50 (1972) (Rehnquist, J., mem.)).

Defendant contends that, because the judge's mother was a friend of the victim, the judge was biased against him and the judge's impartiality could be questioned. He concludes that the judge abused his discretion by failing to recuse himself. We disagree. In order to require recusal, bias must be of a personal nature against the party seeking recusal. *State v. Case,* 100 N.M. 714, 717, 676 P.2d 241, 244 (1984). Personal bias cannot be inferred from an adverse ruling or the enforcement of the rules of criminal procedure. *See id.* In the instant case, the judge had previously informed the parties of his mother's friendship with the victim. Because Defendant did not think that recusal of the trial judge was necessary until after an adverse ruling, we hold that the trial judge did not abuse his discretion by declining to recuse himself.

VI

Defendant raises several issues relating to jury selection, function, and instruction including: (1) Whether the trial court erred when it refused to order the sheriff to bring a potential juror to court for jury duty; (2) whether the trial court erred when it denied Defendant's motion for a change of venue; (3) whether the trial court erred when it denied Defendant's challenges for cause of various potential jurors; (4) whether the trial court erred when it informed the jury that the State would not seek the death penalty; and (5) whether the trial court erred when it gave the felony murder instruction to the jury. We discuss each issue separately.

A

Defendant first contends that the trial court erred when it failed to delay voir dire (and ultimately trial) and send the sheriff to bring an absent prospective juror to the courtroom. Citing NMSA 1978, Section 38–5–2 (Repl.Pamph.1987), Defendant claims that the trial court abused its discre-

tion by excusing the potential juror based on an alleged emotional disorder, without taking evidence on that matter.

We need not address whether the trial court abused its discretion in excusing the absent juror because Defendant has failed to demonstrate, nor do we discern, any resulting prejudice.[4] The absent potential juror was the 58th prospective juror chosen and jury selection ended at number 38. Thus, we find no error.

B

Defendant also contends that the trial court erred when it denied his motion to change venue. Defendant asserts that pervasive pretrial publicity made a change of venue necessary to ensure a fair trial. *See Rideau v. Louisiana,* 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963) (due process violated by denial of motion for change of venue after recorded confession broadcast three times). As Defendant concedes, granting or denying a motion for a change of venue is within the sound discretion of the trial court. *State v. Hargrove,* 108 N.M. 233, 239, 771 P.2d 166, 172 (1989). On appeal, the trial court's ruling will not be disturbed absent an abuse of this discretion, and the burden of establishing an abuse of discretion rests with the moving party. *Id.* Potential jurors' exposure to pretrial publicity, by itself, does not require a change of venue and does not raise a presumption of prejudice. *Chamberlain,* 112 N.M. at 726, 819 P.2d at 676. "[T]he pertinent inquiry is whether 'the jurors * * * had such fixed opinions that they could not judge impartially the guilt of the defendant.' " *State v. McGuire,* 110 N.M. 304, 311, 795 P.2d 996, 1003 (1990) (citations omitted) (alterations in original) *quoted in Chamberlain,* 112 N.M. at 726, 819 P.2d at 676.

Citing *State v. Shawan,* 77 N.M. 354, 423 P.2d 39 (1967), Defendant claims that he was prejudiced by pretrial publicity. However, *Shawan* is distinguishable. The defendant in *Shawan* was tried for a second time for assault with the intent to kill after his first conviction was reversed. Prior to jury selection, the defendant moved for a change of venue and filed an affidavit alleging that a front page newspaper story printed the day before the second trial was to start would deny him a fair trial because of public excitement and local prejudice. The story contained an account of the evidence to be introduced at trial, the defendant's prior criminal record, and the fact that the defendant had been travelling in a stolen car prior to the assault. The defendant introduced a copy of the story as an exhibit and offered to call witnesses to testify that the story had also been broadcast on the local radio on the day before trial. After voir dire indicated that a number of jurors had either read the newspaper story or heard the radio broadcast, the defendant renewed his motion, which was denied, and, after being tried and convicted, the defendant appealed. Because the release of the story on the eve of trial had created "an atmosphere incompatible with impartiality," we held that the trial court abused its discretion. *Id.* at 358, 423 P.2d at 42.

Unlike the defendant in *Shawan,* Defendant in the instant case did not introduce evidence that he was deprived of a fair and impartial jury. Unlike the record in *Shawan,* the record before us in this case does not contain any example of pre-trial publici-

4. Defendant has cited no authority for the proposition that a trial court's failure to bring all potential venire persons to the court prior to jury selection amounts to an abuse of discretion. We have found no authority to support defendant's position; in fact, our research indicates that

> In the absence of statute, jurors who do not answer to their names do not need to be sent for, and it is not the practice to issue attachments for missing persons on the jury list when there are enough in attendance to complete the jury.
>
> * * * [A]n accused has no vested right to any particular juror or jurors; all that he can insist on is an impartial jury of the requisite number in his own case and, at the most, a substantial compliance with the statutes governing the selecting and summoning of jurors.

47 Am.Jur.2d *Jury* §§ 191–192 (1969) (footnotes omitted). In the instant case, Defendant asserts neither that there were insufficient venire persons to complete the jury nor that the trial court failed to comply with the statutes governing selecting and summoning jurors.

ty that could have prejudiced the jurors. In fact, Defendant in the instant case failed to file an affidavit alleging that the venire members had been exposed to pre-trial publicity or that pre-trial publicity created an atmosphere of impartiality. Our review of the record on appeal shows that, while many of the prospective jurors had read or heard about the case, all but a few could not remember what they had heard or read. Defendant was able to question these jurors and was able to challenge those who indicated partiality. We hold that Defendant has failed to meet his burden of proving that the trial court abused its discretion by failing to grant a motion for a change of venue.

C

A related issue that Defendant raises on this appeal is whether the trial court erred when it denied his challenges for cause of various potential jurors. Defendant's challenges can be classified in three categories: (1) prospective jurors who had read or heard about the case, *see State v. Pace,* 80 N.M. 364, 456 P.2d 197 (1969); (2) prospective jurors who knew the victim, *see State v. Dobbs,* 100 N.M. 60, 665 P.2d 1151 (Ct.App.), *cert. quashed,* 100 N.M. 53, 665 P.2d 809 (1983); and (3) a prospective juror who could not serve on a jury for an extended period of time. Defendant concludes that he was denied a fair and impartial jury by failure of the trial court to excuse various jurors for cause.

Whether a prospective juror should be excused for cause rests within the sound discretion of the trial court. *State v. Sutphin,* 107 N.M. 126, 129, 753 P.2d 1314, 1317 (1988). Because the trial judge is in the best position to assess the demeanor and credibility of prospective jurors, we will not disturb his ruling absent a manifest error or a clear abuse of that discretion. *State v. Wiberg,* 107 N.M. 152, 156, 754 P.2d 529, 533 (Ct.App.), *cert. denied,* 107 N.M. 106, 753 P.2d 352 (1988). The burden of establishing an abuse of discretion rests on the moving party. *Id.* at 156–57, 754 P.2d at 533–34. We have reviewed the tapes of the voir dire of those jurors challenged for cause by the Defendant that he now claims mandate reversal. In each case, the prospective juror stated that he or she could render a fair and impartial verdict. The trial court did not abuse its discretion in denying these challenges for cause.

D

Defendant also argues that the trial court erred when it informed the jury that the State would not seek the death penalty. By so arguing, Defendant overlooks established New Mexico precedent and a comment to the Uniform Jury Instructions to the contrary. *State v. Martin,* 101 N.M. 595, 605, 686 P.2d 937, 947 (1984) (proper for judge to instruct jury in capital case that the State would not seek death penalty); SCRA 1986, 14–6007 Comment 1 (same). The trial court did not err in informing the jury that the State would not seek the death penalty in this case.

E

Defendant also contends that the trial court erred when it gave the felony murder instruction to the jury. Citing our recent opinion in *State v. Ortega,* 112 N.M. 554, 817 P.2d 1196 (1991), Defendant claims that the felony murder jury instruction given at his trial, which was identical in form to that given in *Ortega,* failed to include an essential element of the crime: the intent to kill. At trial, Defendant objected to the felony murder instruction, arguing that the evidence introduced did not support instructing the jury on this count; however, he did not object to the lack of the intent to kill element in the instruction. As Defendant recognizes, his failure to object to the lack of intent in the instruction may be raised as a basis for appeal only if it constitutes fundamental error. *Id.* at 566, 817 P.2d at 1208. Under the analysis set forth in *Ortega,* Defendant concludes that the trial court committed fundamental error because he lacked the intent to kill: if the jury believed the testimony of David Salaiz, he (Defendant) cannot be convicted of felony murder because the killing was accidental.

In *Ortega*, the defendant, Richard Ortega, was charged with murder in connection with the stabbing deaths of two victims. At the close of evidence, the trial court instructed the jury to consider three different murder theories: willful and deliberate murder under NMSA 1978, Section 30-2-1(A)(1), and SCRA 1986, 14-201; felony murder under Section 30-2-1(A)(2), and SCRA 1986, 14-202; and second degree murder under Section 30-2-1(B) and SCRA 1986, 14-211. *Ortega*, 112 N.M. at 564-65, 567, 817 P.2d at 1206-07, 1209. After the jury found him guilty of felony murder, Ortega appealed, claiming that the felony murder statute and the instructions proffered by the trial court unconstitutionally established a presumption of mens rea or, in the alternative, that the felony murder statute unconstitutionally created a strict liability crime. While we did not find that our felony murder statute was unconstitutional, *see Ortega*, 112 N.M. at 575-76, 817 P.2d at 1217-18 (BACA, J., dissenting in part), we interpreted the statute to contain an element of intent to kill in addition to the intent to commit the underlying felony. *Id.* at 563, 817 P.2d at 1205 (majority opinion). We defined that intent to kill as follows:

> The intent to kill need not be a "willful, deliberate and premeditated" intent as contemplated by the definition of first degree murder in Subsection 30-2-1(A)(1), nor need the act be "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life," as contemplated by the definition in Subsection (A)(3). Indeed, an intent to kill in the form of knowledge that the defendant's acts "create a strong probability of death or great bodily harm" to the victim or another, so that the killing would be only second degree murder under Section 30-2-1(B) if no felony were involved, is sufficient to constitute murder in the first degree when a felony *is* involved—or so the legislature has determined. Second degree murder, in other words, may be elevated to first degree murder when it occurs in circumstances that the legislature has determined are so serious as to merit increased punishment * * *.

Ortega, 112 N.M. at 563, 817 P.2d at 1205.

As in *Ortega*, the jury in the instant case was instructed on willful and deliberate murder, felony murder, and second degree murder regarding the death of Brown. The jury in the instant case, like the jury in *Ortega*, found Defendant not guilty on the willful and deliberate murder charge but guilty of felony murder. The verdict of not guilty to the charge of willful and deliberate murder in the instant case is consistent with evidence presented at trial. The State's expert witness testified that the cause of Brown's death was suffocation. The victim had numerous bruises on her body and other external injuries to her face. The disarray of the apartment and the unnatural position of the victim's body indicated that the victim may have been involved in a struggle prior to her death. Salaiz testified that Defendant told Salaiz that he (Defendant) had panicked during the burglary and placed a pillow over the victim's head to quiet her screams. Salaiz also testified that Defendant had said "I killed the old lady. I didn't mean to." While this evidence may have been sufficient to support a conviction for willful and deliberate murder, the jury could have concluded that Defendant, like the defendant in *Ortega*, had not given careful thought to his proposed course of action, had not weighed considerations for and against that course of action, and had not considered the reasons for or against such action. *See Ortega*, 112 N.M. at 567, 817 P.2d at 1209; SCRA 1986, 14-201.

The above evidence is also consistent with a conviction for felony murder. Defendant seizes on his statement, as testified to by Salaiz, "I didn't mean to [kill Brown]," and our statement in *Ortega* "[a]n unintentional or accidental killing will not suffice [to support a conviction for felony murder]," 112 N.M. at 563, 817 P.2d at 1205, to argue that he did not have sufficient intent to kill. We disagree. As we stated in *Ortega*, "intent to kill in the form of knowledge that the defendant's acts 'create a strong probability of death or great bodily harm' to the victim or another,

so that the killing would be only second degree murder under Section 30–2–1(B) if no felony were involved, is sufficient to constitute murder in the first degree when a felony *is* involved." *Id.* In the instant case, as in *Ortega,* the jury must have concluded that, during the course of the predicate felonies, Defendant caused the victim's death and could have concluded that he knew that his actions of holding a pillow over the victim's face for several minutes created a strong probability of death or great bodily harm. *See Ortega,* 112 N.M. at 566–69, 817 P.2d at 1208–11. Thus, the jury would have been justified in rendering a guilty verdict on the charge of second degree murder. "Second degree murder * * * may be elevated to first degree murder when it occurs [during the commission of a dangerous felony] * * *." *Id.* at 563, 817 P.2d at 1205.

"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 verdict to stand, or when the court considers it necessary to avoid a miscarriage of justice." *Id.* at 566, 817 P.2d at 1208. In the instant case, as in *Ortega,* "we not only have confidence in the jury's verdict * * *; we think it would be a miscarriage of justice to upset the verdict[ ] and remand for a new trial, the outcome of which most assuredly would be the same." *Id.* at 566–67, 817 P.2d at 1208–09.

VII

The next issue raised by Defendant is whether the trial court erred when it qualified Arnold Bentz as an expert witness for the State. At trial, the State offered Bentz as an expert on hair analysis based on his job training and experience. Defendant objected, claiming that this experience was insufficient to qualify Bentz as an expert. The trial court qualified Bentz as an expert, and he testified as to his role in the investigation, which was to separate hairs collected from the crime scene into those matching the victim's hair and those not matching the victim's hairs. Defendant now claims that Bentz lacked the scientific education and training necessary to qualify him as an expert witness.

Under SCRA 1986, 11–702, a trial court must make a two-prong inquiry before allowing expert testimony to be introduced. First, the trial court must determine whether scientific, technical, or other specialized knowledge will assist the jury in its understanding or in determining a fact at issue. *Id.* Second, the trial court must determine whether the proffered expert witness is qualified based on his or her "knowledge, skill, experience, training, or education." *Id.* We review the determination of the trial court that Bentz was qualified to give expert testimony for an abuse of discretion. *See Madrid v. University of California,* 105 N.M. 715, 717, 737 P.2d 74, 76 (1987); *State v. Newman,* 109 N.M. 263, 265, 784 P.2d 1006, 1008 (Ct.App.), *cert. denied,* 109 N.M. 262, 784 P.2d 1005 (1989).

Defendant asserts that, because Bentz lacked a scientific education and training, he was not properly qualified as an expert witness, and that the trial court abused its discretion in allowing him to testify. As we noted in *Madrid,* however, the use of the disjunctive "or" in the rule "indisputably recognizes that an expert witness may be qualified" on the basis of any one of the five factors. 105 N.M. at 717, 737 P.2d at 76. The evidence introduced at trial demonstrated that Bentz had in excess of sixteen years of job experience performing trace evidence analysis, including hair analysis. Based on this evidence, the trial court did not abuse its discretion in qualifying Bentz as an expert witness. Any perceived deficiency in Bentz's education and training is relevant to the weight accorded by the jury to his testimony and not to the testimony's admissibility.

VIII

The next issue raised by Defendant is whether the trial court erred when it denied his motion in limine or motion for a continuance based on a prosecutorial misconduct. In June of 1990, Defendant requested that the State turn over certain slides in its possession to Dr. Griest. Griest was told by the State's agent, Captain

Hall, that the slides either did not exist or were lost. Griest finally received the slides approximately one week prior to trial, and Defendant moved for a continuance, contending that the delayed delivery of the evidence in the State's possession was too late for Griest to prepare for trial. When the trial court denied the motion for a continuance, Defendant made a motion in limine to prohibit the State's expert from testifying about the slides. This motion was also denied. Citing *State v. Wisniewski,* 103 N.M. 430, 708 P.2d 1031 (1985), and SCRA 1986, 5–501 (Repl.Pamp.1992), Defendant claims that an agent's misconduct in misplacing evidence should be imputed to the District Attorney. Defendant cites SCRA 1986, 5–505(B) (Repl.Pamp.1992), for the proposition that the trial court should have granted his motion in limine to preclude the State's expert from testifying regarding the evidence or granted a continuance to allow his expert to prepare for trial.

The State has a duty to disclose the results of scientific tests or experiments that are within the control or possession of the State and that are known or with reasonable diligence should be known to the prosecutor. Rule 5–501(A)(4). Information within the custody or control of an agent of the State is presumed to be within the control of the prosecutor. *See Wisniewski,* 103 N.M. at 435, 708 P.2d at 1036 (extending prosecutor's duty to disclose exculpatory information to police who are part of prosecutorial team). When the State fails to deliver such evidence to the defendant, the trial court may, in its discretion, resort to several sanctions, including limiting the admissibility of the evidence or granting a motion for a continuance. Rules 5–501(G) & 5–505(B). On review, however, the defendant bears the burden of showing that he was prejudiced by the nondisclosure. *See State v. Griffin,* 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct.App.) (interpreting Rule 5–501(A)(5)), *cert. denied,* 108 N.M. 97, 766 P.2d 1331 (1988).

In the instant case, Defendant has failed to meet his burden of showing prejudice. The evidence in question, the slides taken from the victim, showed that she was not raped prior to her death. Nothing contained in the slides implicated Defendant in her murder. Thus, we find no prejudice here. The trial court did not err in refusing to grant Defendant's motion for a continuance nor his motion in limine.

IX

Defendant next contends that the trial court erred when it failed to rule on the sufficiency of the evidence prior to submitting the case to the jury. At the close of the State's case, Defendant moved for a directed verdict based on insufficient evidence, and the trial court denied the motion. Defendant then presented his case, and, after the trial court submitted the case to the jury, Defendant moved for a mistrial because the trial court had failed to again rule on the sufficiency of the evidence. Citing SCRA 1986, 5–607(K) (Repl.Pamp.1992), and *State v. Lard,* 86 N.M. 71, 519 P.2d 307 (Ct.App.1974), Defendant claims that the trial court erred by failing to consider the sufficiency of the evidence before presentation of the case to the jury, even though he did not renew his directed verdict motion.

We agree with Defendant that the trial court must rule on the sufficiency of the evidence before presenting the case to the jury. SCRA 1986, 5–607(K) ("[at the close of all evidence, the trial] court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made"). We do not agree, as Defendant suggests, that this procedural lapse by the trial court merits reversal. As the Court of Appeals has held, we hold that the failure of the trial court to rule on the sufficiency of the evidence before presentation of the case to the jury merely preserves the issue of sufficiency of the evidence for appellate review. *See Lard,* 86 N.M. at 73, 519 P.2d at 309.

X

The above discussion necessarily suggests the next issue that we address: Whether there was sufficient evidence introduced at trial to support Defendant's

conviction. Defendant asserts that the only evidence linking him to Brown's murder and the burglary, attempted robbery, and battery was the testimony of David Salaiz and hair samples collected at the scene. Defendant argues that the State's expert testimony indicated that the hair samples found in Brown's apartment, while matching Defendant's hair, could also have come from another person. In addition, Defendant asserts that testimony indicated that Salaiz had the reputation of being a liar, that Salaiz had incentives to lie, *i.e.*, reward money and favorable treatment on pending criminal matters, and that the jury did not believe Salaiz's testimony as illustrated by its not guilty verdict on the aggravated battery charge against defendant.[5] Defendant concludes that his conviction was not supported by substantial evidence.

Our review consists of determining "whether 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." *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. "Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion." *State v. Isiah*, 109 N.M. 21, 30, 781 P.2d 293, 302 (1989). We view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict. *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. We may not reweigh the evidence nor substitute our judgment for that of the jury. *Id.*

In light of the above standard of review, Defendant's contention of insufficient evidence to support his guilty verdicts must fail. The evidence adduced at trial favorable to supporting the verdicts is as follows. Salaiz testified that Defendant told him (Salaiz) that he (Defendant) had entered the victim's apartment to steal something to sell to obtain money to purchase drugs. Salaiz also testified that Defendant related that, while in the apartment, he encountered the victim who started to scream, he panicked, and then he killed the victim. The State also introduced expert testimony that hairs found at the murder scene matched known hair samples of Defendant. While Defendant attacked Salaiz's credibility and the validity of the hair identification, our duty on appeal is neither to substitute our judgment for that of the jury nor reweigh the evidence. As indicated by the verdicts, the jury believed Salaiz's testimony regarding the murder and burglary and could have found that the hair analysis, while not conclusive in establishing Defendant's identity as the murderer, linked Defendant to the murder. Thus, as the above discussion indicates, substantial evidence supports Defendant's conviction.

XI

Defendant's final argument is that the above claims of error, taken cumulatively, amount to a violation of his right to due process. The doctrine of cumulative error "requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *Martin*, 101 N.M. at 601, 686 P.2d at 943. In the instant case, the only error committed by the trial court was its failure to anticipate our opinion in *Ortega*, which changed the law regarding felony murder. Our review of the record indicates that Defendant received a fair trial; therefore, we do not find cumulative error.

In accordance with the foregoing discussion, the decision of the trial court is AFFIRMED.

IT IS SO ORDERED.

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

5. Defendant also contends that even if the jury believed Salaiz's testimony regarding Defendant's involvement in the burglary at Brown's apartment, this testimony does not establish that Defendant had the intent to kill Brown as required by *Ortega*. We have already discussed this issue in Section VI–E, *supra*, and see no reason to repeat that discussion here.

846 P.2d 333

STATE of New Mexico, Plaintiff–Appellee,

v.

Jose ROYBAL, Defendant–Appellant.

No. 13094.

Court of Appeals of New Mexico.

Oct. 14, 1992.

Certiorari Denied Dec. 30, 1992.

Tom Udall, Atty. Gen., Ann M. Harvey, 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

MINZNER, Judge.

Defendant appeals from his convictions for possession of a controlled substance, child abuse, and tampering with evidence as a result of an incident in which three undercover police officers observed him and two others engaged in what they perceived to be a drug transaction at a park. The three co-defendants were tried together. The charges against one co-defendant were dismissed at trial for insufficient evidence; the other co-defendant, Robert Baca, was convicted for trafficking in a controlled substance by distribution. On appeal to this court, his conviction was affirmed by memorandum opinion. *See State v. Baca,* Ct.App. No. 13,072 (filed June 22, 1992), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992).

In this appeal, Defendant raises six issues: (1) failure to prove probable cause to arrest; (2) denial of due process by the state's failure to examine the testifying officers' internal affairs records and the trial court's denial of a defense motion for in camera inspection of those records; (3) error in denial of a motion to sever; (4) the tampering with evidence statute is overbroad and vague; (5) there was insufficient evidence to establish the requisite intent for tampering with evidence; and (6) there was insufficient evidence to establish proof of child abuse. We discuss the facts, where relevant in connection with an issue, when we discuss that issue.

We reverse Defendant's convictions for tampering and child abuse for insufficient evidence to satisfy Defendant's right to due process. We affirm Defendant's conviction for possession, notwithstanding the fact that we conclude the trial court erred in denying Defendant's motion to sever because we conclude the error in denying the motion was harmless.

Probable Cause

Defendant argues on appeal, as did his co-defendant, that the trial court erred in determining that the police officers had probable cause to arrest him. Therefore, he contends, the trial court erred in denying his motion to suppress. We conclude that the trial court's decision on the motion to suppress was proper.

[redacted] "Probable cause [to arrest] exists when the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being, committed." *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App.1986). On appeal, the trial court's denial of a motion to suppress will not be disturbed if it is supported by substantial evidence. The facts are viewed in a manner most favorable to the state, all reasonable inferences in support of the trial court's decision are indulged in, and all inferences to the contrary are disregarded. Resolution of factual conflicts, credibility, and weight is the task of the trial court. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.), *rev'd on other grounds,* 100 N.M. 470, 672 P.2d 643 (1983).

[redacted] Defendant contends that evidence that an informant telephoned the police with information concerning activity at 2249 Lilac, that co-defendant Baca was present at a previous drug crime scene, and that he was known to the police as a heroin dealer, are each independently insufficient to establish probable cause to arrest. We assume but need not decide that the informant's tip by itself would not have established probable cause. *See State v. Therrien,* 110 N.M. 261, 794 P.2d 735 (Ct.App. 1990). However, we review all the evidentiary facts to determine whether the evidence was sufficient, not each piece of evidence on its own. *See Boeglin,* 100 N.M. at 132, 666 P.2d at 1279.

Officers Garcia and Gandara had extensive experience in observing narcotics transactions. Gandara knew the co-defendant to be a heroin user and dealer. Shortly before the arrest, the officers saw a green Volkswagen at the Lilac address, where heroin had been found during the execution of a search warrant several months previously. The co-defendant was seen in that same vehicle in Duranes Park.

He had been present at the Lilac address when the earlier warrant was executed and had been suspected of swallowing heroin on that occasion. From a distance of five to ten feet from the Volkswagen, Garcia saw Defendant hand the co-defendant currency and receive some small items in return. The three officers announced that they were police officers and Defendant dropped some items from his hand to the ground. The foregoing was evidence from which the trial court could have determined that the police officers could have believed that Defendant was engaging in a narcotics transaction. *See Copeland,* 105 N.M. at 31–32, 727 P.2d at 1346–47; *Boeglin,* 100 N.M. at 132, 666 P.2d at 1279.

Defendant argues that the inconsistency between Gandara's testimony that she observed the transaction through binoculars and Garcia's testimony that he saw the transaction from a few feet away precludes the establishment of probable cause because it is inherently improbable that the officers could have been in two places at once. We understand that the officers' testimony refers to one transaction. The testimony of neither officer, independent of the other's, was inherently improbable. *See State v. Soliz,* 80 N.M. 297, 454 P.2d 779 (Ct.App.1969) (testimony of single witness was not inherently improbable where it appeared that what was related could have occurred under the circumstances described).

It was for the trial court as fact-finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lay. *State v. Frazier,* 17 N.M. 535, 131 P. 502 (1913). Here, the trial court determined that Garcia was the most credible of the witnesses who testified at the suppression hearing. The testimony of Garcia alone was sufficient to enable the trial court judge to infer that Garcia observed Defendant engage in a suspicious transaction. *See Soliz,* 80 N.M. at 298, 454 P.2d at 780 (testimony of a single witness is sufficient for a conviction).

Inspection of Internal Affairs Records

Although Defendant contends that the trial court abused its discretion in refusing to conduct an in camera inspection of the files of Officers Gandara, Salazar, and Garcia, at trial he only moved for in camera inspection of Garcia's files. He cannot claim that the trial court erred in failing to inspect the files of Gandara and Salazar since he did not seek that review below. *See State v. Martinez,* 97 N.M. 316, 639 P.2d 603 (Ct.App.1982). In addition, we note that Defendant's motion for in camera inspection of Garcia's files was made pursuant to *State v. Pohl,* 89 N.M. 523, 554 P.2d 984 (Ct.App.1976). *Pohl* held that it was error to refuse to conduct an in camera inspection of the internal affairs file on an arresting officer where the defendant was charged with battery on a police officer and had shown two prior instances of the officer's alleged misconduct; the defendant showed as specific a need as could be expected under the circumstances of the case. In contrast with the showing made in *Pohl,* Defendant did not make any showing that the internal affairs files contained information material to the preparation of his defense. The newspaper article on which defendant relied, for example, does not cast any doubt on Garcia's credibility. Rather, it asserts that Salazar's affidavit contained false information. Defendant's other appellate arguments regarding disclosure are made for the first time on appeal. As a result, there is no basis for appellate review of these claims. *See State v. Baca,* 111 N.M. 270, 804 P.2d 1089 (Ct.App.1990) (this court reviews the trial court's ruling for reversible error on the grounds on which defendant based his objection at trial).

Motion to Sever

The co-defendants advised the trial court that they would seek to have Defendant's suppression hearing testimony admitted at trial as the prior testimony of an unavailable witness. The suppression hearing testimony was offered to prove that the police officers attempted to persuade Defendant to testify against his co-defendants. As the court summarized the tender, at least

one of the police officers told Defendant: " 'If you turn an informant, then we won't press charges against you, and you and your family can go[.]' "

Initially, Defendant did not object to the admission of his prior testimony. However, as soon as the trial court ruled that the state could introduce evidence of Defendant's prior convictions to impeach that testimony, Defendant objected and moved to sever his trial. Defendant's motion to sever is inconsistent with the notion that he waived any objection to admission of his prior testimony; the very purpose of the motion was to avoid admission of the prior testimony. We conclude he preserved the issue he argues on appeal because he alerted the trial court to his objections as soon as they arose. *See State v. Montoya,* 80 N.M. 64, 451 P.2d 557 (Ct.App.1968).

The standard of review for denial of a motion to sever is abuse of discretion. *State v. Montoya,* 114 N.M. 221, 836 P.2d 667 (Ct.App.1992); *State v. Pacheco,* 110 N.M. 599, 798 P.2d 200 (Ct.App.1990). To succeed in proving error, the defendant must make a showing that he suffered prejudice by the joinder. *Id.* Further, "[e]ven when inadmissible evidence is introduced in a joint trial, reversal of a denial of severance is not automatic." *Montoya,* 114 N.M. at 224, 836 P.2d at 670.

We note that the language of the relevant rule has changed since this court's decision in *State v. Volkman,* 86 N.M. 529, 525 P.2d 889 (Ct.App.1974). *Compare* SCRA 1986, 5–203(C) (Repl.1992) ("If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants by the filing of a statement of joinder for trial, the court may order separate trials of offenses, grant a severance of defendants, or provide whatever other relief justice requires.") *with* NMSA 1953, 2d Repl. Vol. 6 (1972), § 41–23–34 (Supp.1975) Rule of Criminal Procedure 34(b) (" 'Upon motion, any defendant shall be granted a separate trial as of right * * * (2) if the court finds that the prosecution probably will present evidence against a joint defendant, other than reputation or character evidence, which would not be admissible in a separate trial of the moving defendant.' "), *quoted in Volkman,* 86 N.M. at 530, 525 P.2d at 890.

Notwithstanding the change in the rule, ordinarily an initial step in the analysis is whether the evidence in question would not have been admissible in a separate trial of the moving defendant. *See Montoya,* 114 N.M. at 224, 836 P.2d at 670. In this case, the parties do not dispute that the evidence of Defendant's convictions would not have been admissible had he been separately tried. The evidence was offered to impeach his credibility under SCRA 1986, 11–609, solely because his codefendants wished to rely on his suppression hearing testimony. It would not have been admissible for the same purpose at a separate trial at which Defendant chose not to testify. The state has not suggested that it would have been admissible for any other purpose, or that we should assume Defendant might have chosen to testify had he been tried separately. We conclude that the evidence would not have been admissible in a separate trial.

The next question is whether the trial court, once it decided to admit the evidence, erred in denying the motion to sever.

> On review of such a decision we must decide whether, due to the joint trial, there is an appreciable risk that the jury convicted for illegitimate reasons. This inquiry necessarily involves consideration of the degree of prejudice caused a defendant by the joint trial and of the strength of the legitimate evidence arrayed against that defendant.

Montoya, 114 N.M. at 224, 836 P.2d at 670 (citation omitted).

Generally, proof of other crimes has a tendency to prejudice the minds of the triers of fact and to predispose them to a belief in the accused's guilt. *See State v. Rowell,* 77 N.M. 124, 419 P.2d 966 (1966); R. 5–203(C) committee commentary (examples of when prejudice may be shown include where combined trial might result in admissibility of evidence of other crimes not normally admissible under SCRA 1986, 11–404(B)). Actual prejudice, however, is

not shown unless there is an appreciable risk that the jury convicted for illegitimate reasons. *See State v. Ramming,* 106 N.M. 42, 738 P.2d 914 (Ct.App.) (evidence not devastating in its effect against defendant), *cert. denied,* 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

The grant or refusal of severance is reversed only upon a showing of an abuse of discretion. *State v. Gallegos,* 109 N.M. 55, 64, 781 P.2d 783, 792 (Ct.App.1989). Under the equivalent federal rule of criminal procedure, the "review on appeal is limited to whether '* * * the joint trial [was] so prejudicial * * * as to require the exercise of that discretion in only one way, by ordering a separate trial * * *.'" *United States v. Ragghianti,* 527 F.2d 586, 587 (9th Cir. 1975) (quoting *Parker v. United States,* 404 F.2d 1193, 1194 (9th Cir.), *cert. denied,* 394 U.S. 1004, 89 S.Ct. 1602, 22 L.Ed.2d 782 (1969)). The test for prejudice under the federal rule is to demonstrate that under all the circumstances, the jurors would be unable "to follow the court's instructions and keep separate the evidence that is relevant to each defendant." 9 *Federal Procedure (Lawyers Edition)* § 22:623 (Thomas J. Goger, et al., eds. 1982). "It is not enough to simply show that joinder makes it more difficult [for the defendant to defend against the state's case,] * * * or that a separate trial might offer him a better chance of acquittal." *Id.* at § 22:624 (footnotes omitted).

In the recent case of *State v. Gonzales,* 113 N.M. 221, 824 P.2d 1023 (1992), our supreme court considered whether a defendant showed prejudice that would require severance of the charges of felon in possession of a firearm from other counts because evidence of a prior conviction would otherwise be inadmissible at a trial on the other counts. *Gonzales* declined to adopt a per se rule requiring severance and held that the defendant did not show prejudice to require severance where the jury was not given details surrounding the conviction, the prior conviction was very dissimilar, and the jury was twice given limiting instructions that they were presumed to have followed. In view of the rule change since *Volkman* was decided, we interpret *Gonzales* as requiring Defendant to establish actual prejudice. *See State v. Saavedra,* 103 N.M. 282, 705 P.2d 1133 (1985); *cf. Ragghianti,* 527 F.2d at 587–88 (dealing with joinder of offenses).

The evidence of Defendant's guilt on the possession offense was overwhelming. *See State v. Martinez,* 99 N.M. 48, 52, 653 P.2d 879, 883 (Ct.App.1982) (where other evidence overwhelmingly establishes proof of defendant's guilt, admission of evidence objected to is harmless). Conflicts in the officers' testimony did not render the state's case weak; the only significant inconsistency related to the site from which Defendant's conduct was first observed. We conclude the trial court's instruction would have been sufficient to cure any prejudice had the possession offense been the only charge. However, Defendant was also charged and convicted of two other offenses. The evidence offered in support of these offenses was not overwhelming, and in fact Defendant challenges both convictions as based on insufficient evidence. Under the circumstances of this case, we believe there is an appreciable risk that Defendant was convicted on these counts for illegitimate reasons. However, for the reasons that follow, in discussing the last two issues on appeal we also conclude that neither of these convictions was based on sufficient evidence to satisfy Defendant's constitutional right to due process. *See State v. Garcia,* 114 N.M. 269, 837 P.2d 862 (1992). Because we reverse and remand with instructions to dismiss these convictions, we conclude that reversing and remanding for a new trial on the possession conviction would not change the result.

Therefore, we hold that the trial court's decision denying Defendant's motion to sever his trial from that of his co-defendants did not result in reversible error. *See State v. Wright,* 84 N.M. 3, 498 P.2d 695 (Ct.App.1972) (error must be prejudicial to be reversible). On appeal, error will not be corrected if correction will not change the result below. *Wright v. Brem,* 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

Constitutionality of Tampering with Evidence Statute

Defendant contends that the statute is overbroad because it subjects him to criminal prosecution for exercising his right against self-incrimination. *See State v. Gattis,* 105 N.M. 194, 197, 730 P.2d 497, 500 (Ct.App.1986) (overbroad statute sweeps within its ambit those actions ordinarily deemed to be constitutionally protected). He also contends that the statute is vague. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct.App.1976). Defendant's vagueness claim is based in part on the contention that common persons must guess at the meaning of the statute due to the broad meaning of the verb "place." We do not address either argument because we conclude that there is insufficient evidence to support the conviction for tampering under the instruction given.

Sufficiency of Evidence to Support Conviction for Tampering with Evidence

Under the instruction given, the state was required to prove beyond a reasonable doubt that Defendant "placed heroin" and "intended to prevent [his] apprehension, prosecution or conviction." *See* SCRA 1986, 14–2241. Defendant claims that this proof was lacking because there was no proof that he knew the persons who approached him were police officers. Salazar testified that he and the other two officers approached simultaneously and identified themselves as police officers. Assuming that proof of Defendant's knowledge was required, Salazar's testimony was evidence from which the jury could have inferred that Defendant knew the three persons were police officers. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). Nevertheless, there was insufficient evidence of specific intent to support the conviction under the instruction given.

The word "place" as used in the instruction indicates an act of putting evidence in a particular place and suggests a definite location. We think the state so narrowly stated the act of which Defendant was accused that it failed to describe the evidence in this case.

People v. Frayer, 661 P.2d 1189 (Colo.Ct. App.1982), *aff'd,* 684 P.2d 927 (Colo.1984), exemplifies the type of behavior that ordinarily underlies a successful conviction for tampering with evidence. In *Frayer,* an alert pharmacist suspected that a phoned-in prescription was phony. After checking with the doctor and confirming his suspicion, the pharmacist alerted the police that a "Nancy Burns" was heading to the store to pick up the illegally-ordered narcotic. The police were waiting outside the store when the defendant walked out with the drug, which was packaged in a glass bottle. A police officer identified himself and ordered her to stop. The defendant tried to get into a waiting car, but the officer grabbed her by the arm and told her she was under arrest. The defendant reacted by throwing the bag containing the bottle toward the waiting car. The officer then retrieved the bottle, but the defendant grabbed it from him again, breaking it. From the circumstances surrounding the defendant's arrest, the Colorado Court of Appeals concluded that sufficient evidence existed to sustain the jury's verdict. The Colorado Supreme Court agreed with the lower court's conclusion, noting that Frayer's conduct at the time of the arrest sufficiently established the requisite intent to interfere with the availability of the drug at a prospective official proceeding. *Frayer,* 684 P.2d at 929. The court said "the offense of tampering with physical evidence depends, to an important degree, on the defendant's conduct and intent." *Id.*

Frayer illustrates the kind of overt act which supports a tampering charge. The defendant in this case did not let the bottle fall from her hand, but threw it away from the police officer twice, and only after the officer identified himself and informed her that she was under arrest. The circumstances make it relatively easy to infer her intent to thwart the officer's investigation.

State v. Papillion, 556 So.2d 1331 (La. Ct.App.1990), is an example of a more typical tampering case, in that the defendant reacted to the presence of police officers at his home by slamming the door, running into the bathroom, and flushing things

down the toilet. The police were able to retrieve five bullets from the toilet, but were unable to retrieve any drugs. The defendant was charged with possession of cocaine and obstruction of justice, and convicted on both counts. On appeal, the defendant claimed that the evidence was insufficient to sustain the convictions. The reviewing court disagreed and affirmed. Although the state was unable to establish what the defendant was trying to get rid of, the court found that one could infer that the defendant was trying to hide incriminating evidence, given that cocaine and drug paraphernalia were seized from his apartment. This case is instructive because, like *Frayer*, it illustrates the kinds of acts necessary to infer intent to tamper with evidence.

The defendant in *State v. McKimmie*, 232 Mont. 227, 756 P.2d 1135 (1988), discarded the rifle he used to shoot his wife. He argued on appeal that he was too distraught to have formed the requisitive mental state; therefore, his conviction for tampering with evidence should be reversed. The court disagreed, finding that the defendant's mental state was established by his conduct. The defendant had removed and concealed the rifle, which was sufficient to indicate that he realized an official investigation would occur, and he wanted to make sure that the rifle would not be found. His conviction for tampering was affirmed.

In all of these cases, the defendants actively sought to disrupt the investigatory process. In each case, there was evidence that the defendant committed one of the acts of "tampering" listed in NMSA 1978, Section 30-22-5 (Repl.Pamp.1984) ("destroying, changing, hiding, placing or fabricating any physical evidence"). Defendant's actions surely indicate an immediate reaction to the predicament in which he found himself. Nevertheless, they do not prove beyond a reasonable doubt that he formed a specific intent to thwart the officers. *See Garcia*, 114 N.M. at 275, 837 P.2d at 868. Further, while Defendant might be said to have tried to conceal the evidence by dropping it to the ground, there is no evidence that he acted to "place" the heroin in a particular location. Under these circumstances, we conclude that the conviction for tampering is not supported by sufficient evidence either of intent or of an act listed in the statute. *Id.*

Sufficiency of Evidence to Support Conviction for Child Abuse

Defendant also argues that the state failed to prove that he acted or failed to act with the result that his daughter's life or health was endangered. We agree.

Defendant's six-year-old daughter was in the car with her mother, Defendant's wife, at the time of the transaction underlying Defendant's possession conviction. Defendant's car was ten or fifteen feet away from the car in which his co-defendants arrived. The police officers who apprehended Defendant and his co-defendants were armed, and one of the co-defendants resisted arrest.

The state's theory is that Defendant's conduct placed his daughter's life or health in danger, because the transaction was one that might be attended by violence. On the record before us, this charge was not supported by substantial evidence indicating that Defendant's daughter was in fact placed in danger. Under these circumstances, we conclude that this conviction, like that of tampering, is not supported by sufficient evidence to satisfy Defendant's constitutional right to due process. *See Garcia*, 114 N.M. at 274, 837 P.2d at 867.

Conclusion

We affirm Defendant's conviction for possession. We reverse his convictions for tampering and for child abuse. We remand for entry of an amended judgment and sentence.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

846 P.2d 341

STATE of New Mexico,
Plaintiff–Appellee,

v.

Samuel Clayton CHARLTON,
Defendant–Appellant.

No. 14070.

Court of Appeals of New Mexico.

Nov. 24, 1992.

Certiorari Denied Jan. 6, 1993.

Tom Udall, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals from a judgment entered after a jury trial in which he was convicted of aggravated assault and failure to appear. He raises the following issues on appeal: (1) whether there was sufficient evidence to support his conviction for aggravated assault; (2) whether the trial court exceeded its authority when it ordered Defendant banished from New Mexico; (3) whether double jeopardy prohibits the trial court from increasing Defendant's sentence after he began to serve his initial sentence; (4) whether double jeopardy prohibits the trial court from enhancing Defendant's sentence for aggravated assault (assault with a deadly weapon) with the firearm enhancement; and (5) whether the trial court committed fundamental error when it failed to instruct the jury pursuant to SCRA 1986, 14-6013.

The second calendar notice proposed to reverse Defendant's sentence and remand for entry of an amended judgment and sentence and to affirm on all other issues. Defendant has filed a timely memorandum in opposition to the proposed summary affirmance and in support of the proposed reversal and remand; the State has indicated its intention not to oppose the proposed reversal and remand. For the following reasons, we affirm Defendant's convictions, but reverse the judgment and sentence from which he appeals and remand for entry of an amended judgment and sentence.

FACTS

We adopt the statement of facts in Defendant's docketing statement because they are not challenged by the State. *See State v. Calanche,* 91 N.M. 390, 574 P.2d 1018 (Ct.App.1978). Defendant operated a gas station in rural Hidalgo County. On January 25, 1990, the victim, Sammy Martinez, stopped at the station. While Martinez was there, an elderly couple drove their car into the station and told Defendant they were having car trouble. Defendant and Martinez, who happened to be a mechanic, looked under the hood to try to ascertain the problem. Both Martinez and Defendant determined that the couple could safely drive the car.

There is some dispute regarding what happened after the two men looked at the car. Eventually, however, an argument ensued and Defendant took a gun out of his back pocket, pointed it at Martinez's head, and threatened to kill him.

The trial court's original judgment, entered on May 26, 1992, sentenced Defendant to eighteen months imprisonment plus one year of parole for aggravated assault,

eighteen months imprisonment plus one year of parole for his failure to appear in court, and one year for committing a non-capital felony with a firearm, for a total commitment of four years. The court suspended all but one year of Defendant's sentence and committed Defendant to the Hidalgo County Jail to serve his sentence. The court additionally ordered "that upon release from the Hidalgo County Jail, the defendant shall **leave the State of New Mexico** and **shall not** return to the **State of New Mexico** without prior permission for [sic] the Court." (Emphasis in original.)

On June 22, 1992, while Defendant was serving the above-mentioned sentence, the trial court amended its judgment. There was only one change between the original and amended judgments, to wit, the trial court added a term of three years probation to be served by Defendant upon completion of his prison sentence.

SUFFICIENCY OF EVIDENCE

Defendant first claims that the State failed to prove his guilt of the charge of aggravated assault beyond a reasonable doubt. This claim lacks merit. Martinez testified that while he was at Defendant's gas station, Defendant took a gun out of his back pocket, pointed it at Martinez's head, and threatened to kill him. This was evidence from which the jury could find beyond a reasonable doubt that Defendant committed aggravated assault with a deadly weapon.

Defendant further argues that because his trial attorney did not prepare the docketing statement, his case should have been assigned to the general calendar. Defendant admits, however, that his trial attorney and the attorney who prepared the docketing statement discussed the facts of his case as they are related in the docketing statement. He also admits that at least one of his attorneys partially reviewed the taped transcript of the trial. Defendant does not contend that there are any relevant facts of which this court is not aware. We are therefore not persuaded that placing this case on the general calendar would affect this court's decision. Defendant's suggestion that the statement of facts in the docketing statement may be deficient does not justify a general calendar assignment. *See State v. Hadley,* 108 N.M. 255, 258–59, 771 P.2d 188, 191–92 (Ct.App.1989) (this court may make a determination of the sufficiency of the evidence on summary disposition if the facts of the docketing statement clearly establish the sufficiency of the evidence), *overruled on other grounds by State v. Bedolla,* 111 N.M. 448, 806 P.2d 588 (Ct.App.1991). Accepting the facts in the docketing statement as true, *see Calanche,* 91 N.M. at 392, 574 P.2d at 1020, we conclude there was sufficient evidence to support the conviction for aggravated assault.

BANISHMENT

The trial court ordered that Defendant be banished from the State of New Mexico when he finished serving his prison term. Defendant argues that banishment is an inappropriate punishment because the district court has no authority to banish and that banishment is contrary to New Mexico public policy. We agree.

Whether a criminal defendant can be banished from the State of New Mexico is a question of first impression. District courts only have that sentencing authority granted by the legislature. *State v. Sparks,* 102 N.M. 317, 324, 694 P.2d 1382, 1389 (Ct.App.1985); *State v. Crespin,* 96 N.M. 640, 643, 633 P.2d 1238, 1241 (Ct.App. 1981). The New Mexico criminal code does not specifically authorize the banishment of criminal defendants from the state. The legislature's refusal to authorize banishment as a sentencing option is evidence that banishment is contrary to the public policy of this state. Further, in the only New Mexico case considering the question of banishment, this court assumed that a trial court lacked the authority to banish a defendant, even if the defendant agreed to be banished. *State v. Gibson,* 96 N.M. 742, 634 P.2d 1294 (Ct.App.1981).

When a judge conditions a defendant's sentence upon refraining from being present in a specific location which is directly related to the offense, such as a bar or

school, such conditions generally have been upheld. Neil P. Cohen & James J. Gobert, *The Law of Probation and Parole* § 6.23, at 261 (1983); Caroll J. Miller, Annotation, *Propriety of Conditioning Probation on Defendant's Not Entering Specified Geographical Area,* 28 A.L.R. 4th 725 (1984). When the trial court orders a defendant to leave a broad geographical region, often characterized as banishment, appellate courts have routinely invalidated this condition. *See, e.g., Henry v. State,* 276 S.C. 515, 280 S.E.2d 536 (1981); *Almond v. State,* 350 So.2d 810 (Fla.Dist.Ct.App.1977). *But see Cobb v. State,* 437 So.2d 1218 (Miss.1983). Some courts have justified this on the ground that general banishment can have no rehabilitative role in modern penology. *Johnson v. State,* 672 S.W.2d 621 (Tex.App.1984); *State ex rel. Halverson v. Young,* 278 Minn. 381, 154 N.W.2d 699 (1967); *see also* Gerald R. Miller, Note, *Banishment—A Medieval Tactic in Modern Criminal Law,* 5 Utah L.Rev. 365 (1957). Other courts have found it violates public policy. *See, e.g., State v. Doughtie,* 237 N.C. 368, 74 S.E.2d 922 (1953).

Banishment "would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself." *People v. Baum,* 251 Mich. 187, 231 N.W. 95, 96 (1930). "To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy." *Rutherford v. Blankenship,* 468 F.Supp. 1357, 1360 (W.D.Va.1979). For these reasons, it has been said that where the legislature has not authorized banishment, "it is impliedly prohibited by public policy." *Id.* (citing *Baum*). Because we decide that banishment is contrary to public policy, we need not reach Defendant's argument that the sentence imposed violated his constitutional right to travel. We hold that the district court exceeded its authority when it banished Defendant from the state.

We note that in invalidating the portion of Defendant's sentence banishing him from the state, we do not invalidate all of Defendant's original sentence. When a trial court imposes one valid and one invalid sentence, this court will sever the sentences if possible in order to give effect to the valid sentence. *State v. Henry Don S.,* 109 N.M. 777, 779, 790 P.2d 1058, 1060 (Ct.App.1990). In this case, the portion of Defendant's sentence regarding banishment is severable from the rest of Defendant's sentence.

AMENDED JUDGMENT AND SENTENCE

The original judgment and sentence filed on May 26, 1992 suspended all but one year of Defendant's sentence, which he immediately began to serve. On June 22, 1992, the trial court filed an amended judgment increasing Defendant's sentence by adding a three-year term of probation. Defendant argues that the trial court violated the prohibition against double jeopardy when it increased his sentence. We agree.

Once a trial court imposes a valid sentence, the court cannot increase the penalty. *Crespin,* 96 N.M. at 643, 633 P.2d at 1241; *State v. Castillo,* 94 N.M. 352, 355, 610 P.2d 756, 759 (Ct.App.1980). Probation is not a mandatory aspect of sentencing in New Mexico, and therefore the failure to impose a term of probation does not invalidate the sentence. *State v. Soria,* 82 N.M. 509, 484 P.2d 351 (Ct.App.1971); *cf. State v. Acuna,* 103 N.M. 279, 705 P.2d 685 (Ct. App.1985) (because failure of trial court to impose parole, which is a mandatory addition to a sentence, invalidates the sentence, parole may be added after imposition of original sentence). The trial court was without authority to increase Defendant's sentence to include probation after it had imposed the original, valid sentence. Since invalidating the banishment portion of Defendant's sentence does not render the rest of the sentence invalid, the sentence could not subsequently be increased.

ENHANCEMENT OF AGGRAVATED ASSAULT WITH FIREARM ENHANCEMENT

As noted above, Defendant's sentence for aggravated assault was enhanced

by one year, pursuant to NMSA 1978, Section 31–18–16(A) (Repl.Pamp.1990). Section 31–18–16(A) states:

> When a separate finding of fact by the court or jury shows that a firearm was used in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense * * * shall be increased by one year, and the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred.

To prove the charge of aggravated assault, the State offered proof that Defendant assaulted Sammy Martinez with a firearm, contrary to NMSA 1978, Section 30–3–2(A) (Repl.Pamp.1984). Section 30–3–2(A) requires the State to prove beyond a reasonable doubt that Defendant used a deadly weapon to effectuate the assault. SCRA 1986, 14–305. A firearm is a deadly weapon for purposes of the aggravated assault statute. NMSA 1978, § 30–1–12(B) (Repl.Pamp.1984).

Defendant contends that the protection against double jeopardy provided by both federal and state constitutions precludes the application of New Mexico's firearm enhancement statute to his sentence for aggravated assault. We have carefully considered Defendant's well-constructed argument. While we agree that our case law should be reexamined in light of recent supreme court precedent, we are not persuaded that our disposition is incorrect.

The United States Constitution precludes "'*multiple punishments* for the same offense.'" *State v. Ellenberger*, 96 N.M. 287, 289, 629 P.2d 1216, 1218 (1981) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (emphasis added)). Not only does the Fifth Amendment to the United States Constitution apply to the states, *Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991) (citing *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)), but New Mexico provides similar protection independently of the federal mandate. N.M. Const. art. II, § 15; NMSA 1978, § 30–1–10 (Repl.Pamp.1984); *see also Swafford*, 112 N.M. at 7 & n. 3, 810 P.2d at 1227 & n. 3. Our Supreme Court recently articulated a new test for determining whether a person has been subject to double jeopardy in single prosecution cases. *Id.* at 13–15, 810 P.2d at 1233–35. *Swafford* articulates a two-step analysis for analyzing claims of multiple punishment. *Id.* at 7, 810 P.2d at 1227.

Like *Swafford*, this is a case in which the defendant contends that he has been subject to multiple punishments in a single prosecution. Under *Swafford*, the court, as a threshold matter, must determine whether the defendant's conduct was "unitary." *Id.* at 13, 810 P.2d at 1233. If a defendant's conduct is unitary, the court continues the double jeopardy analysis; if the conduct is not unitary, the double jeopardy inquiry is at an end—there is no double jeopardy violation. When the acts of a defendant alleged to have violated more than one statute are close in time or space, or the quality and nature of the acts are not sufficiently distinguished from each other, the conduct is said to be unitary. *Id.* at 13–14, 810 P.2d at 1233–34. In the present case, Defendant's relevant conduct constituted a single act, i.e., pointing a gun at Martinez, which is unitary conduct under *Swafford*.

Once a court finds that a defendant's conduct is unitary, the court must determine whether the legislature intended to impose multiple punishments. The double jeopardy clause is said not to apply to the legislature, because it is within the power of the legislature to impose punishments for the violation of a criminal statute. *Id.* at 13, 810 P.2d at 1233 (citing *Grady v. Corbin*, 495 U.S. 508, 518, 110 S.Ct. 2084, 2091, 109 L.Ed.2d 548 (1990), and *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983)). A legislature may impose multiple punishments for a single act if it wishes; the double jeopardy clause only requires that the reviewing court be able to determine the intent. *See Ellenberger*, 96 N.M. at 290, 629 P.2d at 1219. If the court finds that the legislature intended to impose multiple punishments for the defendant's con-

duct, there is no double jeopardy violation. *See State v. Tsethlikai,* 109 N.M. 371, 373, 785 P.2d 282, 284 (Ct.App.1989).

Unless the legislature expressly provides for multiple punishments, the court must ask whether one offense is "subsumed within the other." *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234 (citing *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). *Blockburger* asks whether each offense "requires proof of a different element." 284 U.S. at 304, 52 S.Ct. at 182. The reviewing court must compare the elements of the two statutes; it need not consider the actual evidence presented to prove the elements of the offense. If when using the *Blockburger* test the court finds that the two offenses are the same, the defendant may not be punished under both statutes. *Swafford,* 112 N.M. at 14, 810 P.2d at 1234.

While Section 31–18–16(A) arguably manifests the legislature's express intent for an additional sentence, we address Defendant's argument assuming it does not. Therefore, we consider whether, as Defendant contends, the firearm enhancement statute is subsumed by the aggravated assault statute. We first note that *Blockburger* is used to compare the elements of two criminal offenses. In the present case, however, we do not have two criminal offenses, but one criminal offense and one enhancement statute. Although the enhancement statute does not have "elements" per se, it does have certain specific requirements. In order to apply *Swafford,* we treat the requirements of the enhancement statute as elements.

The firearm enhancement statute requires a separate finding of fact that the defendant committed a noncapital felony and used a firearm to commit the crime. Section 31–18–16(A). The relevant portion of the aggravated assault statute requires a finding that the defendant unlawfully assaulted or struck at another with a deadly weapon. Section 30–3–2(A). Although by definition aggravated assault is a noncapital felony, none of its elements require a finding that a noncapital felony was committed. In addition, the aggravated assault statute prohibits specific conduct, making it a fourth-degree felony, while the firearm enhancement statute mandates an increase in the basic sentence imposed. We conclude that each statute contains an element or elements not included in the other and that one is not subsumed by the other.

Because *Blockburger* does not indicate that our aggravated assault statute and our firearm enhancement statute merge, there is a rebuttable presumption that the legislature intended to impose multiple punishments upon a person who commits aggravated assault with a firearm. *Swafford,* 112 N.M. at 14, 810 P.2d at 1234. "That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent. Here, we must turn to traditional means of determining legislative intent: the language, history, and subject of the statutes." *Id.* If the court, after applying the "traditional means of determining legislative intent," is unable to find an intent to apply multiple punishments, the rule of lenity requires the court to presume "the legislature did not intend pyramiding punishments for the same offense." *Id.* at 14–15, 810 P.2d at 1234–35.

This court has previously held that the legislature intended to apply the firearm enhancement statute to *"any felony other than a capital felony."* *State v. Gabaldon,* 92 N.M. 230, 234, 585 P.2d 1352, 1356 (Ct.App.1978) (emphasis added). This court has also held that the legislature intended to apply the firearm enhancement statute to aggravated battery with a deadly weapon. *See State v. Gonzales,* 95 N.M. 636, 624 P.2d 1033 (Ct.App.1981), *overruled on other grounds by Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981). These holdings are not irrelevant under *Swafford.* Under *Swafford,* statutory construction is part of the analysis.

We have examined the terms of Section 31–18–16 in light of *Swafford* and we conclude that the legislature intended to permit multiple punishment. The legislature has provided for enhancement not only of the first use of a firearm to commit a noncapital felony; it also has provided for enhancement of a second or subsequent use of a firearm to commit a noncapital felony. *See* § 31–18–16(B). Thus, the fire-

arm enhancement statute provides a generally applicable deterrent to the use of firearms. We do not think that it serves the same purpose as Section 30–3–2. *Cf. State v. Haddenham,* 110 N.M. 149, 152, 793 P.2d 279, 282 (Ct.App.1990) (felon in possession statute and general habitual offender statute serve common purpose). We cannot say that one statute is more specifically applicable than another. *See id.* Therefore, we construe the phrase "a noncapital felony" to mean "any noncapital felony," and we conclude that the legislature intended the punishment imposed by the trial court in this case. Under these circumstances, the prohibition against double jeopardy does not preclude enhancing a sentence for aggravated assault pursuant to Section 31–18–16(A). *See State v. Tsethlikai.*

FAILURE TO GIVE JURY INSTRUCTION

Defendant's last claim of error regards the trial court's alleged failure to instruct the jury on the State's burden of proving the basis of the firearm enhancement. Specifically, Defendant argues that the trial court's failure to instruct the jury according to Uniform Jury Instruction 14–6013 amounted to fundamental error. Defendant raises this claim for the first time on appeal; trial counsel did not object to the instructions as given.

The special verdict form given to the jury asked "Do you find that a firearm was used in the commission of Aggravated Assault as charged in Count I?" This instruction does not include a burden of proof. The instruction given to the jury on aggravated assault, however, required the jury to find beyond a reasonable doubt that Defendant used a ".25 caliber semi-automatic handgun" to commit the crime.

In *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct.App.), *reversed on other grounds by* 90 N.M. 191, 561 P.2d 464 (1977), this court found that the general burden of proof instruction was not sufficient to cure a special verdict form on the use of a firearm that did not include an instruction on the burden of proof. *Id.* at 241–42, 561 P.2d at 940–41. *Kendall* is distinguishable from the case at bar. In the present case, the jury specifically found beyond a reasonable doubt that Defendant used a handgun. The burden of proof instruction given in *Kendall* made no reference to the use of a firearm. *Id.* We cannot say that the trial court committed fundamental error when it did not instruct the jury according to Uniform Jury Instruction 14–6013, nor can we say that, as a matter of law, trial counsel's failure to object to the jury instructions as given amounted to ineffective assistance of counsel.

CONCLUSION

In summary, we find sufficient evidence to convict Defendant for aggravated assault. We reverse the trial court's order banishing Defendant from New Mexico and its order placing Defendant on probation. We affirm the portion of Defendant's sentence increased by the firearm enhancement statute. We remand for entry of an amended judgment and sentence in accordance with this opinion.

IT IS SO ORDERED.

BIVINS and BLACK, JJ., concur.

846 P.2d 347

Jeff NARNEY, Vick Kealy, James Castro, and Marlon Bunch, Plaintiffs–Appellants,

v.

David DANIELS, Defendant,

and

City of Roswell, a municipal corporation and governmental entity, City of Roswell Police Commissioners, and Steve Wisniewski, as chief of the Roswell Police Department, Defendants–Appellees.

No. 12127.

Court of Appeals of New Mexico.

Dec. 18, 1992.

Certiorari Denied Feb. 2, 1993.

Thomas E. Lilley, Lilley & Associates, Roswell, for plaintiffs-appellants.

Greg Wheeler, Richard Olson, Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, for defendant Daniels.

Lee M. Rogers, Jr., Atwood, Malone, Mann & Turner, P.A., Roswell, for defendants-appellees City of Roswell, Roswell Police Com'rs, and Steve Wisniewski, as chief of the Roswell Police Dept.

OPINION

APODACA, Judge.

Plaintiffs appeal the district court's order granting summary judgment in favor of defendants City of Roswell (City), the Roswell Police Commissioners (Commissioners), and Steve Wisniewski (Wisniewski), in his capacity as chief of the Roswell Police Department (Department) (collectively referred to as defendants), on plaintiffs' claims of respondeat superior and direct negligence. Defendant David Daniels (Daniels), a police officer with the Department, is not a party to this appeal. The issues raised are whether the district court erred in (1) granting summary judgment when plaintiffs had not completed discovery, (2) ruling that there was no material issue of fact concerning whether Daniels acted in the course and scope of employment during his encounter with plaintiffs, (3) determining that defendants owed no duty to plaintiffs to exercise ordinary care in the hiring, training, and retention of Daniels, and (4) determining that, even if there was such a duty, defendants' actions did not proximately cause plaintiffs' injuries. We conclude that the district court did not abuse its discretion by granting summary judgment for defendants, despite plaintiffs' desire for additional discovery (Issue 1), and that summary judgment on the respondeat superior claim (Issue 2) was proper, but hold that genuine issues of material fact existed concerning plaintiffs' claims of negligence under Issues 3 and 4. We thus affirm in part and reverse in part.

DANIELS' ENCOUNTER WITH PLAINTIFFS

Although the specific events of June 5, 1984, are not completely clear, the following details of Daniels' encounter with plaintiffs are apparently undisputed. On the evening of June 5, Daniels left Roswell in his personal car to drive to Deming. He had his commission card, his personal badge, and four guns, including his Department-issued rifle, the personal rifle approved for use in departmental tactical unit (TAC team) maneuvers, and a semi-automatic rifle that Daniels had borrowed from a Roswell gun store. Daniels testified that he was planning to check the semi-automatic rifle out for possible use by the Department.

As Daniels was driving west on Highway 70 between Alamogordo and Las Cruces, plaintiffs passed him. He claimed that he paced plaintiffs' vehicle traveling at 100 miles per hour. He thought plaintiffs were possibly involved in some type of illegal drug-related activity as well as speeding. Consequently, he flashed his brights at plaintiffs, pulled up beside their car on the right side, and held up his badge where plaintiffs could see it. He motioned plaintiffs to pull over, and when they did not do so, showed them the semi-automatic rifle. Plaintiff Marlon Bunch, the driver, then pulled over and stopped.

Bunch and Daniels exited their cars. Daniels ordered Bunch to obtain the driver's licenses from the other plaintiffs. When he received the licenses, Daniels told Bunch he had to make a radio call. He returned to his car and pretended to speak on a non-existent hand-held radio microphone. Plaintiffs testified that Daniels then acted more strangely. He pointed his gun at them, spoke in various voices, and talked to people who were not there. He eventually got into plaintiffs' car and, with three plaintiffs inside, sped away without turning on the headlights. He then drove the car off the road, through a fence and into a field, where he wrecked it and injured Narney.

Leaving Narney in the car, Daniels and the other two plaintiffs who had been in the car walked back to the highway. On the way, Daniels asked one plaintiff, "Are you Jesus? I want to kiss Jesus." He also told plaintiffs that they needed to get back to the highway so they could be "beamed up" by "Scotty." At the highway, Daniels headed toward his car. The two plaintiffs then went in the opposite direction for help.

On June 6, 1984, Daniels was evaluated by Dr. James E. Welch, a psychiatrist. In the evaluation, Daniels told Welch that the men in the car (plaintiffs) were acting suspicious and, as a result, Daniels let them know he was a police officer. Welch diagnosed Daniels as having an acute psychotic episode and believed that Daniels possibly was having an acute schizophrenic reaction, also classified as a bi-polar disorder with manic and depressive stages. Daniels told Welch about a psychiatric hospitalization about ten years previously and of having consulted a psychiatrist about three years previously. Welch felt that, during the episode with plaintiffs, Daniels was not acting rationally due to a psychological or mental problem and that he was suffering from a mental disease. Welch concluded that it appeared Daniels might be a danger to others. Daniels was committed to the state hospital.

Plaintiffs sued Daniels, the City, the Commissioners, and Wisniewski. The claims against Daniels are not at issue in this appeal. The claims against the other three defendants were that they were responsible for Daniels' actions under (1) a respondeat superior theory and (2) a negligent hiring and supervision theory. Plaintiffs' current counsel entered his appearance on July 17, 1989. Some discovery was conducted by both plaintiffs and defendants. Defendants moved for summary judgment in September 1989. Plaintiffs moved to continue the summary judgment motion, in part on the ground that summary judgment was premature because discovery was incomplete. On October 20, the district court stayed all further discovery, except for discovery relating to defendants' claims of res judicata, pending a hearing in November on the summary judgment motion. The district court later granted summary judgment in favor of defendants on the basis that there were no genuine issues of fact that (1) during the incident Daniels "acted outside the course and scope of his employment" with the Department; (2) the City, the Commissioners, and Wisniewski owed no duty to plaintiffs to exercise ordinary care in the hiring, retention, and supervision of Daniels; and (3) any failure by the City, the Commissioners, or Wisniewski to exercise ordinary care in Daniels' hiring, retention, or training was not a proximate cause of plaintiffs' injuries.

All four plaintiffs appealed. However, plaintiffs Kealy, Castro, and Bunch settled with defendants after the briefs in this appeal were filed and are no longer parties to this appeal. Although plaintiff Narney is the only remaining appellant, because the briefs include all plaintiffs, this opinion will refer to plaintiff Narney in the plural.

DANIELS' BACKGROUND

At the time Daniels encountered plaintiffs in June 1984, he had been employed as a police officer by the City for approximately two years. Before this employment, he had served from 1973 to 1977 in the United States Air Force as a member of a special tactical unit or rapid deployment force. While stationed in Turkey, Daniels' superiors noted that he had mental or emotional problems and sent him to a psychiatrist for evaluation. He was sent to Wil-

ford Hall, a USAF hospital, for additional psychological evaluation. According to Daniels, the diagnosis was termed a "personality disorder."

After his discharge from the Air Force, Daniels worked as a deputy for the Luna County Sheriff's Department. He was suspended once without pay and fired after approximately two and one-half years.

Daniels was then hired by the Deming Police Department as a police officer. While working in Deming, he was suspended once without pay after he and another officer shot some javelina pigs that had wandered into town. After the incident, Daniels was required to undergo a psychological evaluation. Daniels said he believed the diagnosis was depression because of his marital problems at the time. Additionally, while working for the Deming Police Department, Daniels responded to the scene of a shooting in which a friend was killed. In June 1982, Daniels resigned because he felt that termination was imminent.

Daniels was appointed as a Roswell police officer in August 1982. Before being hired, Daniels took a written test, performed a physical agility test, gave an oral interview, took a "lie detector" test, and took a "personality profile-type" test. O.J. Correia, deputy chief of the department, did a one-day pre-employment investigation by driving to Deming to talk with the Luna County sheriff and the Deming chief of police. Correia, who had served with Daniels in the Air Force, recommended that the Department hire him. The application for employment with the Department that Daniels filled out contained no provision for reporting hospitalizations, psychological problems, mental problems, or emotional problems or treatment. Daniels did not remember being asked for any information about such disorders or treatments. He provided his military discharge form, which included his Wilford Hall assignment, to the Department. Daniels was never asked about the Wilford Hall assignment.

When Daniels was hired by the Department, he was issued a commission card that he was required to keep with him at all times. He was also issued a badge. He bought a second badge through another Roswell police officer. He signed an oath to "support the * * * laws of New Mexico" and was issued a "Police Policy and Procedures Manual," which had been drafted by Wisniewski.

Daniels was a member of the TAC team. The Department encouraged officers, especially TAC team members, to carry guns when off duty. Wisniewski testified that police officers, when off duty, were to use their discretion to determine whether to take action in emergencies or if they witnessed felonies. Daniels did not know if there was a specific departmental policy on an officer's duty when witnessing a crime outside the City limits.

Wisniewski and Larry Loy, who commanded the TAC team, were aware that Daniels was a gun enthusiast. The Department approved Daniels' use of a personally owned semiautomatic rifle with a scope for TAC team use. Daniels testified that Wisniewski and Loy sought his advice about weapons and that he put them in touch with an arms dealer in Albuquerque. Loy and Wisniewski denied that such had occurred.

Larry Dunn, a fellow officer and roommate of Daniels, stated in an affidavit that he was afraid of Daniels and had reported this fear, as well as accounts of Daniels' strange behavior and his belief that Daniels was "somewhat dangerous," to Loy well before the incident with plaintiffs. Loy denied that Dunn so informed him before the incident with plaintiffs, but stated that he knew Daniels was "a little different."

In 1983, Daniels was involved in the arrest of Cameron Marshall, who died on the way to or at the Chaves County Jail. A Chaves County sheriff's deputy questioned Daniels accusatorially and intimated that Daniels would be charged with murder. Both the Department and the FBI investigated the death. Daniels described it as "the worst situation" he had been involved in. He also told Loy, his immediate supervisor, and Major Lacer of the Department that he was very upset about the incident. He felt that he had contributed to Mar-

shall's death and feared serious repercussions on the Department, a possible suit alleging a violation of Marshall's civil rights, an FBI investigation, and possible criminal charges against him. Daniels did not receive any assistance, counselling, or time off work at the time of the Cameron Marshall incident.

About a week before his encounter with plaintiffs, Daniels learned that the FBI was going to conduct an additional investigation of him and of the Department in connection with Marshall's death. Daniels became upset and began losing sleep. He also lost his appetite and his work performance suffered. He may have suffered from food poisoning. He exhibited unusually strange behavior. He alerted the TAC team in a situation when an alert was not warranted; he called for a "clear radio," an extraordinary call to be made only in emergencies; and he broadcast a "Code Orange" over the radio, a code to be used only when the TAC team was alerted.

Because of this behavior, Daniels met with his superiors, Sergeant Escalante and Lieutenant Schwartz, and with Loy on June 4, 1984. Daniels informed Escalante, Schwartz, and Loy of several traumatic incidents, including the fact that, while he was in the military, a friend had committed suicide with Daniels' weapon; the death of his friend and fellow officer in Deming; and the effects of Marshall's death. Loy said he became concerned and concluded that Daniels was suffering from "extreme job stress" and "post-shooting stress syndrome," and believed that Daniels should be referred to counselling and relieved of duty until his mental state improved. Loy stated in his deposition that he felt Daniels' actions were "abnormal" and "strange." Additionally, he felt that they were "not appropriate" decisions.

Daniels' supervisors at the meeting did not tell Daniels to see a psychologist or to seek counselling. They advised him to take a couple of days off and, when he asked about going to Deming to see his estranged wife and child, encouraged him to leave town. Daniels did leave town and, while driving to Deming, encountered plaintiffs, resulting in the incident previously noted.

On June 5, 1984, Loy wrote a memorandum to Wisniewski, advising him that Daniels be placed on administrative suspension. There was a handwritten note on the memo indicating that an appointment for Daniels with a psychologist was scheduled for June 8. Wisniewski testified that only he had the authority to place Daniels on administrative leave and that he did so on June 5. However, he did not recall talking with Daniels and no written verification of any leave or suspension was produced.

Daniels testified that no one ever had advised him he was to be suspended. He asked if he was going to be suspended and his superiors told him Lacer would decide. Daniels was not asked at that time to return his commission card or any Department-issued equipment.

DISCUSSION

1. *The Propriety of the District Court's Order Granting Summary Judgment Before Discovery Completed.*

Plaintiffs contend that the district court's order granting summary judgment was an abuse of discretion. They argue that, without access to the Department's officers' manual and without being allowed to depose Daniels' immediate supervisors, they were unable to prove their theory that Daniels acted in the course and scope of employment when he stopped plaintiffs or to discover facts relevant to the issues of defendants' duty toward plaintiffs and whether their actions proximately caused plaintiffs' harm. Because of our disposition, we need not address this first issue in connection with defendants' duty toward plaintiffs or whether their actions proximately caused plaintiffs' harm. We do need to address the issue in connection with the issue of whether Daniels acted in the scope and course of employment.

Most of plaintiffs' assertions relating to this argument, both below and in their briefs, concern their need for additional discovery to respond adequately to the issue of whether defendants were negligent in hiring, supervising, or retaining Daniels, an issue not involved in the summary judg-

ment granted, and to the issues of duty and proximate cause. The only assertions relating to the issue of course and scope of employment were that plaintiffs were not allowed access to the police department manual and were not allowed to ask additional questions of some of the supervisory officers concerning what was contained in the manual. Plaintiffs admit that they deposed some of the supervisory officers but complain of those officers' "contradictory" statements about what the manual contained.

Because plaintiffs were able to depose these officers and to obtain information concerning what was in the manual, we believe additional discovery would not have provided additional information affecting the issues. Consequently, the district court did not err in holding the summary judgment hearing despite plaintiffs' desire to conduct more discovery. *See Neece v. Kantu,* 84 N.M. 700, 708, 507 P.2d 447, 455 (Ct.App.1973) (additional discovery would not affect issues); *cf. Marchiondo v. Brown,* 98 N.M. 394, 399, 649 P.2d 462, 467 (summary judgment premature when plaintiff was totally denied the opportunity to discover relevant information), *writ quashed sub nom. Marchiondo v. New Mexico State Tribune Co.,* 98 N.M. 336, 648 P.2d 794 (1982).

2. *Was Daniels Acting in the Course and Scope of His Employment? Thus Allowing Waiver of Immunity Under the Tort Claims Act?*

To obtain summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SCRA 1986, 1-056(C) (Repl.1992). Summary judgment is a drastic measure that should be used with great caution. *Knapp v. Fraternal Order of Eagles,* 106 N.M. 11, 12, 738 P.2d 129, 130 (Ct.App.1987). We view the evidence on appeal in the light most favorable to granting a trial on the merits. *Id.* All reasonable inferences are to be made in favor of the party opposing the motion. *Id.* at 13, 738 P.2d at 131.

Defendants argue that the district court's granting of summary judgment was proper because the undisputed facts demonstrated that, as a matter of law, Daniels was not acting within the scope of his employment. At the outset, we emphasize that, although this case is clearly one arising under the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (Repl.Pamp.1989), the issues of immunity and waiver of immunity were not raised and decided during the summary judgment hearing. The basis of the district court's judgment was limited to the common-law concept of course and scope of employment. Additionally, neither party briefed on appeal any issue concerning the Tort Claims Act. Therefore, our discussion should not be taken as implying that immunity was or was not waived for the liability that may exist in this case.

The district court held that there was no material issue on the question of whether Daniels was acting in the course and scope of employment when he stopped plaintiffs. It was undisputed that Daniels was taking a personal trip and was well outside the Roswell city limits when the incident involving plaintiffs occurred. The precise issue before us is whether, under the facts of this appeal, the district court was correct in concluding that no reasonable trier of fact could conclude that Daniels was acting in the course and scope of his employment at that time. *See Goradia v. Hahn Co.,* 111 N.M. 779, 782, 810 P.2d 798, 801 (1991) (if, from the facts presented, only one reasonable conclusion can be drawn, summary judgment is properly granted). Based on the discussion that follows, we conclude that the district court's decision was correct.

Defendants essentially contend that Daniels could not have been acting within the scope of his employment because he was "off duty," acting unlawfully, and outside the boundaries of his jurisdiction when the incident occurred. Although defendants emphasize that, at the time of the encounter, Daniels was off duty, we do not believe that fact alone is determinative of the issue of whether he

was acting in the course and scope of his employment. 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." This court has recently stated in addressing this section that "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." *State v. Murillo,* 113 N.M. 186, 191, 824 P.2d 326, 331 n. 3 (Ct. App.1991). Nonetheless, police officers generally retain authority to act as police officers when off duty. *See, e.g., Armijo v. State ex rel. Transp. Dep't & Motor Veh. Div.,* 105 N.M. 771, 737 P.2d 552 (Ct.App.1987) (upholding revocation of defendant's driver's license after off-duty police officer stopped defendant and administered sobriety test). Additionally, in *Murillo,* this court held that an off-duty investigator for a district attorney's office who was moonlighting as a private security guard could be subject to the requirements of the Fourth Amendment of the federal constitution. *See Murillo,* 113 N.M. at 189–91, 824 P.2d at 329–31 (remanding for determination of whether investigator was acting in truly private capacity).

Additionally, we reject defendants' argument based on *Stull v. City of Tucumcari,* 88 N.M. 320, 540 P.2d 250 (Ct. App.1975), that, for the officer's activity to have occurred in the course and scope of employment, the conduct in controversy must be of the same general nature as that he or she is authorized to do or incident to such authorized activity. If the officer makes an unauthorized arrest, then his or her action is no longer within the scope of employment. *See id.; see also Cherry v. Williams,* 60 N.M. 93, 287 P.2d 987 (1955). Defendants claim that the fact that Daniels was outside his jurisdiction, *see Sturman v. City of Golden Beach,* 355 So.2d 453 (Fla.Dist.Ct.App.1978), and thus could not have been acting for the benefit of the City, demonstrates as a matter of law that he was acting without authority. Additionally, defendants contend that, because Daniels lacked probable cause or reasonable suspicion, *see State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977), his actions were beyond the scope of his duty.

Basically, defendants argue in favor of a bright-line test for determining "scope of employment." However, *Cherry* and *Stull,* on which defendants rely, were decided before the Tort Claims Act was enacted and were not cases on the common-law concept of course and scope of employment, which is at issue in this case. Rather, *Cherry* and *Stull* addressed the scope of governmental liability under the law before immunity was abolished and reenacted under the Tort Claims Act. The legislature is presumed to know existing statutory and common law. *State ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977). Additionally, we presume that, when the legislature enacted a new statute, it intended to change the existing law. *Id.* Section 41–4–12 specifically waives immunity for liability for such actions as false arrest, false imprisonment, assault, and battery when committed by police officers acting within the scope of their duties. Although "scope of duties" as that term is used in Section 41–4–12 may or may not be identical to "course and scope of employment," we point out why defendants' argument concerning their actions being unlawful would be incorrect under current governmental liability law. If such actions were always beyond the scope of officers' duties, and thus unauthorized, there could be no waiver of immunity for them. Thus, we reject defendants' argument that *Cherry* and *Stull* are controlling. Instead, New Mexico has developed a multifactored test for determining scope of employment, which we clarify in the context of the facts of this appeal.

Generally, whether an employee is acting in the course and scope of employment is a question of fact. *See McCauley v. Ray,* 80 N.M. 171, 181, 453 P.2d 192, 202 (1968). This court has recognized that "the course and scope of employment" has been variously defined. *Tinley v. Davis,* 94 N.M.

296, 297, 609 P.2d 1252, 1253 (Ct.App.1980). Under SCRA 1986, 13-407:

> An act of an employee is within the scope of employment if:
>
> 1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and
>
> 2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

Applying these criteria may appear straightforward, but, as this court has recognized, in certain situations additional analysis is required. *See Gonzales v. Southwest Sec. & Protection Agency, Inc.*, 100 N.M. 54, 665 P.2d 810 (Ct.App.1983). In *Gonzales*, this court affirmed a verdict for the plaintiff against an employer after the employer's security guards falsely imprisoned and beat the plaintiff. *Gonzales* noted that additional considerations were required because of the nature of the security guards' work and stated:

> "A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant."

Id. at 55, 665 P.2d at 811 (quoting Restatement (Second) of Agency § 245 (1958)). The opinion also quoted comment c to Section 245, which notes that when the employment is likely to lead to the use of force, it " 'is likely to lead to altercations, and the master may become liable, in spite of instructions that no force shall be exerted * * * * ' " *Id.* at 56, 665 P.2d at 812 (emphasis deleted). Thus, this court has previously recognized that employers who endow their employees with the means and authority to use force can be held liable for their employees' misuse of those instrumentalities and authority. *Id.*

We thus believe that, under New Mexico law, whether an employee's act was committed in the course and scope of employment is not determinable by any one criterion. Depending on the facts, various considerations or factors may be pertinent. In determining scope of employment, we agree with the summary of the relevant test adopted by the Maryland Court of Appeals in *Sawyer v. Humphries*, 322 Md. 247, 587 A.2d 467 (1991). In *Sawyer*, a police officer who was off duty apparently had a nervous breakdown and assaulted two motorists. After explaining that the test was whether the employee's acts were in general in furtherance of the employer's business, even though expressly unauthorized, the court stated:

> In applying this test, there are few, if any, absolutes. Nevertheless, various considerations may be pertinent. The Court, in *E. Coast Lines v. M. & C.C. of Balto., supra*, 190 Md. [256] at 285, 58 A.2d [290] at 304 [(1948)], summarized four of them:
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> "To be within the scope of the employment the conduct must be of the kind the servant is employed to perform and must occur during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and actuated at least in part by a purpose to serve the master. *Mechem on Agency*, Section 36; *Huffcut on Agency*, Section 5; *American Law Institute, Restatement, Agency*, Section 228, comment (b)."

Sawyer, 587 A.2d at 471.

We adopt this statement, which we express as a four-point test: An employee's action, although unauthorized, is considered to be in the scope of employment if the action (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area, and (4) is actuated, at least in part, by a purpose to serve the employer.

Applying this test to the facts of this appeal, we hold that no reasonable trier of fact could conclude that Daniels was acting in the course and scope of his employment

when he terrorized plaintiffs. *See Goradia,* 111 N.M. at 781–82, 810 P.2d at 800–01. Although it appears that fact questions exist on the first criterion and a part of the fourth criterion in that stopping people for speeding or drug violations is the sort of activity police officers perform and could be actuated by a purpose to serve government in general, no factual question exists on the third criterion when considered in combination with the second criterion. The place of the arrest was simply too far removed from the place Daniels was authorized to perform his duties, and the arrest occurred during a time that Daniels was expressly told to take off. We thus affirm the district court's grant of summary judgment on this issue.

3. *Did Defendants Owe Plaintiffs a Duty to Use Reasonable Care in the Hiring, Supervision, and Retention of Daniels?*

Defendants argue that they cannot be liable for negligently hiring, retaining, or supervising Daniels because they had no duty toward plaintiffs to exercise ordinary care. Any such duty, they claim, is "owed only to persons who [have] some connection to the business of the Roswell Police Department" and not "to persons encountered by Daniels while off-duty, on a pleasure trip, nearly 200 miles from Roswell."

We consider *Calkins v. Cox Estates,* 110 N.M. 59, 792 P.2d 36 (1990), instructive. In that case, our Supreme Court held that a landlord could be liable for harm caused by the landlord's breach of his duty to maintain the common areas of his property, even though the injury occurred *outside* the landlord's property. *Id.* at 64, 792 P.2d at 41; *see also Bober v. New Mexico State Fair,* 111 N.M. 644, 808 P.2d 614 (1991) (property owner had duty to traveling public outside owner's property to maintain premises in safe condition). Just as a property owner's duty does not cease at the boundary of his or her property, *see id.,* we do not believe a municipality's duty ceases at its city limits. As a result, we reject defendants' argument that they had no duty to plaintiffs simply because they were outside the Roswell city limits.

Defendants correctly argue that generally, for an employer to be liable for the tort of negligently hiring, supervising, and retaining an employee, there must be a connection between the employer's business and the injured plaintiff. *See Valdez v. Warner,* 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct.App.1987). They urge this court to apply the following test for finding the requisite connection:

> (1) The employee and the plaintiff have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff met the employee as a direct result of the employment; and (3) the employer would receive some benefit, even if only a potential or indirect benefit, from the meeting of the employee and the plaintiff had the wrongful act not occurred.

Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability,* 53 Chi.-Kent L.Rev. 717, 724 (1977). Applying this test to the facts of this appeal, defendants conclude that plaintiffs cannot show the requisite connection because, they argue, (1) although both Daniels and plaintiffs had the right to be on the highway, Daniels had no right to stop or detain plaintiffs or to enter their car; (2) Daniels and plaintiffs did not meet as a direct result of his employment since his position as a police officer for the City did not require him to travel to Deming; and (3) the City could not obtain any benefit from Daniels' meeting with plaintiffs since the City had no interest in the conduct of persons in Otero County. We believe that defendants' focus on the relationship between defendants and plaintiffs under the above-noted factors is too narrow. Although such factors may be relevant, the law of duty in New Mexico is more broad-based and not necessarily limited to these factors.

This Court recently held that "[l]iability 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.'" *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct.App.1992) (quoting *Valdez*, 106 N.M. at 307, 742 P.2d at 519) (emphasis added). In *Calkins*, our Supreme Court noted that foreseeability is integral to the issues of both duty and proximate cause. It then said:

> 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 respondent's actions; in other words, to whom was the duty owed? In determining proximate cause, an element of foreseeability is also present—the question then is whether the injury to petitioner was a foreseeable result of respondent's breach, i.e. what manner of harm is foreseeable? Both questions of foreseeability are distinct; the first must be decided as a matter of law by the judge, using established legal policy in determining whether a *duty* was owed petitioner, and the second, *proximate cause*, is a question of fact.

Calkins, 110 N.M. at 61, 792 P.2d at 38 (emphasis in original). Although there must be a relationship between the plaintiff and the defendant by which the defendant has a legal duty to protect the plaintiff's interest, *id.* at 62, 792 P.2d at 39, that relationship can be established either (1) by a specific statutory or common-law duty that creates the affirmative duty toward a party, such as a landlord's duty to a tenant, or (2) by the general negligence standard, which requires an individual to use reasonable care in dealing with society as a whole. In the latter situation, the party's liability is limited by foreseeability. *Id.* at 62, 792 P.2d at 39 n. 1. "The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law." *Id.* at 62, 792 P.2d at 39.

We are concerned here with whether Daniels' actions were foreseeable to defendants under the "duty" prong of the analysis. In considering foreseeability, we need not determine that the particular resulting injury was foreseeable, only whether a general harm or consequence was foreseeable. *Valdez*, 106 N.M. at 308, 742 P.2d at 520.

Examination of New Mexico statutes reveals a strong public policy that defendants have a duty to appoint and retain only mentally stable police officers. *See* NMSA 1978, § 29-7-8(A)(4) (Repl.Pamp.1990) (concerning the prerequisites for permanent employment and continued employment as a police officer and stating that no one may be permanently appointed as a police officer in New Mexico unless he "is found, after examination by a certified psychologist, to be free of any emotional or mental condition which might adversely affect his performance as a police officer"). Additionally, our Supreme Court has noted that the requisite level of care increases as the foreseeable danger increases. *Cross v. City of Clovis*, 107 N.M. 251, 254, 755 P.2d 589, 592 (1988). Common sense dictates that a mentally unstable person cloaked with the authority and paraphernalia of a law enforcement officer poses a danger to the people he encounters.

In this appeal, before hiring Daniels, defendants had notice that he had previously received psychological care because they had been informed of his stationing at the USAF hospital, with which Correia would have been familiar. Additionally, just prior to the incident involving plaintiffs, defendants knew Daniels had been acting strangely. They knew he had been subject to a great deal of stress. Possessed of such knowledge, they nonetheless encouraged him to leave Roswell, knowing it was likely that he would take his badge and weapons because it was departmental policy to encourage its police officers to keep these items with them at all times. It was not unforeseeable as a matter of law that, in Daniels' confused mental state, he would misuse his authority as a law enforcement officer that the City had first cloaked him with and then allowed him to retain on his planned trip. We thus conclude that defendants had a duty toward plaintiffs to use due care in hiring, supervising, and retaining Daniels as a police officer.

Even if we were to rely solely on the three factors proposed by defendants, we

would conclude that defendants had a duty toward plaintiffs. As defendants concede, plaintiffs and Daniels had the right to be on Highway 70. They met as a direct result of Daniels' use of his authority as a police officer and the paraphernalia, his badge, associated with that position. Finally, although the City may not have had a direct interest in the behavior of persons outside its city limits, it had much to gain as an indirect benefit from the general respect given to law enforcement personnel. *See White v. County of Orange,* 166 Cal.App.3d 566, 212 Cal.Rptr. 493, 496 (1985). We therefore conclude that the district court erred in determining that defendants had no duty to exercise due care in the hiring, retention, and supervision of Daniels.

4. *Were Defendants' Actions the Proximate Cause of Plaintiffs' Injuries?*

Defendants essentially argue that Daniels' actions while en route to Deming were so "abnormal, extraordinary, and surprising" that they could not possibly have been foreseen by Daniels' supervisors when they sent him home from work the day before. Plaintiffs, on the other hand, contend that Daniels' treatment of plaintiffs was consistent with his psychological condition and his previously manifested behavior and thus was foreseeable by defendants.

Generally, determinations of proximate cause are questions of fact. *Calkins,* 110 N.M. at 61, 792 P.2d at 38. Relying on *F & T Co. v. Woods,* 92 N.M. 697, 594 P.2d 745 (1979), defendants emphasize that they could not have foreseen what Daniels would do while off duty and outside of Roswell. In *F & T Co.,* our Supreme Court held that, as a matter of law, the employer could not have foreseen that his employee would, while off duty, rape one of his customers. However, the Court emphasized that "[w]hether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case." *Id.* at 701, 594 P.2d at 749. Because the facts of this appeal are distinguishable from those of *F & T Co.,* we do not consider that case dispositive. Rather, considering the facts of this appeal, we hold that there is a genuine issue of fact concerning whether defendants' acts proximately caused plaintiffs' injuries.

As noted previously, the fact that Daniels was off duty at the time of the incident is not dispositive of the issue of foreseeability. We consider this case more analogous to the facts of *Medina,* in which this Court held that the employer of a bouncer could be held liable under a negligent hiring theory when the bouncer, who was off duty though on call, got into a fight with a customer. *Medina,* 113 N.M. at 473, 827 P.2d at 861. As we observed earlier, police officers may act as police officers even though off duty. *See Murillo,* 113 N.M. at 189–90, 824 P.2d at 329–30; *Armijo,* 105 N.M. at 771–72, 737 P.2d at 552–53. Nor do we believe that, as a matter of law, defendants' responsibilities ceased at the Roswell city limits. *Cf. Bober,* 111 N.M. at 648–50, 808 P.2d at 618–20 (holding that State Fair's liability for accident depended not on whether accident occurred on or off the fairgrounds but on the foreseeability of harm resulting from the hazardous condition); *Calkins,* 110 N.M. at 64, 792 P.2d at 41 (stating that the fact accident occurred off the landlord's premises was relevant to determining whether landlord acted reasonably, but did not compel conclusion that landlord had no duty). We see no principled reason why the location of Daniels' abuse of his authority as a Roswell police officer should affect the outcome of this case on the issue of duty or proximate cause. Plaintiffs produced sufficient evidence to support an inference that defendants could have foreseen that Daniels would misuse his authority as a police officer and harm persons with whom he came into contact, and that defendants' failure to take away or otherwise control Daniels' use of his badge, commission card, and weapons, while encouraging him to leave town, proximately caused plaintiffs' injuries. Thus, we conclude that summary judgment on this issue was likewise improper.

CONCLUSION

Because we hold that there was no genuine issue of material fact regarding wheth-

er Daniels was acting within the course and scope of his employment when he terrorized plaintiffs, we affirm the district court's order granting summary judgment on plaintiffs' respondeat superior claim against defendants. However, because we hold that defendants had a duty to plaintiffs to exercise due care in hiring, supervising, and retaining Daniels, and that there was a genuine issue of material fact concerning whether defendants' acts or omissions were the proximate cause of plaintiffs' injuries, we conclude that granting summary judgment on plaintiffs' negligent hiring claim was error. We remand for proceedings consistent with this opinion. Plaintiff Narney is awarded costs on appeal.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

846 P.2d 1063

Max J. SALAZAR, Petitioner–Appellant,

v.

NEW MEXICO EMPLOYMENT SECURITY DIVISION and Medite Corporation, Respondents–Appellees.

No. 20316.

Supreme Court of New Mexico.

Jan. 5, 1993.

Rehearing Denied Feb. 3, 1993.

Northern New Mexico Legal Services, Craig B. Fretwell, Las Vegas, for petitioner-appellant.

Tom Udall, Atty. Gen., Douglas McKinnon, Sp. Asst. Atty. Gen., Albuquerque, for respondents-appellees.

OPINION

FRANCHINI, Justice.

This is an appeal from the district court's order affirming an administrative decision of the Department of Labor, Employment Security Division (the Division), denying appellant unemployment benefits due to the labor dispute disqualification provision in NMSA 1978, Section 51–1–7(D) (Repl.Pamp.1991). The sole issue raised on appeal is whether appellant was subject to the labor dispute disqualification once his employer hired a permanent replacement to fill his job. This issue raises a question of first impression in New Mexico. We affirm the district court.

I

Appellant Max Salazar does not challenge the findings of fact entered by the Division's appeals bureau and subsequently adopted by the district court. On June 11, 1990, Salazar, and other members of Carpenters Local 1319 of the Western Council of Industrial Workers (the union), went on strike against their employer Montana de Fibre (now known and hereinafter referred to as Medite). On June 12, 1990, Medite sent Salazar and other striking employees a letter stating that if they did not return to work by June 18, 1990, the company would seek to hire permanent replacements for their positions. All employees who did not return to work by June 18 were perma-

nently replaced on or before June 25, 1990. Salazar did not return to work and subsequently filed for unemployment compensation benefits on September 14, 1990.

On October 24, 1990, the union was decertified pursuant to a membership vote. Picketing ceased, and by mutual agreement the dispute was ended. By letter to Medite dated November 14, 1990, Salazar requested that he be reinstated in his job. Medite responded in a letter dated November 19, 1990, stating that after Salazar went on strike a replacement was hired to fill his position, and the company was unable to return him to work. Salazar obtained other employment on December 11, 1990.

II

Section 51–1–7 in pertinent part provides:

> An individual shall be disqualified for, and shall not be eligible to receive, benefits:
>
> * * * * * *
>
> D. for any week with respect to which the division finds that his unemployment is due to a labor dispute at the factory, establishment or other premises at which he is or was last employed * * *.

The question of whether an employee qualifies for unemployment benefits or falls within the disqualifying labor dispute provision requires a determination that a labor dispute existed, as well as a determination that the employee's unemployment resulted from the labor dispute. *Wellborn Paint v. New Mexico Employment Sec. Dep't,* 101 N.M. 534, 539–40, 685 P.2d 389, 394–95 (Ct.App.1984). Designating that the individual's unemployment be "due to" a labor dispute, Section 57–1–7(D) "imposes a requirement of causal connection between the unemployment for which benefits are claimed and a labor dispute." *Id.* at 540, 685 P.2d at 395.

Salazar argues that the labor dispute disqualification provision ceased to apply on June 25 when Medite hired a permanent replacement for his position. Once the permanent replacement was hired, Salazar contends the cause of his unemployment was the existence of the replacement rather than the labor dispute. The Division counters that the labor dispute disqualification was applicable until the dispute ended on October 24, because Salazar did not accept the employer's offer to return to work, nor did he seek reinstatement or receive a notice of discharge from the employer during the course of the dispute.

Salazar relies on *Ruberoid Co. v. California Unemployment Insurance Appeals Board,* 59 Cal.2d 73, 27 Cal.Rptr. 878, 879, 378 P.2d 102, 103 (1963), for the proposition that the labor dispute disqualification ceases to apply when striking employees have been permanently replaced. In *Ruberoid,* the employer, Mastic Tile Corporation of America (Mastic), sent striking employees a letter informing them they had been permanently replaced together with a check for their pro rata vacation pay to the date the strike began. During the course of the dispute and after receipt of the notification of permanent replacement, fifteen striking employees applied to be rehired by Mastic. Only seven of the fifteen were rehired, and all those rehired lost the seniority and privileges they had accrued through prior employment. It was on these facts the court reasoned that at the moment the strikers were permanently replaced, "[t]he employer broke the chain of causation between the trade dispute and the unemployment and put in place of the dispute, as the proximate and direct cause of the unemployment, its own counter action." *Id.* 27 Cal.Rptr. at 884, 378 P.2d at 108.

We find more applicable the result reached in *Windigo Mills v. California Unemployment Insurance Appeals Board,* 92 Cal.App.3d 586, 155 Cal.Rptr. 63 (1979). In *Windigo Mills,* striking employees were sent a letter by the company's president warning them that if they did not return to work by a certain date, the company had the right to replace them. Later, after notification by a union representative that they had been permanently replaced, a number of striking workers requested to return to work. The workers were reinstated with full benefits, even though other

new employees had been hired on a permanent basis. In determining that benefits had been properly denied, the court in *Windigo Mills* was guided by the proposition that "unless there is an *unequivocal act* by the employer discharging the strikers, the claimants must demonstrate willingness to return to work [and be denied reemployment] in order to be eligible for unemployment benefits." *Id.* 155 Cal.Rptr. at 72.

In this case, while Medite notified Salazar that he would be permanently replaced if he did not return to work, it did not take any additional steps indicative of actual termination of employment, such as enclosing payment for pro rata vacation pay. The letter sent to the striking employees by Medite did not instruct them that they would be terminated if they failed to report for work by June 18, it only stated that after that date "the company will seek to hire a permanent replacement for your position."

These circumstances are distinguishable from cases cited by Salazar in which employers unequivocally notified strikers by mail, during ongoing labor disputes, that permanent replacement meant termination of employment. *See Baugh v. United Tel. Co.*, 54 Ohio St.2d 419, 377 N.E.2d 766 (1978); *Sprague & Henwood, Inc. v. Unemployment Compensation Bd. of Review,* 207 Pa.Super. 112, 215 A.2d 269 (1965). The common factor in these cases is that the claimants did not become eligible for benefits until the employer notified them they would not be rehired. Here, there was no unequivocal act by the employer terminating the strikers' employment, nor did Salazar take any steps to obtain reemployment during the strike. One striking employee who requested reinstatement was put back to work on June 25, 1990, although he worked only that day and did not return.

We hold that an employer's notice to striking employees of an intent to permanently replace them during a labor dispute is not tantamount to termination of the strikers' employment. *See Rice Lake Creamery Co. v. Industrial Comm'n,* 15 Wis.2d 177, 112 N.W.2d 202, 205 (1961) (holding permanent replacement of strikers does not terminate the employment status of the strikers as a matter of law). Where striking employees make no attempt to gain reemployment during the dispute, and absent a denial of reemployment by the employer or other unequivocal notice or act by the employer terminating the strikers' employment, the disqualifying provisions of Section 51–1–7(D) remain in effect. Accordingly, we affirm the district court's decision that Salazar became eligible for benefits only after October 24, 1990, when the labor dispute with Medite ended.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

RANSOM, Chief Justice (dissenting).

I dissent from the foregoing opinion. Salazar contends that he was *no longer an "employee" on strike once he was replaced:* "[T]he permanent replacement of strikers severs the relationship between the labor dispute and the claimant's unemployment." Significantly, Salazar did not file for benefits until September 14, 1990, when he was no longer an employee. The dates between September 14 and October 24, 1990, when the labor dispute ended, should have been included in the period for which he was eligible for unemployment benefits. I agree with Salazar and with the Supreme Court of Ohio:

> Accordingly, we find that the General Assembly did not intend that the statutory disqualification from unemployment compensation benefits * * * be applicable if, during the course of a *bona fide* labor dispute, the employer terminated the employee status and thereby caused the unemployment. In such an instance, although the labor dispute directly caused the initial unemployment, the statutory disqualification terminated with the severance of the employee status. At that moment in time the direct cause of the unemployment became the act of the employer. From then on the employer's action and not the labor dispute was the proximate cause of unemployment.

Baugh v. United Tel. Co., 54 Ohio St.2d 419, 377 N.E.2d 766, 769 (1978). The Colorado Court of Appeals, in construing the Colorado version of the labor dispute disqualification statute, held that the employment relationship is terminated when a striking employee is permanently replaced. *Brannan Sand & Gravel Co. v. Industrial Claim Appeals Office,* 762 P.2d 771, 774 (Colo.Ct.App.1988), *aff'd sub nom. en banc, Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo.1990). Such a construction, the court found,

> furthers the state's neutrality in any labor dispute while not requiring an employer to finance a strike against itself. An employer receives the full protection of [the labor dispute disqualification] during the progress of the labor dispute so long as it does not act affirmatively to end the employment status of the striking worker. If, however, an employer acts to terminate the employment status during the labor dispute, thereby disturbing the status quo, the policies for affording the protection disappear.

Id. (citations omitted).

The majority holds that "an employer's notice to striking employees of an intent to permanently replace them during a labor dispute is not tantamount to termination of the strikers' employment." We are not dealing with "notice of intent"; rather, we are dealing, as of June 25, with the fact of permanent replacement. I can not agree with the representations in the opinion that there is neither an unequivocal act by the employer terminating the strikers' employment nor any indication that Salazar would have been denied reemployment during the course of the dispute after he had been replaced. The undisputed findings of fact state that:

> 7. All other employees who did not report to work by June 18 (all claimants inclusive) were permanently replaced on or before June 25, 1990.
>
> * * * * * *
>
> 12. After [October 24, 1990], the claimants either sent a letter to the employer or telephoned the employer asking for their jobs back.
>
> 13. In each case, the employer responded by letter informing the claimant that he had been permanently replaced.

I would reverse because Salazar was no longer an employee on strike once he had been permanently replaced; the employer-employee relationship was terminated. The underlying policy of Section 51-1-7(D) favors an employer whose *employees* are on strike; but it does not favor an employer who is receiving the services of permanent replacements for those employees. When the striking employee thus becomes a former employee, he or she should be entitled to benefits once that employee files a claim therefor and receives orientation and a work search program.

BACA, J., concurs.

846 P.2d 1066

Armando and Rebecca HERRERA, Parents and Next Friends of Amanda Herrera, a Minor, Plaintiffs-Appellants,

v.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, a New Mexico corporation, Defendant-Appellee.

No. 20680.

Supreme Court of New Mexico.

Jan. 20, 1993.

Flinn Wold Attorneys, Alexander A. Wold, Jr., Albuquerque, for plaintiffs-appellants.

Modrall, Sperling, Roehl, Harris and Sisk, Geoffrey D. Rieder, Albuquerque, for defendant-appellee.

OPINION

RANSOM, Chief Justice.

Amanda Herrera was injured in an automobile accident while occupying a motor vehicle owned by her parents and operated by her mother. Amanda's parents, Armando and Rebecca Herrera, brought suit as Amanda's next friend against Mountain States Mutual Casualty Company to recover uninsured motorist benefits under a policy purchased by Armando's employer, Rader Awning and Upholstering, Inc. Rader was the named insured in the policy. The schedule of automobiles and coverages contained in the Mountain States policy listed four company trucks, and the Herreras sought to stack the uninsured motorist coverage under each of those four vehicles. Recovery, therefore, was dependent upon Amanda being a class-one insured. *See Gamboa v. Allstate Ins. Co.*, 104 N.M. 756, 758, 726 P.2d 1386, 1388 (1986) (class-one coverage not limited to occupancy of insured vehicle).

The Herreras asserted that, since the named insured as stated in the policy was a corporation, each of the thirty-two employees of the corporation was necessarily a named insured for bodily injury coverage and that, since Amanda was a resident of the household of her named insured father, she also was a class-one insured. "Insured means: (1) the named insured as stated in the policy [e.g., Armando Herrera as an employee of the named insured] and, while residents of the same household, the spouse of any such named insured and relatives of either * * *." The trial court disagreed and entered judgment declaring that Amanda was not an insured. She appeals. We affirm.

Horne not controlling. The Herreras argue that their case is controlled by *Horne v. United States Fidelity & Guaranty Co.*, 109 N.M. 786, 791 P.2d 61 (1990). The insurance policy at issue in *Horne* defined class-one insureds as "You or any family member." The named insured was a corporation, New Mexico Security Patrol, Inc., which was equivalent under the policy to "you." Because the rider for uninsured/underinsured motorist coverage was worded for family and individual coverage, the majority in *Horne* found the definition of class-one insureds to be ambiguous. Construing the ambiguity against the insurer, a majority of this Court held that Horne, as an employee of New Mexico Security Patrol, Inc., was included within the definition of "You or any family member." The Herreras argue that employee Horne was included within the term "you" and that, on the same rationale relied upon by the Court in *Horne*, Armando Herrera should be included within the terms "named insured as stated in the policy" because of his employment status with Rader. Therefore, argue the Herreras, Amanda was also a class-one insured as defined in the policy: "the named insured as stated in the policy [i.e., her father] and, while residents of the same household, the spouse of any such named insured and relatives of either [i.e., Amanda]."

The Herreras' argument fails, however, because in *Horne* the resolution of the ambiguity was not that employee Horne was included within the meaning of "you"; rather, it was that Horne was included

within the meaning of "any family member." In *Horne,* this Court specifically followed the reasoning in an Ohio case that held that "you" referred to the insured company as a legal entity, and that the phrase "relatives living in your household" referred to employees of the company. *Id.* at 787, 791 P.2d at 63. The issue in *Horne* was whether the employee was only a class-two insured because he was an occupant of a company vehicle or a class-one insured because he was a "family member." *Id.* at 788, 791 P.2d at 64. We decline to extend the rationale of *Horne* to define a named corporate insured as including the employees, and consequently we will not include Armando Herrera within the meaning of "named insured as stated in the policy." The ambiguity present in *Horne* is not present here. Since Armando was not the named insured and Amanda consequently was not a relative of a named insured, and since Amanda was not an employee (which under *Horne* would have classified her as a "family member"), Amanda is not a class-one insured. Because she was not occupying a covered vehicle, she also was not a class-two insured. Therefore, Amanda was not covered under the Mountain States policy.

Intent of the parties. This case was decided on its merits under stipulated facts. The trial court did not enter findings of fact and conclusions of law, but since the Herreras requested no findings of fact and conclusions of law, they cannot be heard to complain. *See* SCRA 1986, 1-052(B)(1)(f) (Repl.Pamp. 1992) (party waives specific findings of fact and conclusions of law if that party fails to make a general request therefor in writing or fails to tender specific findings and conclusions). Specifically, the trial court found no ambiguity in this commercial policy. The parties stipulated that neither the principal purchasing the policy for Rader nor the insurer had the purpose or intention to provide uninsured motorist coverage to Rader employee family members occupying a non-listed vehicle. Rader's principal intended to buy uninsured motorist coverage only for people occupying listed business vehicles. On these facts, the trial court reasonably could have determined the parties unambiguously meant that only the corporation was the "named insured as stated in the policy." We will attribute any reasonable meaning to the underlying facts as may support the judgment of the trial court. We will not construe the policy against the insurer in the face of evidence as to the intention of the parties that supports the judgment of the trial court. *See Crawford Chevrolet v. National Hole-In-One Assoc.,* 113 N.M. 519, 521, 828 P.2d 952, 954 (1992) (the general rule that ambiguous language should be construed strictly against an insurer is a rule of construction not to be used if evidence of the intention of the parties exists); *Atlas Assurance Co. v. General Builders,* 93 N.M. 398, 401, 600 P.2d 850, 853 (Ct. App.1979) (third persons not parties to a contract of insurance usually not entitled to a construction in their favor).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

846 P.2d 1070

STATE of New Mexico,
Plaintiff–Appellee,

v.

David Sylvester LAMURE, Sr.,
Defendant–Appellant.

No. 13255.

Court of Appeals of New Mexico.

Dec. 21, 1992.

Tom Udall, Atty. Gen., Barbara Mulvaney, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Nancy Hollander, Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg, P.A., Albuquerque, for defendant-appellant.

OPINION

BIVINS, Judge.

Defendant, a pathologist, appeals his convictions on five counts of criminal sexual contact of a minor (CSCM), two counts of criminal sexual penetration (CSP), and one count of extortion, all involving one adolescent victim. He makes the following claims on appeal: (1) ineffective assistance of counsel in (a) failing to diligently investigate an alibi, (b) failing to object to evidence of prior bad acts involving other adolescents, and (c) failing to object to allegedly improper closing argument; (2) trial court error in (a) permitting the State to amend the indictment at trial in light of the court's simultaneous denial of Defendant's request for a continuance to investigate possible alibi witnesses, (b) denying Defendant's motion in limine to exclude evidence of uncharged misconduct involving Defendant's two sons; (3) reversible error resulting from the prosecutor's closing argument; (4) reversible error resulting from missing exhibits; and (5) cumulative error resulting in denial of a fair trial. We affirm.

BACKGROUND

Defendant was indicted on numerous counts involving a single adolescent victim. The indictment included two counts of extortion, twelve counts of CSCM, one count of kidnapping, and seven counts of CSP. Defendant admitted to having a sexual relationship with the victim. That fact was not at issue. The primary issues centered around when some of these activities occurred and, most importantly, whether they all occurred consensually or as a result of Defendant's improper use of his position of authority to coerce the victim. It is important to keep in mind that the defense strategy was to openly and forthrightly reveal Defendant's sexual problems in an attempt to convince the jury that he did not coerce the victim. In short, Defendant presented himself as powerless over his addiction to deviant sexual behavior and felt it important to divulge this sickness. This strategy was not altogether unsuccessful. The jury acquitted Defendant on many of the charges.

1. *Ineffective Assistance of Counsel*

After trial, Defendant employed new counsel to pursue a motion to reconsider denial of a motion for a new trial, and also to handle this appeal. Although Defendant presents his claims of ineffective assistance of counsel under several different points, we discuss them together. We apply the standards set forth in *State v. Crislip,* 109 N.M. 351, 353–54, 785 P.2d 262, 264–65 (Ct.App.), *cert. denied,* 109 N.M. 262, 784 P.2d 1005 (1989).

a. *Failing to Investigate Alibi*

Under the State's charges, Defendant's sexual activities with the victim occurred during four time periods. The second time period was described in the indictment as being "on or about August 22, 1987." During trial, after the victim testified, it became apparent that the date should have

been August 25 rather than August 22. The State successfully moved to amend the pertinent counts of the indictment. The trial court denied Defendant's request for a continuance to investigate possible alibi witnesses for August 25.

Defendant claims his counsel was ineffective for failing to discover, prior to trial, his exact whereabouts on August 25, 1987, the date of the second series of alleged sexual encounters with the victim. After trial, counsel was able to find telephone and hospital records that indicated Defendant did not arrive at the hospital, the location of the alleged encounters, until 6:00 p.m. on that day and was in a staff meeting for part of the evening. Defendant moved for a new trial, alleging newly discovered evidence and adding the ineffective assistance of counsel claim. After an evidentiary hearing on the motion, the trial court denied it, stating that the new evidence would not change the result of the trial because, although it established Defendant's whereabouts on August 25, the victim's whereabouts on that date were never clear. In other words, even with the new evidence the jury could have found that the victim and Defendant were at the hospital at the same time.

It is clear that counsel could have discovered, prior to trial, the more detailed information about his client's activities on August 25. However, counsel's testimony at the hearing on the motion for new trial established that he had good reasons for failing to do so, so that the failure did not constitute ineffective assistance. First, Defendant himself had told counsel that the hospital did not have staff meetings during the summer, and did not tell counsel of that particular staff meeting. Also, August 25 was after school started for the victim, and the victim's pretrial statements indicated he did not work at the hospital after school began, and that he was last at the hospital on August 21, for a banquet. Counsel therefore focused on the victim's whereabouts and not on Defendant's. Counsel also tried to determine whether there was a record at the hospital that would establish when the pathologists were at the hospital and in the laboratory, and was told there was no such record. At the hearing, counsel testified that "[y]ou could characterize it that the defendant forgot to tell me he was at the meeting," so that counsel believed there was no meeting. At the same time, counsel also believed that no one remembered where they were on August 25, 1987, and that no records existed with which they could refresh their memories. All of this establishes that the failure to more fully develop Defendant's whereabouts was caused partly by Defendant's own misstatements to counsel, and partly by counsel's strategic decision to focus on the victim's location rather than Defendant's.

Under these circumstances, we do not believe that the trial court was compelled to find ineffective assistance of counsel. *See State v. Dean,* 105 N.M. 5, 8, 727 P.2d 944, 947 (Ct.App.) (this court will not attempt to second-guess tactics and strategy of trial counsel), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986).

b. *Failing to Object to Prior Bad Acts Evidence*

The trial court conducted a pretrial hearing on Defendant's motion in limine to exclude evidence of prior bad acts involving a number of adolescent males, including Defendant's two sons, all of whom had been named by the State as witnesses. At the hearing, the defense put on evidence through Dr. Dougher, a clinical psychologist specializing in treatment of sex offenders. This testimony previewed much of what would be offered by the defense at trial. Dr. Dougher stated that it was his opinion that Defendant is a homosexual hebephile and that, based on a review of extensive records, including records of sexual activities between Defendant and a number of the other adolescent males, it was not likely that Defendant used force or coercion in his sexual encounters. The psychologist discerned a pattern involving all of these adolescents, including the victim, in which Defendant boldly touched the adolescent's genitals; observed for reaction; progressed if the approach was accepted;

and backed off if the approach was rejected.

At that hearing and following Dr. Dougher's testimony, defense counsel withdrew his objection to the State's calling the adolescent males as witnesses, because such testimony would provide essential background for Dr. Dougher's opinion testimony. He indicated, however, that he would object to the State's calling Defendant's two sons because that testimony was highly prejudicial, confusing, and not relevant to any issues. The admissibility of the sons' testimony will be discussed later.

We reject Defendant's claim of ineffective assistance of counsel based on withdrawal of the objection. The withdrawal of the objection to the testimony was clearly a matter of tactics and strategy. As already noted, Defendant's position at trial was that, although he did have a sexual relationship with the victim, it was entirely voluntary on the victim's part. In presenting that position, Defendant relied on expert testimony about his condition of homosexual hebephilia, which causes him to be sexually attracted to male adolescents. Dr. Dougher testified that it was important for him, in forming an opinion about Defendant's condition, to understand Defendant's sexual history. He also stated that the testimony of the other adolescents who had been approached by Defendant was important in determining whether there was a consistent pattern in the way Defendant approached the adolescents. Finally, Dr. Dougher gave his opinion that Defendant's claim of a noncoercive relationship with the victim was more consistent with Defendant's condition than the victim's claim of a coercive relationship. Thus, Defendant used the testimony of the adolescents to support the opinion of his expert witness which, in turn, bolstered his defense. The failure to object to this evidence, then, was a matter of trial tactics and strategy that we will not second-guess on appeal.[1] *See State v. Rodriguez,* 107 N.M. 611, 615, 762 P.2d 898, 902 (Ct.App.) (ineffectiveness not necessarily established even when appellant establishes that trial counsel used improvident strategy or unsuccessful tactics), *cert. denied,* 107 N.M. 546, 761 P.2d 424 (1988).

c. *Failing to Object to Allegedly Improper Closing Argument*

Defendant claims failure of defense counsel to object to the use of prior misconduct in the State's closing argument constituted ineffective assistance of counsel. While failure to object to improper closing argument may constitute ineffective assistance, because we find no reversible error in these comments, see point 3, it follows that trial counsel's performance did not fall below the standards because he failed to object.

2. *Trial Court Error*

a. *Amendment of Indictment and Denial of Continuance*

The indictment alleged that the second series of incidents occurred "on or about" August 22. At trial, the victim testified, albeit ambiguously, that the incidents occurred on the Tuesday following the 18th, which would have been August 25. The State moved to amend the indictment to conform to the evidence. Defense counsel stated that there would be no objection, as long as Defendant was given an opportunity to investigate an alibi for August 25 and file a late notice of alibi if necessary. In response, the State argued that defense counsel's investigator had been aware of the changed date for several months. Defendant then objected to the amendment. The judge allowed the amendment, and said he would take defense counsel's request under advisement, and would not rule on it "at this time."

1. Under the circumstances of this case, Defendant may not have had a choice but to pursue the strategy he did. His wife knew about his relationship with the victim, and he had been forced to (or volunteered to, it is not clear which) undergo treatment as a result. His wife had spoken to the victim's mother about the relationship between Defendant and the victim. Therefore, Defendant could hardly succeed with a defense strategy of denying that anything had ever happened between the victim and himself.

Defendant never renewed his request for more time to investigate an alibi.

The facts that the judge held his ruling in abeyance instead of denying Defendant's request, and that Defendant never renewed his request, are fatal to Defendant's position on this issue. A party must invoke a ruling from the trial court in order to preserve an issue for appeal; it is not enough to simply make a motion. *See, e.g., State v. Cordova,* 100 N.M. 643, 646, 674 P.2d 533, 536 (Ct.App.1983); *State v. Andrada,* 82 N.M. 543, 548, 484 P.2d 763, 768 (Ct. App.), *cert. denied,* 82 N.M. 534, 484 P.2d 754 (1971). Since Defendant did not renew his request for more time, the trial court may well have thought Defendant had been able to investigate his alibi thoroughly while this multi-day trial was continuing. It would therefore be inappropriate to hold that the trial court erred. *Cf. State v. Garcia,* 84 N.M. 519, 521, 505 P.2d 862, 864 (Ct.App.) (where trial court denied motion for severance, but left open possibility of severing at a later time if prejudice became apparent, and defendant did not renew his motion for severance, defendant waived the issue), *cert. denied,* 84 N.M. 512, 505 P.2d 855 (1972).

b. *Incest Testimony by Defendant's Son*

As noted above, at the pretrial hearing on the motion in limine, Defendant withdrew his objection to the State calling other adolescents, but continued to object to the State presenting evidence of Defendant's prior bad acts through Defendant's sons. At trial, the prosecutor called only one of Defendant's sons, Jeff. Jeff testified to incestuous conduct with Defendant that began when Jeff was eight years old and continued until he was fifteen. He said his father would crawl into bed and rub Jeff's genitals under the covers. He also said that Defendant did the same thing to Jeff's brother and that Jeff knew what was happening because he would hear his brother's underwear "snap." Jeff testified that Defendant also rubbed Jeff's genitals in the shower, sometimes saying that he was giving Jeff a medical examination.

In objecting at the pretrial hearing, defense counsel urged that these acts were different from the relationships with the other adolescents; that their incestuous aspect made the acts different; that introducing evidence of them would create confusion; and that introducing evidence of them would compel the defense to go into Jeff's mental health problems.

SCRA 1986, 11–404(B), states that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

See State v. Lopez, 85 N.M. 742, 743–44, 516 P.2d 1125, 1126–27 (Ct.App.1973). At the pretrial hearing, the trial court overruled Defendant's objection to the sons' testimony, indicating that it was relevant and came within one or more of the exceptions, such as motive, opportunity, or intent. The court stated that there were similarities between Defendant's activities with his sons and those alleged in the indictment, and that the evidence would be admitted.

We review the trial court's actions for abuse of discretion. *State v. McGhee,* 103 N.M. 100, 104, 703 P.2d 877, 881 (1985). Applying that standard, we hold that the court did not abuse its discretion in allowing Jeff's testimony at trial.

Even assuming that the testimony could be said to prove Defendant's character or that he acted in conformity with this character,[2] the evidence was not offered for that purpose. As previously discussed, the question of whether Defendant used his position of authority to coerce his victim was a critical issue in the case. Defendant argued at the pretrial hearing that the contacts with his sons were entirely different

2. Given the defense strategy to openly disclose Defendant's deviant sexual behavior, character and propensity were nonissues in the context of the State's case. Defendant admitted to a propensity for sex with male adolescents. He denied it was coerced.

from those with the other adolescents. While there were some differences, certain similarities existed which made Defendant's contacts with his sons highly relevant and within one or more of the exceptions to the rule.

It was important for the State that it prove Defendant used his position of authority to coerce his victim. "Position of authority" is defined as a "position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child." NMSA 1978, § 30-9-10(D) (Repl.Pamp.1984). "Undue influence" has been defined as " 'the result of moral, social, or domestic force exerted upon a party, so as to control the free action of his [or her] will....' " *State v. Gillette*, 102 N.M. 695, 702, 699 P.2d 626, 633 (Ct.App.1985) (quoting *Trigg v. Trigg*, 37 N.M. 296, 301, 22 P.2d 119, 123 (1933)). We agree with the trial court that the testimony of Defendant's son was probative of the coercion issue.

The relevance and probative value of this testimony can be demonstrated by comparing Jeff's testimony with that of one of the other adolescent victims, Terry. Terry testified that when he was thirteen or fourteen years of age, he went with Defendant's family to their cabin in Ruidoso. This was in 1975 or 1976. After they arrived, Defendant grabbed Terry in the groin area as he walked through the kitchen in the cabin. That night Defendant got into bed with Terry and put his hand inside the boy's underpants and attempted to masturbate him. Defendant then placed Terry's hand inside Defendant's pajamas and on Defendant's penis. Terry struck Defendant and ran from the room.

The following day, Defendant again grabbed Terry's groin. While driving back to Roswell, Defendant positioned the interior rear-view mirror so that he could look directly at Terry. Terry testified that Defendant gazed at him with an "evil look" which frightened and upset Terry.

Jeff testified similarly about Defendant's mean nature and his fear of Defendant. Jeff was so afraid that, on cross-examination, when defense counsel asked whether Jeff enjoyed his father's sexual advances, Jeff testified that while he did not enjoy being touched, he enjoyed his father being nice to him, and that his father was nice on those occasions. At other times he was mean. Jeff said he was afraid of his father and could not look at him while on the witness stand. This type of control bore on the question of plan, design, and intent, as did Defendant's attempt to control Terry, and was relevant to counter Defendant's contention that the relationship between Defendant and the victim was consensual.

While the contacts in question were with Defendant's sons, which made them different from those with the other boys, the use of control and the approach were similar.

The result we reach is consistent with *State v. Lucero*, 114 N.M. 489, 840 P.2d 1255 (App.1992). In the case before us, Jeff's testimony went directly to the question of whether Defendant had the plan, design, or intent to control the victim by use of position of authority. Jeff was an adolescent male when Defendant molested him, as was the victim, and Defendant used his position of authority as a father to attain his ends with Jeff, just as he used his position of authority as a supervisor to attain his ends with the victim. In *Lucero*, however, the evidence presented was so factually dissimilar to the alleged acts giving rise to the charges that it simply was not probative of plan, design, or intent. The *Lucero* Court flatly rejected the "State's assertion that occasional rejection of Defendant's request for oral sex by his girlfriend is admissible to prove he sexually assaulted the seven-year-old daughter of a friend." *Id.* at 493, 840 P.2d at 1259. The factual differences between one act, arguing with an age-appropriate girlfriend about sex, and the other, sexually molesting a seven-year-old girl, simply were too great for the former to be admissible under Rule 11-404(B) to show that the defendant had the plan, design, or intent to commit the latter.

Additionally, SCRA 1986, 11-404(A)(1), permits evidence of a pertinent character trait when offered by an accused, or by the

prosecution in rebuttal. As discussed earlier, the defense's theory was based on propensity. Defendant's expert testified that in his opinion Defendant did not use his position of authority or other types of coercion to get his way with boys. Jeff's testimony contradicted that theory. While that testimony was offered as part of the State's case, given the fact that the defense made its theory known as early as the pretrial hearing, the State could have anticipated this theory and offered rebuttal testimony before Defendant put on his case.

In balancing the probative value of evidence with its prejudicial effect, it ordinarily would be difficult to imagine anything more prejudicial than evidence of incest. Viewing the trial in its entirety, however, we believe that the testimony in question lost much of its sting. As already noted, the defense strategy was to present an open, unabashed disclosure of Defendant's sickness and to persuade the jury that the relationships were consensual, not coercive. That strategy brought before the jury a series of witnesses who depicted, in graphic detail, Defendant's activities, including meeting men in gay bars, hustling boys off the street, and frequenting adult video parlors. We believe the jury was so inoculated to such sordid testimony, the trial court could find that the evidence of incestuous activities added little prejudicial effect to what had already been presented.

Therefore, we find no abuse of discretion in allowing this testimony under the unusual circumstances of this case.

3. *Closing Argument*

Defendant claims that the prosecutor engaged in an unfair closing argument that amounted to fundamental error. Since there was no objection, Defendant must rely on fundamental error. *See* SCRA 1986, 12–216 (Repl.1992).

Defendant describes comments made by the prosecutor about Defendant's sickness, his hustling boys, and his activities in video parlors. These statements are based on the evidence. Comments on the evidence are not error or fundamental error. *See State v. Taylor,* 104 N.M. 88, 94, 717 P.2d 64, 70 (Ct.App.) (prosecution allowed reasonable latitude in closing argument, but remarks must be based on the evidence presented), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986).

Nor do we find any error in the prosecutor's favorable comments about defense counsel, and Defendant has not provided argument or authority why this comment constitutes fundamental error. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (appellant must present argument and authority on each appellate issue).

Finally, Defendant argues that the prosecutor expressed his personal opinion or belief as to Defendant's guilt or the credibility of witnesses. While it is correct that a prosecutor is prohibited from expressing his or her personal view on these matters, *see State v. Ferguson,* 111 N.M. 191, 194, 803 P.2d 676, 679 (Ct.App.), *cert. denied,* 111 N.M. 144, 802 P.2d 1290 (1990), we believe the comments in question did not clearly violate that principle. We are not persuaded by the State's concession that the remarks were improper.[3]

The prosecutor's comment that "I think this [case] has the facts necessary for you to convict the accused," could be viewed as proper. *See Id.* at 195, 803 P.2d at 680 (quoting from F. Bailey & E.H. Rothblatt, *Successful Techniques for Criminal Trials* 25:16, at 565–66 (2d ed. 1985)). " 'The right of a prosecuting attorney to draw in his argument all legitimate inferences from the evidence authorizes him to assert a belief based on the evidence that the accused is guilty.' " *Id.*

Similarly, the comment about the State's burden of proving coercive use of authority and the prosecutor's belief that Defendant was in a position of authority could be viewed as drawing on the evi-

3. While conceding the impropriety of the remarks, the State argued they did not rise to the level of fundamental error.

dence. While the prosecutor should not have prefaced his remark about the statements of Garth Dennis, with whom the victim had a relationship, with "I think," we are not persuaded that the jury would necessarily have considered the remark personal rather than something established by the evidence and inferences.

We will not find fundamental error in an ambiguous comment when a timely objection would have afforded the court and the prosecutor an opportunity to cure any problem by resolving the ambiguity.

4. *Loss of Exhibits*

Defendant claims he was prejudiced by the loss of two photographs that were introduced into evidence. However, he does not explain how he was prejudiced. *See State v. Hoxsie,* 101 N.M. 7, 10, 677 P.2d 620, 623 (1984) (an assertion of prejudice is not a showing of prejudice), *overruled on other grounds by Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 731, 779 P.2d 99, 110 (1989).

Defendant relies on *State v. Chouinard,* 96 N.M. 658, 634 P.2d 680 (1981), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1982). Defendant's reliance is misplaced. *Chouinard* involved the destruction of evidence before trial. Here, we are dealing with two photographs, both of which were apparently admitted into evidence and presumably published to the jury. Thus, Defendant was not deprived of the opportunity to have the jury consider these photographs, even if the jury was unable to take them to the jury room during the deliberations. The loss of the exhibits does not require reversal.

5. *Cumulative Error*

Having found that no error occurred, we reject this claim. *See State v. Isiah,* 109 N.M. 21, 32, 781 P.2d 293, 304 (1989) (where there has been no accumulation of irregularities at trial, cumulative error does not exist).

We affirm Defendant's convictions.

IT IS SO ORDERED.

DONNELLY, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

I concur in the result and join in all of Judge Bivins' opinion for the Court except the discussion under the heading "Incest Testimony by Defendant's Son."

I would not rest admissibility of the incest testimony on SCRA 1986, 11–404(B). To understand that rule properly, it needs to be read in the context of the entire Rule 11–404, as well as SCRA 1986, 11–405. These rules are virtually identical to Federal Rules of Evidence 404[1] and 405. For ease of reference I will refer to the two rules, and their federal counterparts, as simply Rules 404 and 405. They state:

Rule 404. **Character evidence not admissible to prove conduct; exceptions; other crimes.**

A. **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 11–607, 11–608 and 11–609.

B. **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs or acts

1. The one difference of substance is an amendment to Federal Rule of Evidence 404(b) effective in 1991, which requires the prosecutor to provide notice of evidence to be offered under that provision.

is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 405. **Methods of proving character.**

A. **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

B. **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Rules 404 and 405 establish two pertinent general propositions. One is that ordinarily a person's character should not be used circumstantially—that is, to prove that a person acted in conformity with his or her character. This prohibition, particularly in the context of criminal prosecutions, is justified by concern that character evidence when used circumstantially is likely to be given more probative value than it deserves and may lead the fact-finder to punish a bad person regardless of the evidence of what happened in the specific case. *See* Fed.R.Evid. 404 advisory committee's note. The other proposition is that ordinarily character is not to be proved by evidence of specific instances of conduct. This prohibition is justified by the danger that when character is proved by evidence of specific acts, the inquiry into those acts may constitute minitrials that consume too much time and may distract or confuse the fact-finder. *See* Fed.R.Evid. 405 advisory committee's note.

Both of these propositions support the prohibition in Rule 404(B) against proving conduct to establish character to prove action in conformity with that character. The second sentence of Subsection B recognizes, however, that evidence of specific conduct may be relevant for other purposes. Although one might read the sentence as establishing an exception to the first sentence, *cf.* David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 135, at 117 (rev. vol. 2 1985) [hereinafter Louisell] (Rule 404 "does not exclude character evidence which is relevant for any other purpose, such as showing motive or intent."), a more natural reading of Subsection B is that the second sentence simply clarifies that the first sentence does not always exclude other-acts evidence. Under this reading one must be cautious in applying the second sentence to be sure that one is not using a rubric such as "plan" to obscure the fact that other-acts evidence is actually being used for the purpose prohibited by the first sentence.

That leaves the question of what is prohibited by the first sentence of Rule 404(B). In particular, what is meant by "character"? The most common view—what I will call the "traditional view"—equates "character" with "propensity." In other words, the first sentence excludes evidence of a person's specific acts to show that the person has a propensity to engage in a certain type of conduct to show that the person engaged in specific conduct on the occasion at issue. One school of thought would also exclude propensity evidence offered to establish that a person had a particular state of mind on the occasion at issue. *See* Lee E. Teitelbaum & Nancy A. Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent,* 13 N.M.L.Rev. 423 (1983). But the dominant approach appears to be that the prohibition in Rule 404(B) against other-acts evidence to prove that a person "acted in conformity with" a character trait addresses only *actions,* not the state of mind accompanying the act at issue. *See* 22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure, Evidence* § 5242, at 473–74 (Supp.1992) [hereinafter Wright & Graham]. There is, however, a widely recognized constraint on the use of propensity evidence to prove state of mind. Because the actor's state of mind is generally an issue in the case—certainly when the actor is the defendant in a crimi-

nal case—almost any evidence prohibited by the first sentence of Subsection B could be argued to be admissible to prove the actor's state of mind. Thus, to prevent the evisceration of the prohibition in the first sentence, courts commonly require that the "intent exception" be limited to cases in which the issue of intent is seriously disputed. *See* Wright & Graham, *supra,* § 5242, at 488–89.

Another view adopts a narrower definition of character. Professor Paul Rothstein has suggested that the term "character" in the first sentence of Rule 404(B) refers to only a subset of potential propensities. He provides the following definition:

> "Character" is a propensity that is both general (i.e. propensity for "honesty" or "dishonesty," "violence" or "non-violence") as opposed to specific (i.e., propensity for executing certain kinds of violent or dishonest acts, or for executing them in a certain manner) and possessed of good or bad moral connotations.

Paul F. Rothstein, *Evidence in a Nutshell: State and Federal Rules* 355–56 (2d ed. 1981). *See generally* Wright & Graham, *supra,* § 5233; A.B.A. Criminal Justice Section, Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299, 322–24 (1987) [hereinafter A.B.A.]. His definition of "character" is apparently based on the observation that judicial decisions tend to admit evidence of non-character propensities pursuant to the second sentence of Subsection B. These decisions can then be rationalized on the ground that evidence of non-character propensity is more likely to be probative and less likely to lead to unfair prejudice than is evidence of character. Professor Rothstein's discussion of the admissibility of propensity or character evidence has been described as "[a] valiant effort to make general sense out of general nonsense." 1A Wigmore, *Evidence* § 54.1, at 1156 n. 2 (Tillers rev. 1983) [hereinafter Wigmore]. In my view adoption of his approach would lead to greater judicial candor and a sounder analysis of the critical factors arguing for or against admissibility.

I would not admit the incest testimony under either the traditional approach or Professor Rothstein's approach. First, under the traditional approach, the court must determine whether there is some "other" purpose (other than that prohibited by the first sentence of Rule 404(B)) for the evidence. The majority opinion states that the incest testimony "went directly to the question of whether Defendant had the plan, design, or intent to control the victim by use of a position of authority." The incest testimony, however, does not establish a "plan" (which I take to encompass also the term "design") as that term should properly be used in applying Rule 404(B). I see no relevance for the incest testimony, and the majority suggests none, other than via the chain of logic that because Defendant engaged in similar conduct in the past, he was more likely to have done so on the occasions alleged in this case. A leading treatise states:

> The justification for admitting evidence of other crimes to prove a plan is that this involves no inference as to the defendant's character; instead his conduct is said to be caused by his conscious commitment to a course of conduct of which the charged crime is only a part. The other crime is admitted to show this larger goal rather than to show defendant's propensity to commit crimes.

Wright & Graham, *supra,* § 5244, at 499–500. For example, in a prosecution of a defendant for murdering one of her partners, the state could prove her plan to take total control of the company by removing her partners through any means available, including blackmail, involuntary commitment to mental institutions, murder, etc. The evidence in this case is rather similar to evidence whose admission is criticized by the treatise:

> A recent Washington case illustrates the problem many courts have in distinguishing between "plan" and "modus operandi" as grounds for admission of other crimes. The defendant was charged with two counts of statutory rape and two uncharged crimes were admitted. In all of these, the defendant had enticed

teenage runaways into exchanging sex for food and shelter. This common modus operandi was said to be admissible under Rule 404(b) to prove that defendant had engaged in intercourse as part of a plan to take advantage of runaways in this fashion.

This is evidence of propensity, not plan. But the opinion suggests that what misled the court was to read "plan" to mean something like a blueprint. Proof that the witch had constructed one gingerbread house will support an inference that she has the "plans" for this type of architectural endeavor but it does not prove whether or not she will ever use the blueprint to construct another lure for lost children. It is only when we can infer a plan for a subdivision to be called "Gingerbread Acres" that we can infer from the plan that the witch also constructed a second house.

To say that the defendant had a "plan" to seduce every runaway he could may not do violence to the language but it does undermine the policy of Rule 404(b) by permitting the use of propensity to prove conduct. To be properly admissible under Rule 404(b) it is not enough to show that each crime was "planned" in the same way; rather, there must be some overall scheme of which each of the crimes is but a part.

Wright & Graham, *supra,* at 504.

As for use of the incest testimony to prove intent, there was no serious dispute regarding Defendant's "intent to control the victim by use of a position of authority." I am not even sure that such intent was an element of the offense under NMSA 1978, Section 30–9–11(B)(1). But even if it was an element, the real dispute concerned Defendant's conduct, not his mental state at the time. If he acted in the manner described by the alleged victim, he undoubtedly had the requisite intent. If Defendant acted in the way that he described, he did not have the intent. This was not a case in which the act was admitted and the jury question was the defendant's state of mind.

Under Professor Rothstein's approach, the issue is somewhat more difficult. The propensity at issue is what one might call "coercive homosexual hebephilia." That propensity has moral overtones, but it is probably too specific to be considered a trait of "character," as defined by Rothstein. *Cf. State v. Swavola,* 114 N.M. 472, 477, 840 P.2d 1238, 1243 (App.1992) [Vol. 31, No. 47, SBB 1064, 1066] (trait was not a sufficiently general propensity to fit the "character" rubric). Nevertheless, the Rothstein approach does not require admission of all non-character propensity evidence. Indeed, there are strong reasons to analyze with particular care whether non-character propensity evidence should be excluded pursuant to Rule 11–403. That rule, which tracks Federal Rule 403, states:

> 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.

Even if the absolute exclusionary principle stated in the first sentence of Rule 404(B) should be applied only to evidence of acts used to prove "character" as defined by Rothstein, the underlying concerns expressed in that rule must still be considered when the acts are used to prove a non-character propensity. One cannot ignore the long tradition of courts and commentators expressing fear that jurors are too likely to give undue weight to evidence of a defendant's prior misconduct and perhaps even to convict the defendant solely because of a belief that the defendant is a bad person. Wigmore, *supra,* § 54.1. Also, admission of evidence of other misconduct may lead to a distracting and time-consuming trial within a trial. I find it instructive that commentators who recognize that propensity evidence often should be admitted would impose limitations on the admissibility in criminal cases of evidence of other crimes beyond the limitations set forth in Rule 403. *See* A.B.A., *supra,* at 330 (probative value must substantially outweigh danger of improper prejudice, etc.); Richard B. Kuhns, *The*

Propensity to Misunderstand the Character of Specific Acts Evidence, 66 Iowa L.Rev. 777, 806 (1981) (probative value must outweigh danger of prejudice, etc.).

With these considerations in mind I would not admit the incest testimony even under the Rothstein approach. Because of the remoteness in time of the incest and the difference in nature of the incest incidents and the incidents at issue in this case, I do not think that the evidence was sufficiently probative of Defendant's alleged propensity to abuse his authority in order to engage adolescent males in sexual activity.

Nevertheless, the testimony was admissible in the specific circumstances of this case. What changes the analysis is the nature of Defendant's defense. That defense, which was disclosed before trial, was that (1) Defendant was a homosexual hebephile, (2) such hebephiles act consistently in using or not using coercion to satisfy their drives, (3) Defendant had consistently not used coercive methods, and (4) therefore it was unlikely that Defendant used the coercive methods described by the alleged victim.

Given that defense, the incest testimony was admissible, even if one views Defendant's homosexual hebephilia (whether coercive or non-coercive) as a matter of "character." Under Rule 404(A)(1) an accused is permitted to present evidence of his character, in which case the prosecution may offer evidence "to rebut the same." Of course, not every prior act of Defendant would necessarily be relevant as rebuttal, but the incest testimony, which might otherwise seem too remote in time and different in nature to be probative, became very much in point in light of the testimony of Defendant's expert. Also, I agree with the majority that the trial judge could properly find little chance of unfair prejudice from the incest testimony in the context of this case.

To be sure, the incest testimony was admitted before Defendant's expert witness testified at trial concerning Defendant's homosexual hebephilia. But Defendant's attorney made his proposed defense so clear before trial—the expert testified at length at a pre-trial hearing and defense counsel withdrew his objection to almost all of the other prosecution evidence regarding Defendant's acts of homosexual hebephilia on the ground that it would be relevant to the defense expert's testimony—that any error in taking the State's evidence out of order could only be harmless error. Indeed, Defendant may have been better off having the evidence presented in the State's case in chief than having it emphasized in the State's rebuttal case.

There is also a potential problem arising from Rule 405, which I repeat:

> A. **Reputation of opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> B. **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Was the incest testimony a proper means of proving the nature of Defendant's homosexual hebephilia? Because Defendant's homosexual hebephilia was not an essential element of the charge or his defense, Subsection B does not apply; and Subsection (A) appears to prohibit proof of specific instances of conduct to rebut Defendant's character evidence. There are, however, three potential means of overcoming this obstacle.

First, the above straightforward reading of Rule 405 may not be the law in New Mexico. In *State v. Baca,* 114 N.M. 668, 845 P.2d 762 (1992), our Supreme Court wrote, "In cases where the pertinent character trait of the victim *goes toward proving* an essential element of the defense, proof may be made of specific instances of the victim's conduct. *See* SCRA 1986, 11–405(B)...." (Emphasis added; citation to Court of Appeals opinion omitted). Our Supreme Court thus reads "is an essential

element" to mean "goes toward proving an essential element." In *Baca* the defendant tried to support a claim of self-defense by offering evidence of specific conduct that established the violent disposition of the victim. (Proof of the violent disposition of the victim is a circumstantial use of character, not proof of an essential element of the defense of self-defense. *See* Fed.R.Evid. 404 advisory committee's note.) Although there is authority directly to the contrary in interpreting identical language in Federal Rule of Evidence 405, *e.g., Perrin v. Anderson,* 784 F.2d 1040, 1045 (10th Cir. 1986), the *Baca* court relied on a pre-rule opinion, *State v. Ardoin,* 28 N.M. 641, 216 P. 1048 (1923), as authority for admitting evidence of specific acts of violence, subject only to the general requirements of Rule 11–403. Given the authority of *Baca,* the evidence of specific acts illustrating Defendant's homosexual hebephilia appears to be admissible.

A second approach is more straightforward. Simply put, Defendant cannot complain because he opened the door to such testimony when in a pretrial hearing his attorney informed the court of his intent to rely on specific conduct to prove Defendant's psychological condition. When withdrawing his motion in limine objecting to the State's calling various witnesses who had engaged in sexual conduct with Defendant, defense counsel stated that his expert "pretty clearly testified that [Defendant's] sexual history is relevant and is material to his consideration and his opinions."

The third approach is perhaps the most interesting. Psychiatric testimony of character is simply sui generis.

> [I]t is settled that specific acts by the accused may be shown, to prove either sanity or the lack of it. Yet the mental element in dispute in these cases is generally *not* thought to involve character as that term is used in [federal] rules [of evidence] 404 and 405, but a separate aspect of the psyche, hence to lie beyond reach of these provisions.

Louisell, *supra,* § 141, at 279–80. *But cf.* Wright & Graham, *supra,* § 5233, at 355–56 (concluding that "at least some mental traits are to be defined as 'character' under Rule 404.") Once Defendant offered a psychiatric defense based on an expert's evaluation of Defendant's prior conduct, it was appropriate for the State to rebut that defense by proving specific conduct inconsistent with the alleged psychiatric condition. In this case the incest testimony could be viewed as inconsistent with the expert's conclusion that Defendant would not use a position of authority to satisfy his homosexual hebephilia. It was therefore admissible.

I recognize that the above theories of admissibility were not the ones relied upon by the district court. Yet an appellate court can affirm on a basis other than that relied upon at trial if reliance on the new ground does not prejudice the defendant. *See State v. Beachum,* 83 N.M. 526, 494 P.2d 188 (1972); *Naranjo v. Paull,* 111 N.M. 165, 170, 803 P.2d 254, 259 (Ct.App. 1990). I see no prejudice here because the district court's finding of relevance under Rule 404(B) would require admissibility on the grounds that I have mentioned.

846 P.2d 1082

STATE of New Mexico, Plaintiff–Appellee,

v.

Thomas HARRISON, Defendant–Appellant.

No. 13714.

Court of Appeals of New Mexico.

Dec. 29, 1992.

Certiorari Denied Feb. 3, 1993.

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

Sammy J. Quintana, Chief Public Defender, Sumita Mukhoty, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BLACK, Judge.

Defendant appeals his conviction for driving while intoxicated (DWI). The issues on appeal are whether Defendant's conviction for DWI was supported by substantial evidence and what type of criminal intent must be proved in order to convict a person for DWI. Specifically, this appeal presents the Court with the issue of whether a person who is discovered unconscious or asleep at the wheel of an automobile, whose engine is on and tires are blocked, can be convicted of DWI. We hold that under those circumstances, there is sufficient evidence to support a conviction for DWI. We further hold that the criminal offense of DWI, NMSA 1978, Section 66–8–102(A), (C) (Cum.Supp.1992), is a strict liability crime. Therefore, we affirm Defendant's conviction.

FACTS.

Defendant and a friend, Jude Mari (Mari), were at a mutual friend's home. Upon preparing to leave the residence, Mari noticed that Defendant was intoxicated and offered to drive for him. They got into Defendant's car. Mari drove and Defendant was a passenger. Mari drove the vehicle for a short distance when the car stalled and would not restart. Mari testified that he steered the vehicle as close as he could to the curb and parked it. Mari further testified that he then took the keys out of the ignition, placed them under the seat, and placed bricks under the front and back tires of the vehicle. Mari instructed

Defendant not to leave the vehicle and then left in search of help.

Officer Longobardi was dispatched to the area in response to a call that an individual was slumped over the steering wheel of a vehicle. Longobardi testified that upon arriving at the scene, he saw Defendant's vehicle in the southbound lane of traffic, positioned at least ten feet away from the curb. Longobardi confirmed that bricks were underneath the tires of the vehicle on the driver's side.

Longobardi testified that, upon approaching the vehicle, he saw Defendant passed out behind the steering wheel of the car. He further testified that the key was in the ignition, the ignition was turned on, the transmission was in drive, and Defendant had his foot on the brake. The officer aroused Defendant, who spoke to Longobardi in a slurred manner. Longobardi smelled alcohol on Defendant's breath and noticed that Defendant had red, bloodshot eyes. On cross-examination, the officer admitted that he did not inquire of Defendant whether he had driven the vehicle to that location, or why the car was sitting there.

Officer Meloy accompanied Longobardi to the scene and confirmed his testimony that Defendant was passed out behind the wheel and that the keys were in the ignition with the engine running. Officer Meloy also testified that Defendant had his hands on the steering wheel.

After awakening Defendant, the officers asked him to submit to field sobriety tests which he refused. Defendant was transported to the Bernalillo County Detention Center where he submitted to breath tests which produced readings of .17 and .15.

In the metropolitan court proceedings, Defendant was found guilty of DWI. On appeal in the trial de novo in district court, Defendant and the State stipulated to all but one element of the charge of DWI. The sole issue before the district court was whether Defendant was "driving" the vehicle and was, therefore, in violation of the DWI statute, Section 66–8–102.

Relying on *Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986), the district court concluded that NMSA 1978, Section 66–8–102 (Cum.Supp.1992), makes it unlawful for any person who is under the influence to drive or be in actual physical control of a motor vehicle, and that motion of the vehicle was not required to support a conviction. The court also found that Defendant was in actual physical control of the vehicle. Furthermore, the district court concluded that the police officers had reasonable grounds to believe that Defendant had committed the offense of DWI and that the State had proven all of the elements of DWI beyond a reasonable doubt. Based on the above, the district court found Defendant guilty of DWI. This appeal followed.

I. DEFENDANT WAS "DRIVING" A VEHICLE WITHIN THE MEANING OF SECTION 66–8–102.

Defendant was convicted of driving while intoxicated in violation of Section 66–8–102. Defendant's only defense to this charge is that he was not "driving" within the meaning of the statute. Our Supreme Court held that the defendant in *Boone,* who was found in the driver's seat of his automobile, stopped in a traffic lane late at night with the engine running, was guilty of "driving," stating:

> We therefore hold that Section 66–8–102 makes it unlawful for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of a motor vehicle or to exercise control over or steer a vehicle being towed by a motor vehicle; motion of the vehicle is not a necessary element of the offense.

105 N.M. at 226, 731 P.2d at 369 (footnote omitted); *see also* N.M.Att'y Gen.Op. 5858 (1953) (person may be guilty of DWI if physically handling the controls even though car not in motion).

Defendant contends that the district court's conclusion that he was "driving" a vehicle under Section 66–8–102 is not supported by substantial evidence. *See State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985) (substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion). Defendant first attempts to distinguish *Boone* on the basis that there was no

contention in that case that anyone other than the defendant was driving the vehicle, and the *Boone* defendant was conscious when discovered by the police. In contrast, in Defendant's case, he was discovered unconscious, and evidence was presented that only Mari had actually driven the vehicle. For the reasons that follow, we view these differences between the case at hand and *Boone* as distinctions without a legal difference.

Defendant appears to argue that the evidence to support his conviction was insufficient due to the fact that he was found unconscious behind the wheel. We note, as did the majority in *Boone,* that our Motor Vehicle Code, NMSA 1978, §§ 66–1–1 to –8–140 (Repl.Pamp.1987 & 1989 & Cum. Supp.1992), defines a "driver" as one "who drives or is in actual physical control of a motor vehicle." Section 66–1–4.4(K) (Cum. Supp.1992). Several jurisdictions have determined that there is sufficient evidence to support a DWI conviction based on a defendant's "actual physical control" of a vehicle, even when the defendant is found unconscious or asleep at the wheel. *See, e.g., Mitchell v. State,* 538 So.2d 106 (Fla.Dist. Ct.App.1989) (per curiam) (defendant may be found in "actual physical control" when slumped over steering wheel, keys in ignition, but engine not running; car in parking lot); *Wofford v. State,* 739 P.2d 543 (Okla.Crim.App.1987) ("actual physical control" where defendant found asleep in car parked in road, with key in ignition); *see also* James O. Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance,* 93 A.L.R.3d 7, §§ 9[a], 15[a] (1979).

In reviewing the law from other jurisdictions on whether an unconscious or asleep individual can validly be determined to be in actual physical control of a vehicle, we find a discussion from the Oklahoma Court of Criminal Appeals to be apropos:

> We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away.

Hughes v. State, 535 P.2d 1023, 1024 (Okla.Crim.App.1975).

In the case at hand, Mari testified that he left Defendant in the passenger seat, stashed the ignition keys under the driver's seat, and instructed Defendant not to leave the vehicle. However, when the police officers discovered Defendant, he was seated in the driver's seat, the engine was running, the transmission was in the "drive" position, and Defendant had his foot on the brake. It can reasonably be inferred that Defendant actively searched for the vehicle keys, started the engine, and was prepared to drive away before he passed out or fell asleep. In other words, Defendant's efforts were evidence of his exercise of actual physical control over the vehicle.

The fact that the officers discovered no signs that the vehicle had been moved by Defendant is irrelevant. *See Boone,* 105 N.M. at 226, 731 P.2d at 369 (DWI does not require movement of the vehicle). Furthermore, the fact that the only evidence presented concerning driving focused on Mari and not Defendant is also irrelevant. *See id.* (DWI committed when a person under the influence drives or is "in actual physical control" of the vehicle).

Based on the above, we hold that, for purposes of a DWI conviction, a defendant may exercise "actual physical control" over a vehicle when he is discovered behind the wheel of an automobile, either passed out or asleep, under these circumstances. Therefore, there was sufficient evidence to support the district court's finding that Defendant was in actual physical control of the vehicle. *See Sparks,* 102 N.M. at 320, 694 P.2d at 1385.

II. SECTION 66–8–102 DOES NOT REQUIRE INTENT.

Defendant next argues that there was insufficient evidence to support his

conviction because the State failed to prove that he intended to drive the car. Although the parties appear to use specific intent and general intent interchangeably, general intent is all that is at issue in this case. DWI does not require an intent to do a further act or achieve a further consequence, such as is ordinarily required in specific intent crimes. *See* Mark B. Thompson III, *The Lazy Lawyer's Guide to Criminal Intent in New Mexico,* Judicial Pamphlet 14, addendum at 332 (1974). Defendant argues that since he was not conscious of his wrongdoing, he cannot have the intent he says is required to sustain a DWI conviction. We disagree.

New Mexico's DWI statute states in part that "[i]t is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state," and further, "[i]t 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(A), (C). Our primary focus is to give effect to the intention of the legislature. *See State v. Richardson,* 113 N.M. 740, 832 P.2d 801 (Ct.App.), *cert. denied,* 113 N.M. 690, 831 P.2d 989 (1992). In doing so, we examine the language used in the relevant statute. *Id.* Section 66–8–102 makes absolutely no reference whatsoever to a required intent on the part of an accused. *See generally State v. Alderette,* 111 N.M. 297, 804 P.2d 1116 (Ct.App.1990) (appellate court will not read into statute language which is not there). Rather, the statute clearly provides that the only thing necessary to convict a person of DWI is proof that the defendant was driving a vehicle either under the influence of intoxicating liquor or while he had a certain percentage of alcohol in his blood.

A strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent. *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App.), *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975). The legislature may forbid the doing of an act and make its commission criminal without regard to the intent of the wrongdoer. *State v. Lucero,* 98 N.M. 204, 647 P.2d 406 (1982). The rationale for making an act criminal without regard to the perpetrator's intent is that the public interest is so compelling, or the potential harm so great, that the public interest must override the individual's interests. *State v. Barber,* 91 N.M. 764, 581 P.2d 27 (Ct.App.1978). The standard for determining whether a statute is a strict liability statute involves ascertaining whether there is a clear legislative intent that the act does not require any degree of mens rea. *State v. Herrera,* 111 N.M. 560, 807 P.2d 744 (Ct.App.), *cert. denied,* 111 N.M. 529, 807 P.2d 227 (1991).

Obviously, the public's interest in deterring individuals from driving while intoxicated is compelling. This is due to the dangers of the practice, not only to those who operate motor vehicles while under the influence, but also to those innocent individuals who are injured or killed as a result of DWI accidents. The fact that innocent individuals are oftentimes injured or killed, and their families and loved ones made to suffer, makes the potential harm from DWI much greater than if only the irresponsible person who drove while intoxicated was put in danger. We have recognized that the policy behind the DWI statute is to prevent individuals from driving or exercising actual physical control over a vehicle when they, 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 themselves and the public. *See Richardson,* 113 N.M. at 742, 832 P.2d at 803; *see also Incorporated County of Los Alamos v. Johnson,* 108 N.M. 633, 776 P.2d 1252 (1989) (recognizing public policy of removing DWI drivers from New Mexico roads in order to protect the public). We believe that the legislature recognized this significant public interest and potential harm when it drafted Section 66–8–102 and made no mention of the need to prove a required intent in order to secure a conviction.

Moreover, we believe adopting Defendant's position and interpreting Section 66–8–102 as a crime requiring intent, rather than a strict liability crime, would defeat the legislature's purpose and achieve ab-

surd results. *See generally Alderette,* 111 N.M. at 299, 804 P.2d at 1118 (appellate court will not construe a statute to defeat its intended purpose or achieve absurd results). Reduced to its essence, Defendant's argument is that he could not be convicted of DWI because he was too intoxicated to form the conscious intent to drive drunk. To allow persons charged with DWI the opportunity to present such a defense would be absurd and undoubtedly contrary to the statute's purpose. *See State v. West,* 416 A.2d 5, 7–8 (Me.1980).

Section 66–8–102(C) is referred to as the "per se" violation. *See* Rule 14–4503 committee commentary. The "per se" label has also been adopted in other jurisdictions. *See, e.g., State v. Bernhardt,* 245 N.J.Super. 210, 584 A.2d 854 (Ct.App.Div.), *cert. denied,* 126 N.J. 323, 598 A.2d 883 (1991); *State v. Carter,* 810 S.W.2d 197 (Tex.Crim. App.1991) (en banc). This is apparently judicial shorthand for saying driving while intoxicated is a general intent crime and no specific mens rea is required to support a conviction. *See State v. Young,* 8 Haw. App. 145, 795 P.2d 285, *cert. denied,* 833 P.2d 901 (1990); 1 Richard E. Erwin et al., *Defense of Drunk Driving Cases* § 1.05 (3d ed. 1992).

Other courts interpreting similar legislation have specifically recognized DWI as a strict liability offense, especially where the crime is defined solely in terms of driving with a blood alcohol level in excess of a defined percentage. *See, e.g., People v. Thorson,* 145 Ill.App.3d 764, 99 Ill.Dec. 729, 496 N.E.2d 304 (1986); *Burns v. State,* 556 N.E.2d 955 (Ind.Ct.App.1990); *City of Defiance v. Kretz,* 60 Ohio St.3d 1, 573 N.E.2d 32 (1991). The Kansas Court of Appeals found that the fact the legislature failed to specify any intent requirement in defining the offense was an indication of legislative intent to impose strict liability:

> We conclude by its omission of intent as an element in K.S.A.1984 Supp. 8–1567 our legislature intended driving while under the influence to be an absolute liability offense. Therefore, we reject defendant's complaints that the city failed to prove intent.

City of Wichita v. Hull, 11 Kan.App.2d 441, 724 P.2d 699, 702 (1986). As we have noted, Section 66–8–102 likewise contains no intent requirement and we also believe the legislature intended to create a strict liability offense. The State was therefore not required to prove that Defendant intended to drive. *State v. Young,* 795 P.2d at 290–91; *State v. Superior Court,* 153 Ariz. 119, 735 P.2d 149 (Ct.App.1987).

CONCLUSION.

We believe there was substantial evidence to support the district court's finding that Defendant was in control of a motor vehicle, and therefore, driving. In reviewing the language of the DWI statute, we also believe that the legislature drafted Section 66–8–102 in order to make the act of driving while intoxicated a crime, in and of itself, regardless of the intent of the accused. Based on the above, we hold that the offense of DWI is a strict liability crime. Defendant's conviction is affirmed.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

847 P.2d 314

James J. PURPURA, Petitioner,

v.

Pamala Ann PURPURA, Respondent,

and concerning Tom Cherryhomes, Defendant–Appellant.

No. 13707.

Court of Appeals of New Mexico.

Jan. 4, 1993.

Certiorari Denied Feb. 15, 1993.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for State of New Mexico.

Gary C. Mitchell, Ruidoso, for defendant-appellant.

OPINION

FLORES, Judge.

Attorney Tom Cherryhomes (appellant) appeals from an order and an amended order holding him in direct criminal contempt. Appellant makes two claims on appeal: (1) that appellant's actions do not constitute contempt; and (2) that the trial judge should have recused himself from hearing the matter of contempt. We affirm.

Initially, we note that appellant represented himself throughout most of the appellate proceedings. Mr. Gary C. Mitchell entered his appearance on behalf of appellant after briefing was completed.

I. FACTS

The incidents resulting in the contempt adjudication arose December 6, 1991, during litigation of the rights to a time-share condominium by a divorced couple in which appellant represented Pamala Ann Purpura, the respondent. While the trial judge was announcing his decision, appellant interrupted and stated that he would like the record to reflect that he had just been told by Dr. Purpura, the petitioner, to "kiss his ass." Appellant asked the trial judge to admonish the petitioner and stated that this was the type of action that was going to get Dr. Purpura "a little facial surgery." The trial judge addressed the litigants and their attorneys and stated that there appeared to be "heartfelt animosity" between all the participants in the lawsuit and that he wanted everyone to behave like adults and to conduct themselves in a professional and reasonable manner. The trial judge further stated that he had previously held people in contempt but that he did not wish to do so here. The trial judge also stated that he did not hear the petitioner make the statement to appellant. A review of the record indicates that appellant then proceeded to interrupt the trial judge repeatedly. The trial judge asked appellant not to interrupt him again. While the trial judge was speaking, appellant proceeded to loosen his tie and unbutton his top collar button. During the proceeding, appellant was wearing a conventional tie, knotted and closed around his neck, as well as a multi-colored bandanna above that tie and around his neck. The trial judge told appellant that the court proceedings were not yet concluded and to "please put his tie on." Appellant responded that he had two ties on and that he had loosened only the conventional tie from around his neck. After further discussion between the trial judge and appellant regarding the tie, the trial judge held appellant in contempt for failure to abide by the proper decorum of the court. *See State v. Cherryhomes,* 114 N.M. 495, 840 P.2d 1261 (Ct.App.1992) (affirming contempt against appellant for refusal to comply with court order regarding proper attire).

Appellant requested a hearing in which to present evidence. Following a brief recess, the contempt hearing was commenced to determine whether the charge of direct criminal contempt was warranted. The trial judge stated that it was his opinion that appellant's dress was inappropriate with his top collar button unbuttoned and his tie loosened. The trial judge then requested that the deputy officers photograph appellant. Appellant refused to be photographed and stated that he would like to have witnesses testify as to what they heard the petitioner state, the manner in which appellant was dressed, and whether such manner was disrespectful in their opinion. Appellant stated that he wanted the opportunity to introduce the testimony of these witnesses without having three

deputies with guns in the courtroom. Appellant then told the judge: "I've never physically accosted you, I think you understand that if I wanted to I'm quick enough, agile enough, and athletic enough, I can get you judge. I can get you before these three get custody of me." The trial judge then ordered appellant to allow the deputy sheriff to take his photograph. Appellant still refused, and as the deputy sheriff took the photograph, appellant attempted to leave the courtroom. The trial judge ordered appellant not to leave the courtroom. Appellant stated that he was refusing to stay in the courtroom. The trial judge then charged appellant with a second charge of direct criminal contempt and ordered that appellant be arrested and placed in the county jail. The record reveals the sounds of a struggle which ensued. As he was attempting to leave the courtroom, appellant pushed one of the deputies.

At the contempt hearing a few hours later, appellant was given the opportunity to call his own witnesses and to explain his actions. Appellant contends that the trial judge should have recused himself from the contempt hearing because (1) he was too personally involved in the matter to adjudicate a fair ruling; and (2) the trial judge was involved in two prior contempt hearings in which appellant was held in contempt. The trial judge refused to recuse himself, stating that he had no personal animosity toward appellant and that the contempt charges were necessary to uphold the court's authority and dignity. The trial judge then held appellant in direct criminal contempt for (1) refusing to dress properly in court; and (2) disrupting court proceedings by attempting to leave the courtroom prior to the conclusion of the hearing.

II. STANDARD OF REVIEW

The district court has inherent power to sanction for contempt. N.M. Const. art. VI, § 13; *State v. Wisniewski,* 103 N.M. 430, 708 P.2d 1031 (1985). Contumacious words or acts expressed in the presence of the court constitute direct criminal contempt. *Wisniewski,* 103 N.M. at 434, 708 P.2d at 1035. In imposing punishment for criminal contempt, the court must look at the seriousness of the consequences of the contumacious behavior, the public interest in enforcing termination of defendant's defiance, and the importance of deterring future defiance. *State v. Pothier,* 104 N.M. 363, 721 P.2d 1294 (1986). "Commitments and fines for criminal contempt are imposed for the purpose of vindicating the authority of the court and are punitive in nature and intended as a deterrent to offenses against the public." *International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers,* 74 N.M. 195, 198, 392 P.2d 343, 345 (1964).

Conduct violating a court order in the court's presence constitutes direct criminal contempt. *Roybal v. Martinez,* 92 N.M. 630, 593 P.2d 71 (Ct.App.1979). A trial judge may preserve order and decorum in the court and may punish contempts. *See* NMSA 1978, § 34-1-2 (Repl.Pamp.1990). A trial judge may exercise contempt sanctions to preserve authority and respect for the courts. *See Wisniewski,* 103 N.M. at 434, 708 P.2d at 1035.

Appellant argues that the trial court's order of contempt was based on actions which do not constitute contempt. In reviewing whether the trial court erred in holding appellant in criminal contempt, we determine whether there was sufficient evidence constituting proof beyond a reasonable doubt. *See In re Stout,* 102 N.M. 159, 692 P.2d 545 (Ct.App.1984). However, in reviewing the evidence, we view the evidence in the light most favorable to the verdict. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978).

III. EVIDENCE OF CONTEMPT

On appeal, appellant argues that his conduct did not constitute contempt. First, we address the charge of direct criminal contempt against appellant based on his refusal to obey the trial judge's order to uphold the decorum of the court by unbuttoning his top button and loosening his conventional tie. We then discuss the contempt based on appellant's disrupting the court proceedings.

A. *The Tie Incident*

A review of the record indicates that appellant wore his conventional tie in a customary manner throughout most of the proceedings, however, appellant subsequently undid his collar and loosened his tie during court proceedings. The trial judge directed appellant to fix his tie because the hearing was not yet over. Appellant refused to adhere to the court's direct order and the trial judge found appellant in direct criminal contempt.

We hold that the evidence was sufficient to sustain a finding of criminal contempt beyond a reasonable doubt. There is no question that appellant knew of the trial judge's requirement regarding neckwear. This incident occurred approximately three months following a similar incident where appellant had been held in criminal contempt for wearing a bandanna contrary to the same trial judge's order. *See State v. Cherryhomes,* 114 N.M. at 496–97, 840 P.2d at 1262–63. Here, appellant, up until the time of the confrontation, was wearing a conventional necktie as well as a bandanna. The trial judge apparently did not object to the bandanna since appellant was wearing the conventional necktie. The contempt arose when appellant unloosened his necktie and pulled down his bandanna and refused to obey the trial judge's directive that he fasten his necktie. As we said in *State v. Cherryhomes,* it is inappropriate for an attorney to take on the court even if he feels there is a legitimate basis not to comply with a court order. There are proper avenues available to challenge the efficacy of the dress code. Here, because the evidence demonstrates that appellant violated a court order, the trial judge properly invoked his inherent power to issue a contempt sanction to preserve the authority of the court and maintain its respect and dignity. *See Wisniewski,* 103 N.M. at 434, 708 P.2d at 1035.

B. *Attempting to Leave Courtroom and Pushing Deputy*

Next, we address appellant's second charge of direct criminal contempt for interrupting court proceedings by attempting to leave the courtroom prior to the conclusion of the hearing and pushing a deputy sheriff. A review of the record indicates that appellant attempted to leave the contempt hearing after the trial judge had ordered him not to leave, and subsequently pushed a deputy while attempting to leave.

Appellant testified that he believed the hearing was over when he attempted to leave. However, a review of the record indicates that after appellant announced that he was leaving the courtroom, the trial judge told appellant that he was disrupting the proceedings. Appellant disagreed and the trial judge then advised appellant that he was going to hold appellant in direct criminal contempt. Additionally, appellant's testimony was refuted by two other witnesses in the courtroom. We agree that appellant's behavior involved a blatant disrespect for, and disruption of, court proceedings punishable by criminal contempt. *Cf. id.* Again, the trial judge properly invoked his inherent power to issue a contempt sanction.

IV. RECUSAL

On appeal, appellant also argues that the trial judge should have recused himself from the contempt hearing. Appellant argues that he is entitled to have a fair and impartial tribunal as a trier of fact which is both disinterested, and free from any form of bias or predisposition in the case. We agree that "[a]t a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case." *See Reid v. New Mexico Bd. of Examiners in Optometry,* 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). "[F]airness and impartiality may often run counter to natural human reaction, particularly where ... the demeanor of an attorney has been particularly disrespectful or antagonistic ... [n]onetheless, fairness and impartiality ... necessitate that the judge 'be patient, dignified and courteous to ... lawyers ... with whom he deals in his official capacity.'" *State v. Martin,* 101 N.M. 595, 603, 686 P.2d 937, 945 (1984) (citations omitted); *see also* SCRA 1986, 21–300(A)(3) (Repl.1992). In determining whether a fair and impartial tribunal exists, the test, as set forth in

Reid, is not whether the tribunal was actually biased or prejudiced, but whether "in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." *See Reid,* 92 N.M. at 416, 589 P.2d at 200.

In support of his argument, appellant contends that the trial judge was too personally involved to preside over the contempt hearing. Appellant first cites to two cases in which the same trial judge has previously held appellant in criminal contempt or imposed sanctions pursuant to Rule 11 (SCRA 1986, 1-011 (Cum.Supp. 1989)). *See State v. Cherryhomes,* 114 N.M. at 497, 840 P.2d at 1263; *Cherryhomes v. Vogel,* 111 N.M. 229, 804 P.2d 420 (Ct.App.1990). Appellant next submits that the trial judge held a personal dislike toward appellant. In response, the State contends that there was no showing that the trial judge became so provoked or embroiled in the controversy so as to warrant recusal.

Pursuant to SCRA 1986, Code of Judicial Conduct, Canon 21-400 (Repl.1992), a judge shall recuse himself or herself in any proceeding in which the judge "has a personal bias or prejudice concerning a party." "[W]hether a judge should recuse himself [or herself] if his [or her] impartiality might reasonably be questioned, 'places disqualification within the conscience of the judge and within his [or her] discretion.' " *Klindera v. Worley Mills, Inc.,* 96 N.M. 743, 746, 634 P.2d 1295, 1298 (Ct.App.1981) (quoting *Martinez v. Carmona,* 95 N.M. 545, 550, 624 P.2d 54, 59 (Ct.App.1980)). However, if a judge becomes so embroiled in the controversy that he or she is unable to make a fair and objective decision, the judge must recuse himself or herself. *State v. Stout,* 100 N.M. 472, 672 P.2d 645 (1983).

In this case, the record shows that the trial judge stated that he had no personal animosity toward appellant due to his past dealings with him. The record further indicates that appellant has appeared many times before the trial judge, subsequent to his prior contempt citations, without incident. We believe the record establishes that the trial judge's motivation for holding appellant in contempt was that of preserving order and respect in his courtroom and not that of any personal bias against appellant. We find appellant's arguments that the trial judge was biased based on the trial judge's previous contempt charges and sanctions or dislike toward appellant to be without merit. Bias requiring recusal must arise from a personal, extra-judicial source, not a judicial source. *See State v. Case,* 100 N.M. 714, 676 P.2d 241 (1984); *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 629 P.2d 231 (1980), *cert. denied,* 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981). Accordingly, the trial judge did not abuse his discretion in refusing to recuse himself.

Finally, within his argument that the trial judge should have recused himself, appellant argues that the trial judge "may not proscribe the form or content of individual expression absent incitement to illegal action, nor may it proscribe ideas." Additionally, appellant argues that "in order to grow with dignity or honor the precious right to free and independent expression is absolutely necessary."

In this regard, we interpret appellant's argument to be that the trial court's decision which held him in criminal contempt for failure to comply with its order to follow the decorum of the court interfered with his First Amendment right of freedom of expression. In *State v. Cherryhomes,* this Court affirmed the trial court's decision holding appellant in criminal contempt for failure to comply with the trial court's order to wear a conventional tie when appearing before the judge. In that appeal, as here, appellant attacked the constitutionality of the trial court's ruling based on his First Amendment right of free expression. However, in *State v. Cherryhomes,* this Court refused to address appellant's constitutional argument based on the collateral bar rule. *State v. Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264. Under the collateral bar rule, a court order, issued by a court with subject matter and personal jurisdiction, must be obeyed until it is reversed, amended, or vacated. *United States v. United Mine Workers of America,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884

(1947); *see generally* Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders,* 37 Am.U.L.Rev. 323 (1988). "This is true without regard even for the constitutionality of the Act under which the order is issued." *United Mine Workers,* 330 U.S. at 293, 67 S.Ct. at 696; *see also Walker v. City of Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). Deliberate refusal to obey a court's order without testing its validity through established processes directly affects a court's ability to discharge its duties and responsibilities. *United States v. Dickinson,* 465 F.2d 496 (5th Cir.1972).

In *State v. Cherryhomes,* this Court determined that an order existed which was sufficient to place appellant on notice of what was required of him and thus, the trial court properly exercised its discretion in invoking its inherent power to issue a contempt sanction. *State v. Cherryhomes,* 114 N.M. at 498, 840 P.2d at 1264. This Court further stated that appellant should have sought to vacate the trial court's contempt order or sought appellate review, rather than violate the trial court's order. *Id.* at 499, 840 P.2d at 1265.

Applying the same rationale here, appellant had notice that the trial judge found appellant's dress inappropriate. Additionally, appellant failed to fix his tie when ordered to do so by the trial judge. Appellant willfully violated the court's order without first having challenged its constitutionality through established processes. Accordingly, we refuse to address appellant's constitutional argument because he was required to abide by the trial court's order.

V. CONCLUSION

Based on the foregoing, we affirm appellant's contempt convictions.

IT IS SO ORDERED.

BIVINS and CHAVEZ, JJ., concur.

847 P.2d 319

In the Matter of the ESTATE of Joseph C. ROMERO, Deceased, Gilbert Zamora, Personal Representative,

Joseph C. ROMERO, Jr., and Frank E. Romero, By and Through their Guardian and Next Friend, Linda BUSTILLOS, Petitioners/Appellees,

v.

Frances L. NOTT, Claimant/Appellant.

Nos. 12892, 13024.

Court of Appeals of New Mexico.

Jan. 5, 1993.

Debra J. Moulton, Rodney L. Schlagel, Butt, Thornton & Baehr, P.C., Albuquerque, for claimant-appellant.

William J. Darling, Margaret P. Armijo, William J. Darling & Associates, P.A., Albuquerque, for petitioners-appellees.

William N. Henderson, Albuquerque, for the Estate.

OPINION

BLACK, Judge.

Joseph C. Romero (Decedent) executed a will (the Will) on May 22, 1989 and died on June 28, 1989. He divided his estate between his fiancee, Frances Nott (Nott), and his sons, thirteen-year-old Joseph, Jr., and nine-year-old Frank (Sons). In Paragraph III of the Will, Decedent left the use of his Albuquerque residence to "1) Frances L. Nott so long as she remains unmarried and does not cohabit with an unrelated adult male; and, 2) my sons ... so long as they want to live at the residence, provided their mother does not reside there also."

During a hearing on Sons' motion to name a successor administrator, a hearing of which Nott was not provided any notice and at which she did not appear, the district court ruled that Paragraph III violated public policy and ordered the residence sold and the proceeds distributed under the residuary clause. Nott's arguments can be combined into two basic contentions: (1) she was denied due process when the trial court ruled that Paragraph III violated public policy without allowing her notice or the opportunity to be heard; and (2) the devise to Nott intended by Decedent can be accomplished without violating public policy. As we reverse for an evidentiary hearing to determine Decedent's intent, we need not address the due process issue.

SUMMARY OF THE FACTS.

Although there was no evidentiary hearing, the parties apparently do not dispute that Decedent was engaged to and living with Nott at the time he learned he had terminal cancer. Decedent's older son, Joseph C. Romero, Jr., also lived with Decedent and Nott at the time Decedent executed his will and until shortly before his death. Decedent's younger son, Frank, lived with his mother, Decedent's ex-wife, at all times. Paragraph III of the Will reads:

> I leave the use of my residence at 6323 Locust NE, Albuquerque, New Mexico for: 1) Frances L. Nott so long as she remains unmarried and does not cohabit with an unrelated adult male; and, 2) my sons Joseph C. Romero, Jr. and Frank E. Romero, so long as they want to live at the residence, provided their mother does not reside there also. Frances' living at the residence with either of my sons after they become adults shall not disqualify her from continuing to reside there.
>
> In other words, while legal title to my home will devolve to my Trustee upon my death, beneficial title shall reside in Frances L. Nott and/or Joseph C. Romero, Jr., and/or Frank E. Romero. If Orlinda H. Romero, now known as Linda H.

Bustillos, ever resides in the residence and refuses to leave upon due demand made by the Trustee, the residence shall be sold and the proceeds added to my trust. Likewise, if neither Frances, Joseph nor Frank live in the residence and it is not reasonably probable that Joseph or Frank will move into the residence within three months after the residence is first unoccupied, then beneficial title shall vest in my Trustee, who shall sell the residence and add the proceeds from the sale to the corpus of the trust created herein.

At a hearing on August 16, 1990, Sons' attorney orally argued that the devise contained in Paragraph III was void as against public policy. Nott did not receive notice of the hearing. Nott did not attend the hearing on August 16, nor were her interests represented by an attorney. Neither Sons' original petition, filed November 21, 1989, nor the First Amended Petition raised the issue of the devise violating public policy. At the conclusion of the August 16 hearing, the district court announced that the devise contained in Paragraph III of the Will was against public policy inasmuch as it required that Sons live in the residence without their mother, and the court therefore held the entire devise void. The district court determined that the residence should be appraised and sold, and the proceeds should be placed in the residuary estate, which passed entirely to Sons.

On September 27, 1990, before the district court had entered an order embodying its August 16 ruling, Nott filed a Claim Against the Estate seeking the value of her devise which the trial court had invalidated at the August 16 hearing. The personal representative, Gilbert Zamora, did not object to the Nott claim and affirmatively represented in a signed pleading, "Gilbert Zamora, of his own personal knowledge, knows that Joseph C. Romero [Decedent] intended to benefit Frances L. Nott." Sons, by and through their grandmother, requested the court to disallow the claim against the estate.

The district court held a hearing on Sons' request for an order disallowing Nott's claim against the estate and entered findings and conclusions to the effect that Paragraph III violated public policy. It also held that Nott was not entitled to anything. Two of those findings are the focus of this appeal:

9. The attempted devise to Frances Nott was void as against public policy. It was the apparent intent of the Decedent to give Frances Nott and the Decedent's sons an equal right to occupy and live in the residence. However, it is against public policy to condition the right of the Decedent's minor sons to use the residence on the requirement that they live apart from their mother. It would not be possible to strike the prohibition against the mother living with the Decedent's sons in the residence, since it would not be feasible for both the sons, their mother and Frances Nott to live in the residence together. Accordingly, the only viable alternative is to sell the residence.

10. The devise to Frances Nott can not be accomplished without a violation of public policy and therefore fails and is void from inception.

In Finding 9, the district court found the "attempted devise to Frances Nott was void as against public policy." The basis for the finding that the devise to Nott violates public policy does not appear to turn on the fact that she was given the right to occupy the residence so long as she did not remarry or cohabit, but upon the nature of the right of occupancy given to Decedent's Sons. Decedent's ex-wife, Sons' mother, was precluded from residing in the house and the district court found "it is against public policy to condition the right of the Decedent's minor sons to use the residence on the requirement that they live apart from their mother." Faced with a somewhat similar problem, a Virginia court ordered the testator's widow and deceased son's wife to share the house, without undue obstruction. *White v. White,* 183 Va. 239, 31 S.E.2d 558 (Va.1944). The district court in the present case found that solution "impossible." Rather than postponing Sons' enjoyment until their majority or invalidating only their interest, however,

the district court invalidated the devise to Nott as well.

Subject to certain limitations owners may dispose of their property in such manner as they see fit. *Harris v. Harris,* 83 N.M. 441, 493 P.2d 407 (1972). Related to this is the well-recognized rule of construction that in construing a will the court must attempt to give effect to the testator's intent. *In re Estate of Bowles (Vigil v. Bowles),* 107 N.M. 739, 764 P.2d 510 (Ct.App.1988). There are no New Mexico cases specifically applying these rules in the context of will provisions designed to create, or having the effect of creating, a family separation.

Out-of-state authority is inconsistent regarding whether the testator's intent is the polestar in determining whether a will provision is designed to create a family separation which would violate public policy. *Compare Sisson v. Tenafly Trust Co.,* 133 N.J.Eq. 497, 33 A.2d 298 (1943) (indicating that all the surrounding circumstances should be considered in determining the testator's intent); *Morton's Estate,* 13 Pa.D. & C.2d 148 (1957) (same); *Pattee v. Riggs Nat'l Bank,* 124 F.Supp. 552 (D.D.C. 1954) (same), *aff'd per curiam,* 218 F.2d 867 (D.C.Cir.1955) *with Graves v. First Nat'l Bank,* 138 N.W.2d 584 (N.D.1965) (indicating that the language of the will is all that should be considered). *See also* Olin L. Browder, Jr., *Illegal Conditions and Limitations: Effect of Illegality,* 47 Mich.L.Rev. 759, 766 (1949); J.F. Ghent, Annotation, *Wills: Validity of Condition of Gift Depending on Divorce or Separation,* 14 A.L.R.3d 1219 (1967). We believe that the better rule, and the one more in line with our own New Mexico cases, in which the testator's intent governs, is found in the Restatement (Second) of Property.

The authors of the Restatement state the general rule for "Provisions Detrimentally Affecting Family Relationship" as follows:

> An otherwise effective provision in a donative transfer which is designed to permit the acquisition or retention of an interest in property only in the event of either the continuance of an existing separation or the creation of a future separation of a family relationship, other than that of husband and wife, is invalid where the dominant motive of the transferor was to promote such a separation.

Restatement (Second) of Property § 7.2, at 309 (1983). Under the Restatement approach, then, the key to whether a will provision violates public policy is the testator's intent. Where the intent of a testator is not crystal clear from the will itself, the scheme of distribution, circumstances surrounding the testator, and other existing facts should be a subject of judicial inquiry. *Spencer v. Gutierrez,* 99 N.M. 712, 663 P.2d 371 (Ct.App.), *cert. denied,* 99 N.M. 644, 662 P.2d 645 (1983).

In a situation such as that at bar, where the devise is challenged as one designed to undermine the family unit, the authors of the Restatement have recognized a factual inquiry into the testator's dominant motive is necessary:

> *Dominant motive of the transferor.* Before a finding of invalidity will be made under the rule stated in this section, it must be first determined that the dominant motive of the transferor was to promote a separation of a family relationship. In ascertaining the presence of [sic] absence of this motive, there must be a complete inquiry into all of the facts and circumstances, including even the direct oral statements of the transferor....

Restatement (Second) of Property § 7.2 cmt. e (1983).

In the instant case, Decedent's dominant motive may well have been to provide Nott a place to live so long as she remained unmarried. Indeed, the only reference to Decedent's intent in the record is the pleading executed by the personal representative stating, "Gilbert Zamora, of his own personal knowledge, knows that Joseph C. Romero [Decedent] intended to benefit Frances L. Nott." If this was, in fact, the dominant motive of Decedent, the provisions allowing his sons to live in the residence before reaching majority may have been ancillary and the prohibition against their mother also living in the residence no

more than a recognition of what the trial court termed "almost an impossible situation."

Invalidity should not be inferred where a legitimate purpose may be equally apparent. *Jenkins v. First Nat'l Bank,* 107 F.2d 764 (5th Cir.1939). Without a factual inquiry into Decedent's intent, we are not prepared to determine whether his plan of distribution was designed to further a purpose in violation of public policy.

CONCLUSION.

Based on the present record, we are unable to determine Decedent's dominant motive and we must therefore remand to the district court for a factual inquiry into the motive of Joseph C. Romero in incorporating Paragraph III into his last will and testament. If the district court finds Decedent's primary intent was to benefit Nott, then only that portion of the devise to Sons during their minority would violate public policy and be voidable. If, on the other hand, the district court finds Decedent's primary intent was to separate Sons from their mother and the devise to Nott merely a device to implement this illicit purpose, then all of Paragraph III is violative of public policy and should be stricken. In light of our holding, we need not address Nott's arguments that the district court's invalidation of her devise at the August 16 hearing, of which she received no notice, deprived her of a property right without the due process of law.

This case is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

ALARID, C.J., and PICKARD, J., concur.

847 P.2d 323

Celia TALLEY, Petitioner–Appellee,

v.

Buster A. TALLEY, Respondent–Appellant.

No. 14159.

Court of Appeals of New Mexico.

Jan. 5, 1993.

Mark A. Filosa, Truth or Consequences, for petitioner-appellee.

Lawrence M. Pickett, Pickett & Associates, Las Cruces, for respondent-appellant.

OPINION

MINZNER, Judge.

Husband appeals from a final judgment dividing community and separate property and awarding child support, alimony, and attorney fees. He claims error in: (1) the amount of child support; (2) the amount and length of alimony; (3) the division of the community property; (4) the characterization of property; and (5) the award of attorney fees. Except for Issue 3, this case appeared to be a case in which the court's findings were supported by substantial evidence, its conclusions were supported by the findings, and its discretionary acts were within its authority; in both calendar notices, we have proposed to reverse on Issue 3 and affirm on all others. Neither party has responded to our proposed disposition of Issue 3, and neither party now opposes the proposed disposition of Issue 4. For the reasons stated in the calendar notices, we thus reverse and remand for reconsideration on Issue 3 and affirm on Issue 4, and we do not discuss these issues further. *See State v. Johnson,* 107 N.M. 356, 758 P.2d 306 (Ct.App. 1988). Wife has filed a memorandum in support of our proposed dispositions of Issues 1, 2, and 5, and Husband has filed memoranda in opposition. We discuss these issues in the opinion that follows, and for the reasons stated, we affirm.

Although we are disposing of this case on the summary calendar, we believe that our resolution of the disputed issues may be useful precedent. Issue 1 required that we construe NMSA 1978, Section 40–4–11.1(C)(1) (Cum.Supp.1992), and Issues 1, 2, and 5 all raise questions of how this Court reviews for abuse of discretion. Although these are matters that may recur, we believe that the governing law and its application to the undisputed facts are clear. Therefore, disposition on the summary calendar is appropriate. *See Garrison v. Safeway Stores,* 102 N.M. 179, 692 P.2d 1328 (Ct.App.), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1984).

BACKGROUND.

We take the facts from the docketing statement, memoranda filed by the parties, and the record proper, which includes the trial court's findings and conclusions. *See State v. Sisneros,* 98 N.M. 201, 647 P.2d 403 (1982); *State v. Calanche,* 91 N.M. 390, 574 P.2d 1018 (Ct.App.1978). Husband and Wife were divorced on May 19, 1992, but the trial court reserved jurisdiction over child support, alimony, and property division issues. By stipulation, the parties agreed to joint legal custody of their minor daughter and that Wife would have primary physical custody. Husband appeals from the judgment entered July 1, 1992, disposing of the matters reserved when the parties were divorced in May.

Husband is fifty-nine, and Wife is forty-nine. They were married for over seventeen years. Husband has been on "complete and full" disability since 1976 for health reasons, and he is unemployable. According to the docketing statement, he receives a monthly disability benefit from the Social Security Administration (SSA) in the amount of $733 and a monthly disability benefit from the Veteran's Administration in the amount of $151. He also receives income from real estate contracts that are his separate property. Wife has not worked outside the home for twenty years, and she is employable only at minimum wage. She has no separate property. Their daughter is sixteen. She receives monthly child support checks from the SSA in the amount of $395, which will continue until she reaches age eighteen.

The trial court awarded $200 in monthly child support until the parties' daughter reaches age eighteen and monthly alimony of $400 for a period of five years and thereafter $200 monthly for the duration of Wife's life or until she remarries. The trial

court judge set aside property in the approximate value of $134,700 as community; he awarded $87,000 to Wife and $47,000 to Husband. The court found that Wife could not afford her attorney fees and recognized economic disparity between her resources and those of Husband.

On appeal, Husband contends that the trial court erred, because in view of his age, his total disability, Wife's age, and her ability to work, the court set child support too high, set alimony for too long a period and at too high a level, and should not have awarded Wife attorney fees. We believe this case requires us to construe the legislature's intent in enacting Section 40–4–11.1(C), as well as to clarify the scope of our appellate review in like cases.

ISSUE 1—CHILD SUPPORT.

Our second calendar notice proposed to affirm on the basis that Husband's income from real estate contracts and potential income from idle assets were sufficient to justify an obligation of $200 monthly. We based that proposed disposition on our construction of Section 40–4–11.1(C), which defines "income" for purposes of determining levels of child support. We now hold that because "gross income" includes "income from any source" and can include interest or trust income, *see* § 40–4–11.1(C)(2), the trial court was entitled to consider potential as well as actual, present income. Thus, we hold the trial court was entitled to consider assets that could produce such income, in addition to wages or salaries.

In addition to the wording of the statute, we rely on its purposes. We think that our reading of the statute establishing child support guidelines is consistent with the express stated purposes of the legislature in enacting it. *See* NMSA 1978, § 40–4–11.1(B) (Repl.Pamp.1989). The legislature noted that it intended to establish an adequate standard of support, subject to parental ability to pay, as well as to make awards more equitable by ensuring more consistent treatment of persons in similar circumstances. We believe that our construction of the statute advances both purposes.

In his memorandum in response to the second calendar notice, Husband does not dispute the propriety of including idle assets as potential income. He does, however, argue that because his daughter receives SSA benefits in her own right, the trial court's decision represents an abuse of discretion in the circumstances of this case. He notes that two of his real estate contracts are due to expire within a year, and that thereafter the trial court's order requires him to liquidate holdings to pay child support.

Even if we aggregate the SSA benefits and Wife's income, we are not persuaded that the trial court erred in its award of child support. Wife's income of $740 plus the daughter's $395 in SSA benefits equals $1,135. Husband's income is $1,970. Together, that equals $3,105. According to the guidelines, the basic support level is $451 a month. Husband's percentage share of that is 63.4%, or $285.93 monthly. We note that the SSA benefits the child receives will end when she turns eighteen, and that both parties agree that the amount due under the guidelines exceeds the amount awarded. We conclude that the trial court's award reflects a decision balancing the particular circumstances in this case.

The question Husband raises is whether the child support award should have been even lower. This is a question that the legislature has entrusted to the trial court judge, based on his or her considered opinion of the particular circumstances brought to that judge's attention. In view of the legislature's intent to make awards "more equitable by ensuring more consistent treatment of persons in similar circumstances," § 40–4–11.1(B)(2), appeals of awards at the level set forth in the guidelines should be rare. By the same token, an appeal by one against whom an award at a level lower than that set forth in the guidelines has been made should also be rare. *Cf. State v. Wright,* 84 N.M. 3, 498 P.2d 695 (Ct.App.1972) (error must be prejudicial to be reversible). There is no basis in this case to conclude that the trial court

erred in resolving the question of whether the award should be lower than $200.

ISSUES 2 AND 3—ALIMONY AND ATTORNEY FEES.

We will not disturb a trial court's determination of the level of alimony to be paid or an award of attorney fees in a divorce action absent an abuse of discretion. *See Hertz v. Hertz,* 99 N.M. 320, 657 P.2d 1169 (1983). When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion. *State v. Ferguson,* 111 N.M. 191, 803 P.2d 676 (Ct.App.), *cert. denied,* 111 N.M. 144, 802 P.2d 1290 (1990). In this case, the length of the marriage, Husband's substantial separate assets, and Wife's lack of out-of-home working experience are factors that support an award of alimony.

Husband contends that the level of monthly support "seems excessive under the circumstances of this case." He acknowledges that "to require [him] to pay [her] rehabilitative alimony for a short period of time [arguably] has some merit because of the duration of the marriage and [her] lack of employment during that time." However, he contends that requiring alimony indefinitely was an abuse of discretion. He notes that Wife is currently employed and that he is unemployable. He also notes that he expects a shortfall within a year after two real estate contracts are paid up, and thereafter his income will not support his normal monthly expenses.

Wife's current employment is something the trial court considered as a potential source of income at the time of setting the alimony amount. It appears that the trial court balanced this factor, Husband's age and disability, and other factors in arriving at the alimony figure. The court found that Wife's current needs exceed her current ability to support herself. Husband's age and disability are factors the trial court was required to consider in making the alimony award; so also is Wife's minimum wage income. The record indicates that the trial court considered the relevant circumstances, applied the correct law, and reached a decision based on the law and the facts. *See generally Foutz v. Foutz,* 110 N.M. 642, 798 P.2d 592 (Ct.App.1990) (discussing factors to be considered in awarding alimony).

Alimony is a continuation of the right of support. *Ellsworth v. Ellsworth,* 97 N.M. 133, 637 P.2d 564 (1981). It is "based on need, ability to self-support, and the equities of the particular situation." *Id.* at 135, 637 P.2d at 566. The trial court found that since the parties separated, Wife "has undergone two major surgeries ... and has not been able to physically work until on or about May 13, 1992." In the division of community property, Wife received mostly nonliquid assets that could reasonably be seen as necessities of the custodial parent. Aside from a modest bank account, she received a car, the house the parties had owned jointly, and furniture.

The record indicates that this is a case in which neither party is really able to afford to be divorced. Neither is going to be well off after the divorce, and it appears that neither actually has enough to meet anticipated monthly expenses. None of these considerations or any of them in combination, as a matter of law, support a conclusion that the trial court judge abused his discretion in setting the level of alimony or in making the award indefinite. There is evidence that Husband, unlike Wife, has substantial separate property, and the trial court could have determined that Wife's needs were greater than Husband's, and that those needs could not be met by rehabilitative alimony. Therefore, there is no basis to conclude that the trial court abused its discretion in awarding alimony.

Our analysis of the attorney fees issue is similar. An award of attorney fees is appropriate when a party does not have the financial resources to proceed in a divorce action. The trial court found that Wife could not afford to pay her own fees. Husband notes that if the court's support and alimony awards are affirmed, Wife's income will exceed his. However, the award of attorney fees in divorce cases recognizes the ability to proceed with the divorce, and the evidence that supported

the trial court's decision to award alimony is substantial evidence to support the court's finding that Wife lacked the financial resources to proceed with the divorce at the time of the separation. Under these circumstances, the trial court's decision to award attorney fees was within its discretion.

CONCLUSION.

We reverse on Issue 3 and remand to the trial court to reconsider the property division consistent with our proposed holding in the first calendar notice, which was that the difference in the community property awards was more than a lack of "mathematical exactitude." *Foutz v. Foutz,* 110 N.M. at 644, 798 P.2d at 594. Otherwise, we affirm the judgment. No costs or attorney fees are awarded.

IT IS SO ORDERED.

BLACK and FLORES, JJ., concur.

847 P.2d 327

STATE of New Mexico, Plaintiff–Appellee,

v.

Rito Antonio ARIAS, Defendant–Appellant.

No. 13484.

Court of Appeals of New Mexico.

Jan. 12, 1993.

Tom Udall, Atty. Gen., Max Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Vince D'Angelo, Albuquerque, for defendant-appellant.

OPINION

ALARID, Chief Judge.

Defendant appeals from the judgment and order convicting him of voluntary manslaughter, criminal trespass, shooting at an inhabited dwelling, and tampering with evidence. Specifically, Defendant appeals only the voluntary manslaughter conviction. The sole issue is whether the trial court erred in not instructing the jury on involuntary manslaughter under Defendant's "imperfect self-defense" theory. We reverse and remand for a new trial on the voluntary manslaughter conviction.

FACTS

Defendant was convicted of voluntary manslaughter for the death of Mike McKee (McKee). Defendant and a friend, Vincent Vasquez "German" (German), dropped two girlfriends at their home and were waiting for them in their automobile. There was a party in progress at the house next door and two of the party guests, David Wages and Eddie Franco, stepped outside. Defendant testified that the two men approached their automobile and were saying something to German. Apparently, German and Franco knew one another and exchanged hostile words. Defendant exited the automobile, words were exchanged between German and Wages, and German punched Wages in the face. Wages and Franco ran back into the house and sought to arm themselves. Meanwhile, German retrieved a rifle from the automobile he was in. By that time, the victim, McKee, who was unarmed, exited the party to see what was occurring. McKee approached German, who was carrying the rifle, and asked him why he had hit Wages. German pointed the rifle between McKee's eyes and McKee shoved the weapon aside and pushed German. German thrust the rifle into Defendant's hands and began to fight with McKee. At that point, Franco and another party guest, Mendoza exited the house armed with boards.

The testimony given concerning the circumstances of the shooting was conflicting. Franco and Mendoza testified that Defendant fired the first shot towards them as they approached German and McKee. Defendant testified that he fired the first shot toward German and McKee as they were fighting. Defendant was holding the rifle across his body, believed Mendoza and Franco were going to attack, and pulled the trigger. Following that first shot, McKee ran towards the entrance of the house where the party was being held. Mendoza testified that he saw Defendant hold the rifle in one hand and shoot the second shot towards McKee as he was running back to the house. Defendant testified that he fired the second shot towards Franco and Mendoza, who were armed with boards and

approaching him. He further testified that he never intended to shoot anyone, that the bullets struck McKee accidentally, and that he did not know that anyone had in fact been shot. Defendant submitted a jury instruction on involuntary manslaughter patterned after SCRA 1986, 14–231 and the trial court rejected it. Defendant was convicted of voluntary manslaughter and this appeal followed.

DISCUSSION

Defendant argues that he was entitled to a jury instruction on involuntary manslaughter based on his allegation that he was engaged in self-defense at the time the killing occurred. Specifically, Defendant contends that he was engaged in the lawful act of self-defense but acted negligently in so doing. The State argues that Defendant was not entitled to the self-defense instruction the jury received, much less an instruction on involuntary manslaughter. "Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to [a] felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection." NMSA 1978, § 30–2–3(B) (Repl. Pamp.1984). The State's argument is premised on its claim that Defendant was the aggressor and, therefore, could not claim he acted in self-defense.

We first deal with the State's argument that Defendant was not entitled to a jury instruction on self-defense. The State argues that since the evidence revealed that Defendant and German were the aggressors in the incident which led to the killing, Defendant was not entitled to avail himself of the theory of self-defense. In order to warrant a self-defense instruction, the evidence must be sufficient to raise a reasonable doubt in the minds of the fact finder concerning whether a defendant accused of homicide acted in self-defense. *State v. Martinez,* 95 N.M. 421, 622 P.2d 1041 (1981). A self-defense instruction is required in a homicide prosecution whenever a defendant presents evidence which is sufficient to allow reasonable minds to differ with respect to all the elements of the defense. *State v. Branchal,* 101 N.M. 498, 684 P.2d 1163 (Ct.App.1984). A valid self-defense claim consists of evidence that Defendant was put in fear by the apparent danger of immediate harm, that the killing resulted from that fear, and that Defendant acted as a reasonable person would act under the circumstances. *Id.*

Defendant testified that he was in fear of great bodily harm when he saw the men exit the party after they had armed themselves with boards. He further testified that he fired the rifle towards the two armed men as they approached him because he believed they were going to attack him. Defendant also testified that after that shot was fired, one of the armed party guests turned around but the other continued his approach and defendant yelled for him to stop and shot in the guest's direction. The evidence revealed that Defendant was faced with a situation in which his companion arguably provoked an encounter into which Defendant was drawn. While it is true that Wages and Franco initially retreated into the residence, they quickly returned and were armed with boards. Defendant testified that he had no idea how many other party guests would be coming to the aid of those already embroiled in the fight. Defendant testified that he felt outnumbered by others who were exiting from the house and that he fired the rifle to protect himself, believing that Wages and Franco were going to attack. The trial court found that this testimony was sufficient to raise a reasonable doubt in the mind of the fact finder concerning whether the elements of self-defense were present. *See id.* We agree.

The state's argument that the trial court should have refused the jury instruction on self-defense, based on the aggressor status of defendant and German, ignores the fact that the supreme court has adopted SCRA 1986, 14–5191. This jury instruction deals with a defendant's limitations on claiming self-defense and pertains to situations in which the defendant is the aggressor. The record reveals that in addition to self-defense and defense of another instructions,

the jury was given the above self-defense limitation instruction. *See generally Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) (supreme court precedent controls); *State v. Jennings,* 102 N.M. 89, 691 P.2d 882 (Ct.App.1984) (court of appeals lacks authority to set aside approved jury instructions). Therefore, we find the State's argument that Defendant was not entitled to a self-defense instruction, as well as the authority it cites for the argument, unpersuasive. Rather, since evidence was presented to create a factual question concerning whether Defendant acted in self-defense, the jury was properly instructed on that defense. *See State v. Ho'o,* 99 N.M. 140, 654 P.2d 1040 (Ct.App. 1982) (defendant is entitled to a jury instruction on the theory of his case if the evidence exists to support it). *See also Martinez.*

We next deal with the question of whether the trial court erred in not instructing the jury on involuntary manslaughter. Defendant argues that he was entitled to the instruction based on his theory that he lawfully defended himself but in a negligent manner. In order for there to be involuntary manslaughter, a killing by a lawful act requires consideration of the manner in which the act was performed. *See State v. Grubbs,* 85 N.M. 365, 512 P.2d 693 (Ct.App.1973). Therefore, in line with the manner in which our involuntary manslaughter statute, Section 30–2–3(B), is drafted, the jury is required to consider whether the lawful act of self-defense was performed in an unlawful manner or without due caution and circumspection. *Id.* at 366–67, 512 P.2d at 694–95. The statutory phrase "without due caution and circumspection" involves the concept of "criminal negligence." *Id.* at 367, 512 P.2d at 695. Criminal negligence includes conduct which is reckless, wanton, or willful. *Id.*

As we noted earlier, a defendant is entitled to a jury instruction on the theory of his case as long as the evidence exists to support it. *See Ho'o.* In placing this case on the general calendar, we specifically instructed the parties to brief the effect, if any, of the California cases of *People v. Glenn,* 229 Cal.App.3d 1461, 280 Cal.Rptr. 609 (1991), and *People v. Welch,* 137 Cal. App.3d 834, 187 Cal.Rptr. 511 (1982). Those two cases basically dealt with issues similar to the one raised by Defendant concerning the trial court's refusal to give an involuntary manslaughter jury instruction based on the Defendant's theory of imperfect self-defense. The courts in *Glenn* and *Welch* held that such an omission constituted prejudicial error, where there was evidence to support such an instruction, and reversed and remanded for new trials.

In *Glenn,* the defendant and the victim began arguing in a restaurant over money left on the counter by the victim. The defendant testified that after a verbal altercation, he turned and walked to the door and heard the victim coming toward him from behind and believed he was about to be attacked. The defendant offered conflicting versions of how he stabbed the victim. Under one version, he testified he was carrying a knife for protection and turned and stabbed the victim, that he intended to injure him, but not to kill him. The trial court refused to instruct the jury on involuntary manslaughter, based on its determination that there was a lack of sufficient evidence to support such theory. The jury convicted the defendant of voluntary manslaughter. On appeal, the court in *Glenn* reversed the defendant's conviction and held:

> A person who kills another in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury may be guilty of voluntary or involuntary manslaughter depending on the [jury's determination of whether defendant had] an intent to kill.

Id., 280 Cal.Rptr. at 612.

The court further noted that although the evidence, including the defendant's own testimony was conflicting as to this issue, the court must instruct the jury on every theory of the case which is supported by substantial evidence.

Similarly, in *Welch,* the defendant and the victim became embroiled in an argu-

ment in a bar and the victim told the defendant that he was going to "kick his ass." The defendant testified that he was taking medication, Coumadin, which prevents his blood from clotting, and feared that he would suffer severe injury or death if he was injured by the victim. The defendant stated that he pulled out a gun and told the victim to "stop" and "stay back" but the victim kept coming. The defendant also testified that when the victim refused to stop, he did not point the gun, but just raised it and fired, without intent to kill. He stated that his sole intention was to prevent the attack.

The *Welch* Court held that there was evidence in the record upon which a jury could conclude that the defendant did not intend to kill the victim when he fired the weapon. The Court noted that under such facts, a jury could return a verdict of involuntary manslaughter if it found "that the nature of the attack did not justify the resort to deadly force in self-defense or that the force used in self-defense exceeded that which was reasonably necessary to repel the attack." *Id.*, 187 Cal.Rptr. at 514.

We find the rationale in *Glenn* and *Welch* persuasive in resolving this appeal for a number of reasons. First, California and New Mexico have virtually identical involuntary manslaughter statutes. *See* Cal.Penal Code § 192(b) (West 1988); § 30–2–3(B). Specifically, each statute provides for lawful act or criminal negligence manslaughter. In situations where this "imperfect" right of self-defense is recognized, it is generally the case that, where the facts would entitle the defendant to a self-defense instruction, an instruction of the imperfect self-defense variety should also be given. *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 7.11 (1986). Second, California, like New Mexico, adheres to the legal proposition that a defendant is entitled to a jury instruction on his theory of the case as long as there is sufficient evidence to support it. *See, e.g., Ho'o; Welch.* Third, courts in other jurisdictions with involuntary manslaughter statutes similar to New Mexico's have held that where the facts support it, an instruction on imperfect self-defense should be given. *See, e.g., State v. Atwood,* 105 Idaho 315, 669 P.2d 204 (1983); *State v. Scobee,* 242 Kan. 421, 748 P.2d 862 (1988). Furthermore, in deciding whether an instruction is proper, the trial court must not weigh the evidence but simply must determine whether such evidence exists. *State v. Privett,* 104 N.M. 79, 717 P.2d 55 (1986).

Like the *Glenn* and *Welch* cases, we believe the facts in this case are such that an instruction on involuntary manslaughter should have been given based on Defendant's theory of imperfect self-defense. As noted, two bullets hit the victim. We do not know which was the fatal shot. If it was the second shot, while the victim was retreating, we would be inclined to agree with the State that an instruction on self-defense should not have been given. If it was the first shot, then at that point, Defendant could be viewed as being in a position where his safety or the safety of German was threatened. Franco and Mendoza were approaching Defendant with boards. If, in an attempt to protect himself or ward off the attackers, Defendant inadvertently shot the victim, then his actions could be viewed as being the commission of a lawful act [self-defense] committed in an unlawful manner or without due caution and circumspection. *See* § 30–2–3(B); *see generally State v. Gregory,* 218 Kan. 180, 542 P.2d 1051 (1975) (use of excessive force may be found to be "unlawful" manner of committing the "lawful act" of self-defense, and thereby supply the element of involuntary manslaughter). Based on the above, the instruction on involuntary manslaughter based on negligent self-defense should have been given. *See Ho'o; see also Glenn; Welch.*

The State argues that since the jury convicted Defendant of second degree murder, despite the self-defense instructions which were given, it did not believe Defendant's claim of self-defense. We understand this portion of the State's argument to assert that the trial court's failure to instruct on involuntary manslaughter under these circumstances constituted harmless error. We disagree. It is well-established that the failure to give such an

instruction which is supported by the evidence cannot be deemed to be harmless error. *See State v. Benavidez,* 94 N.M. 706, 616 P.2d 419 (1980). Furthermore, the jury, as instructed in this case, only had the options of either accepting or rejecting Defendant's theory on self-defense and, therefore, either acquitting or finding him guilty. In contrast, had the jury been properly instructed on Defendant's theory of "imperfect" self-defense in the context of involuntary manslaughter, it would have had the option of believing Defendant's self-defense theory but concluding that he acted unlawfully in defending himself and, therefore, convicting him for the homicide. Based on the above, a new trial is warranted.

CONCLUSION

Based on the foregoing, Defendant's voluntary manslaughter conviction is reversed and this case remanded for a new trial on that count.

We note that during the pendency of this appeal counsel for Defendant died. On remand we direct the district court to take such steps as are necessary to insure that the case proceeds with promptness and dispatch. *See* SCRA 1986, 12–302(D) (Repl.1992).

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

847 P.2d 744

STATE of New Mexico, Petitioner,

v.

Jay L. CONN, Respondent.

No. 20644.

Supreme Court of New Mexico.

Jan. 7, 1993.

Tom Udall, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for petitioner.

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

FROST, Justice.

We granted the State's writ of certiorari to review the Court of Appeals decision overturning the conviction of the defendant Jay L. Conn for criminal sexual contact with a minor in violation of NMSA 1978, Section 30-9-13(A)(1) (Repl.Pamp.1984). For the reasons stated below, we quash the writ of certiorari as improvidently granted.

FACTS

A complete recitation of the facts is found in the Court of Appeals opinion, and we will not repeat it here in its entirety. *See State v. Conn,* 115 N.M. 101, 847 P.2d 746 (App.1992). The Court of Appeals reversed Conn's conviction, holding that under SCRA 1986, 11-609(A)(1), the trial court abused its discretion in admitting evidence of Conn's prior conviction of assault. The Court of Appeals held that the timing of the introduction of the impeachment evidence, combined with the specific circumstances which occurred during trial, was prejudicial and that such prejudice outweighed any probative value of the impeachment evidence. *Id.* at 106, 847 P.2d at 751.

The Court of Appeals noted that the trial judge initially determined that the evidence of the prior conviction was inadmissible as unduly prejudicial. The trial court's reluctance to admit that evidence seemed to be primarily based upon the absence of documentary proof of the conviction. Once the prosecution obtained such documentation, however, the trial judge reversed himself and allowed the impeachment. Faced with the prospect of having the prosecution cross-examine the defendant at the end of the trial, defense counsel asked Conn about the prior conviction under objection, and Conn admitted that he had pleaded guilty to the charge. The impeachment evidence literally was the last evidence that the jury heard before it retired for deliberation. *Id.* at 104, 847 P.2d at 749.

The Court of Appeals correctly stated that Rule 11–609(A)(1) allows evidence of prior convictions not involving dishonesty which were committed less than ten years prior to trial to be admitted if the district court determines that the probative value of such evidence outweighs its potentially prejudicial effect. *Id.* at 104, 847 P.2d at 749. The Court of Appeals believed, however, that this last minute effort by the prosecution had a significant impact upon the jury because the Court analyzed the case as having boiled down to a swearing match between the victim and Conn, making his credibility the central issue. Because it believed that the probative value of the prior conviction was questionable on the basis of remoteness and that it lacked direct evidence of dishonesty, the Court of Appeals held that the admission of the prior conviction was reversible error. *Id.* at 106, 847 P.2d at 751.

The State argues that the Court of Appeals opinion conflicts with opinions of this Court and with its own opinions because the opinion essentially safeguards a defendant from legitimate impeachment evidence. In addition, the State claims that the Court of Appeals violated the abuse of discretion standard for reviewing decisions of a district court.

Conn argues that the Court of Appeals properly overruled the trial court and correctly found that it abused its discretion in allowing the admission of evidence of the prior conviction. Conn claims that the Court of Appeals applied the unique facts of his case to Rule 11–609 and correctly determined that the prejudice to him outweighed any possible probative value of the evidence. Thus, Conn asserts that the Court of Appeals opinion is consistent with prior law.

DISCUSSION

The sole issue before this Court is whether the Court of Appeals erred in determining that the trial court abused its discretion in admitting evidence of the prior conviction. We do not believe that the issue in this case is an appropriate one for exercise of our jurisdiction by writ of certiorari. Our jurisdiction in certiorari cases does not encompass weighing or reviewing the resolution of factual issues by the Court of Appeals. Our jurisdiction is as follows:

> B. In addition to its original appellate jurisdiction, the supreme court has jurisdiction to review by writ of certiorari to the court of appeals any civil or criminal matter in which the decision of the court of appeals:
>
> (1) is in conflict with a decision of the supreme court;
>
> (2) is in conflict with a decision of the court of appeals;
>
> (3) involves a significant question of law under the constitution of New Mexico or the United States; or
>
> (4) involves an issue of substantial public interest that should be determined by the supreme court.

NMSA 1978, § 34–5–14(B) (Repl.Pamp.1990).

Rule 11–609

The Court of Appeals decision here neither conflicts with earlier decisions of that Court or with any of our decisions as the State suggests. For example, in *State v. Cawley,* 110 N.M. 705, 799 P.2d 574 (1990), the State caught the defendant in a lie when he testified, and we held that the trial court properly allowed for his impeachment with his prior conviction. *Id.* at 711, 799 P.2d at 580. Here, under the threat of cross-examination regarding his prior conviction, Conn admitted to his prior conviction at a time during the trial when given the unusual circumstances of this case, the Court of Appeals believed the jury may have accorded too much weight to such evidence. *Conn,* 115 N.M. at 106, 847 P.2d at 751.

In addition, the Court of Appeals here did not misstate or misapply current law. In *State v. Trejo,* 113 N.M. 342, 825 P.2d 1252 (Ct.App.1991), *cert. denied,* 113 N.M. 524, 828 P.2d 957 (1992), the Court of Appeals reasoned that an act occurring several years before trial and followed by years of lawful conduct is less probative because of the remoteness of the crime. *Id.* 113 N.M. at 346, 825 P.2d at 1256. Conn's

conviction for assault was four months shy of being automatically inadmissible under the ten-year rule. *See* SCRA 1986, 11–609(B) (Cum.Supp.1992). In addition, the *Trejo* court stated that a conviction for a crime of violence has less bearing upon the honesty of a witness than does a conviction of a crime involving fraud or deceit. *Trejo,* 113 N.M. at 346, 825 P.2d at 1256. We cannot say that the Court of Appeals erred in weighing these considerations against allowing the jury to consider all legitimate evidence bearing upon the credibility of Conn, even when the trial boiled down to a swearing match between the victim and the defendant.

Moreover, the question in this case does not involve a significant question of constitutional law or of substantial public interest. *See Deats v. State,* 80 N.M. 77, 80, 451 P.2d 981, 984 (1969) (finding no issue of substantial public interest). Rather, it is a question of fact regarding the district court's exercise of its discretion under Rule 11–609, and it is not within the purview of our jurisdiction on certiorari to resolve mere factual conflicts between the district court of this State and the Court of Appeals.

Abuse of Discretion

We wish to emphasize, however, that the standard of review for a trial court's application of Rule 11–609 is abuse of discretion. An abuse of discretion in a case such as this can be found only when the trial judge's action was obviously erroneous, arbitrary, or unwarranted. *State v. Williams,* 76 N.M. 578, 582, 417 P.2d 62, 65 (1966); *see also State v. Lucero,* 98 N.M. 311, 314, 648 P.2d 350, 353 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982) (defining the abuse of discretion standard as being "clearly against the logic and effect of the facts and circumstances before the court"). An appellate court should be wary of substituting its judgment for that of the trial court. *See Trejo,* 113 N.M. at 347, 825 P.2d at 1257.

CONCLUSION

The issue before us is whether the admission of Conn's prior conviction is more prejudicial than probative under Rule 11–609. The difference of opinion between the district court and the Court of Appeals on that issue is not a proper consideration for this Court by writ of certiorari when none of the conditions in Section 34–5–14(B) are present. Accordingly, the writ of certiorari that we granted is hereby quashed. The opinion of the Court of Appeals in this matter shall be published.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

847 P.2d 746

STATE of New Mexico, Plaintiff–Appellee,

v.

Jay L. CONN, Defendant–Appellant.

No. 12047.

Court of Appeals of New Mexico.

May 4, 1992.

Certiorari Quashed Jan. 7, 1993.

Tom Udall, Atty. Gen., Margaret McLean, Ass't Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals his convictions for two counts of criminal sexual contact of a minor under thirteen years of age in viola-

tion of NMSA 1978, Section 30-9-13(A)(1) (Repl.Pamp.1984). Defendant argues on appeal that the trial court erred in (1) failing to permit defendant to voir dire the state's expert regarding the acceptability in the scientific community of her method of evaluation; (2) admitting evidence of defendant's prior conviction for aggravated assault; (3) admitting evidence of criminal sexual penetration; and (4) denying defendant's motion for a new trial. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Aragon,* 109 N.M. 632, 788 P.2d 932 (Ct. App.1990). Defendant also filed a motion to amend the docketing statement to include three additional issues: the trial court erred in allowing the state's expert witness on child abuse to testify that the victim was credible; ineffective assistance of counsel; and cumulative error.

In addition to the other issues raised by defendant, the convictions raised the question of whether the trial court erred in not instructing the jury on the element of unlawfulness of defendant's conduct, based on the panel's interpretation of our supreme court's holding in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991). We thus filed a memorandum opinion on August 22, 1991, reversing defendant's conviction based on this issue. Our supreme court granted certiorari on October 21, 1991 (Cause No. 20,118). It subsequently quashed the writ on January 10, 1992, and remanded the case to this court to consider the four issues raised by defendant, in light of its decision in *State v. Orosco,* 113 N.M. 780, 833 P.2d 1146 (1992). Having now reconsidered this appeal, we reverse on defendant's original issue two and hold that the trial court abused its discretion in admitting evidence of defendant's prior conviction. We therefore remand for a new trial. Because of our disposition, we need not address defendant's motion to amend and other issues raised in this appeal.

BACKGROUND

The victim, who was ten years old at the time of the alleged incidents, lived in a trailer with her mother, sister, and defendant. At trial, she stated that defendant would awaken her regularly and take her to the living room, where he would remove her garments and "put his penis in [her] vagina." She testified in some detail regarding what transpired in the course of the sexual contact. The victim did not disclose this alleged conduct to anyone until several months later, after she had been repeatedly questioned by her mother, who had observed defendant trying to kiss the victim. The victim's mother and sister testified that they neither noticed nor heard anything unusual during the time that the sexual assaults were alleged to have occurred.

Defendant's defense theory was that the victim had fabricated her story and that her mother's family had put the idea in her head and had told her to lie. There was no medical or physical evidence to support the testimony that the victim had ever been penetrated. However, Section 30-9-13(A)(1), under which defendant was convicted, does not require that penetration occur.

Defendant was convicted on the basis of the victim's testimony and that of the state's expert witness on child abuse, who testified that the victim's responses during psychological examinations were consistent with those of a victim of sexual abuse. *See State v. Newman,* 109 N.M. 263, 784 P.2d 1006 (Ct.App.1989) (therapist allowed to testify that victim's behavior was consistent with that of a sexually abused child).

DISCUSSION

Defendant specifically contends on appeal that admission of his prior conviction was error, that the timing of its introduction had a prejudicial and misleading impact on the jury, and that the prejudice resulting from admission of the evidence outweighed its probative value.

The trial scenario leading to admission of the prior conviction was as follows. During a pause in the presentation of defendant's case, at a bench conference, defendant's trial counsel argued that the prosecutor was required to present a judgment and sentence relating to defendant's prior conviction before defendant could be asked about the matter. At that time, the trial

court expressly observed that the inquiry would be improper for two reasons: (1) the probative value of the admission of a prior conviction for assault in this present case for child sexual abuse would be outweighed by its prejudice; and (2) assuming defendant denied the prior conviction, in the absence of the required documentary evidence, the prosecutor would not have any proof that the conviction had occurred. *See* SCRA 1986, 11–609(A)(1).

Later in the trial, the issue arose once again in the following manner. After conducting redirect examination of defendant, defendant's trial counsel stated that the defense rested. After the trial court had instructed defendant to step down, the prosecutor said that he might ask defendant some additional questions on recross examination. He then requested that the jury be excused. Out of the jury's presence, the prosecutor stated that he had obtained a certified copy of the judgment and sentence relating to defendant's prior conviction. Defendant's trial counsel objected on two grounds: (1) the state could not open a new line of questioning after the defense had rested; and (2) the prosecutor did not have the evidence in his possession until after the defendant had left the stand. The prosecutor's response was two-fold: (1) the issue of defendant's credibility was not a new area but was always at issue when a witness testified; and (2) he had not stated that he had completed his cross-examination of defendant.

The record reflects that the trial court's initial response to this dialogue was to state that the evidence could only be admitted as rebuttal testimony and, repeating its earlier statement, that the resulting prejudice outweighed the evidence's probative value. The trial court then commented that it had excused defendant after a reasonable time, that it seemed as if the prosecutor had trapped defendant, but that it would nevertheless allow the prosecutor's inquiry in the jury's presence. Under objection, defendant's trial counsel asked defendant about the prior conviction, presumably to minimize any possible prejudice.

Rule 11–609(A)(1) provides that evidence of convictions for crimes that do not involve dishonesty and that are less than ten years old may be admitted if the trial court determines that the probative value of the evidence outweighs its prejudicial effect. On two separate occasions during the course of the trial in this appeal, the trial court stated its belief that the evidence was not admissible because its prejudicial effect outweighed any probative value. The trial court's first comment may have been premised on the absence of documents to prove the prior conviction. This premise, however, would have no bearing on the trial court's clear comments of prejudice just before its second ruling, when the prosecutor had stated he had obtained a certified copy of the judgment and sentence. Without considering any argument related to this question or inviting additional comment, the trial court apparently reversed itself and permitted the inquiry.

■ A preliminary question arises whether defendant preserved this issue for appellate review, because the record does not reflect that defendant's trial counsel alerted the trial court to the requisite balancing between prejudicial effect and probative value. We hold, however, that defendant was not required to object on the specific grounds that the trial court had not made the requisite balancing. We do so because the trial court's previous declaration clearly indicated it was aware that Rule 11–609(A)(1) required such a balancing. *See* SCRA 1986, 11–103(A)(1) (specific ground of objection not required if it was apparent from the context); SCRA 1986, 12–216 (it must appear that a ruling or decision was fairly invoked).

Defendant admitted that he had pled guilty to a charge of assault in October 1979. Although it may appear that there is no connection between defendant's prior conviction for assault and the credibility of his testimony to the effect that he denied the victim's allegations, our supreme court has apparently decided otherwise in adopting Rule 11–609(A)(1). *See State v. Lucero*, 98 N.M. 311, 648 P.2d 350 (Ct.App.1982) (felony convictions admissible regardless of

whether they involved dishonesty or false statements).

The specific question before us on appeal is whether the trial court abused its discretion in admitting evidence of the prior conviction. *State v. Hall,* 107 N.M. 17, 751 P.2d 701 (Ct.App.1987). Rule 11–609(A)(1) requires the trial court to determine if the probative value of the evidence outweighs its prejudicial effect to the defendant. *See State v. Lucero.*

On the basis of the record before us, it is not clear that the trial court exercised its discretion to perform the required balancing. Although the statements by the court to the effect that the prejudicial effect of the evidence outweighed its probative value indicate that it was aware of the need to perform the balancing, its abrupt reversal indicates that it may not have properly reweighed probative value versus prejudicial effect. Failure to exercise its discretion would be reversible error. *State v. Coca,* 80 N.M. 95, 451 P.2d 999 (Ct.App.1969); *cf. Ranch World of N.M., Inc. v. Berry Land & Cattle Co.,* 110 N.M. 402, 796 P.2d 1098 (1990) (in absence of finding to justify denial of prejudgment interest, denial was abuse of discretion). On the other hand, if the trial court did in fact exercise its discretion, its failure to articulate its exercise of discretion on the record is not necessarily reversible error. *State v. Trejo,* 113 N.M. 342, 825 P.2d 1252 (Ct.App.1991). We note that the better course is for the trial court, when exercising its discretion, to place its findings and reasons for its decision in the record to allow for adequate appellate review, and we encourage trial courts to follow this practice. *See State v. Trejo.* In this appeal, we conclude that, even if the trial court exercised its discretion, the admission of the evidence of defendant's prior conviction was an abuse of discretion.

Factors that a trial court should consider in deciding whether to admit evidence of defendant's prior conviction under Rule 11–609(A)(1) include:

> "(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."

State v. Trejo, 113 N.M. at 345, 825 P.2d at 1255 (quoting *State v. Lucero,* 98 N.M. at 313–14, 648 P.2d at 352–53). If a ruling admitting evidence of a prior conviction is clearly against the logic and effect of the facts and circumstances before the trial court, the court will be deemed to have abused its discretion. *State v. Trejo; State v. Lucero.* Considering the relevant *Lucero* factors, as applied to the facts of this case, we hold that the court erred in concluding that the probative value of the evidence of defendant's prior conviction outweighed its prejudice. *Id.*

Defendant admitted that he had pled guilty to a charge of assault in October 1979. Although generally a conviction for a crime of violence has less bearing on an individual's honesty than a conviction for a crime involving dishonesty or deceit, *see State v. Trejo,* our supreme court has determined that such convictions are probative of credibility. *See State v. Lucero* (felony convictions admissible regardless of whether they involved dishonesty or false statements).

This court has recently observed that, even if the alleged crime itself did not involve dishonesty, dishonesty is shown when a defendant denies the offense and is subsequently found guilty. *State v. Trejo.* Here, however, defendant did not deny the prior offense but pled guilty instead. Thus, there was no proven dishonesty. This diminishes the probative value of the prior conviction.

The prior conviction occurred in October 1979. Trial in this case was held in late May and early June of 1989. Thus, defendant's prior conviction was very nearly inadmissible under Rule 11–609(B) and its

probative value was weakened by its remoteness. *See State v. Trejo.*

Most importantly, it must be borne in mind that this case essentially turned on the jury's evaluation of the credibility of defendant and the victim. The medical evidence was inconclusive that sexual contact had taken place. The state's expert's opinion (to the effect that the victim's report and tests of the victim were consistent with the victim having been sexually abused) was based to a large extent on the same account of events to which the young victim testified at trial and served to bolster the victim's credibility. At the same time, the evidence of defendant's prior conviction gave the impression of a lack of credibility and was literally the final piece of evidence admitted in the case. The impact it may have had on the jury was thus significant. Although we recognize that when, as here, a defendant's testimony conflicts with that of the state's witnesses, the issue of credibility becomes crucial and the defendant's credibility is subject to impeachment, *see State v. Trejo; State v. Hall,* we do not believe this factor outweighs the remoteness of the conviction and its lack of direct evidence of dishonesty. Under these circumstances, we conclude the resulting error was not harmless. Rather, we believe admission of this evidence was reversible error because of the reasonable possibility that the trial court's failure to exclude the evidence contributed to defendant's conviction. *See Clark v. State,* 112 N.M. 485, 816 P.2d 1107 (1991).

CONCLUSION

In summary, we hold that the trial court abused its discretion in admitting evidence of defendant's prior conviction. We thus reverse and remand for a new trial.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

847 P.2d 751

STATE of New Mexico, Plaintiff–Appellee,

v.

James BALDONADO, Jr., and Dolores Rodrigues, Defendants–Appellants.

Nos. 13534, 13529.

Court of Appeals of New Mexico.

Dec. 30, 1992.

Certiorari Denied Feb. 8, 1993.

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

Sammy J. Quintana, Chief Public Defender, Christopher Bulman, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

OPINION

PICKARD, Judge.

These consolidated cases raise the question of whether there is a seizure, as a matter of law, whenever the police pull up behind a stopped car and turn on their flashing lights. We hold that there is not, but because the trial court may not have appreciated the principles governing the law of stops and seizures in its denial of defendants' motions to suppress, we remand these cases for redetermination in light of our clarification of the applicable law.

The facts are that the officer noticed a car, with its headlights on and engine off, parked on the side of a street in front of a vacant lot in a business district at about one in the morning. One of the defendants was leaning into the back seat of the car. The officer thought the car had broken down or that something suspicious was occurring, so he pulled up behind the car and turned on his emergency lights.

The evidence was disputed concerning whether defendants were free to leave. The officer repeatedly testified that they were free to leave at all times. On the other hand, he also testified that they were not free to leave for a few minutes after he turned on his lights, and he was impeached with prior testimony in which he said that persons stopped are not free to leave when his lights are engaged.

The officer approached defendants' car and looked inside. He saw two open containers of alcohol and a stereo receiver. He was told that the car had run out of gas. He suspected that one defendant was intoxicated. He obtained permission to search the car and check the serial number on the stereo. He asked defendants to pour out the remaining alcohol before defendants left to get gas. A short time later, the officer learned that the stereo had been stolen in a recent burglary. The officer then found defendants and arrested them.

Although we have written the above paragraph in sentences indicating a time sequence, the testimony was not at all clear that the time sequence was as set out above. Neither party questioned the officer about exactly what he said and did as he approached the vehicle. Defendants did not testify.

Both the applicable law and the standard of review to be utilized in this case have recently been set forth in *State v. Lopez,* 109 N.M. 169, 783 P.2d 479 (Ct. App.), *cert. quashed,* 109 N.M. 131, 782 P.2d 384 (1989). The law is that a person is seized within the meaning of the fourth amendment (and thus the police must justify the seizure by probable cause or reasonable suspicion) when, in view of all the circumstances, the person is accosted and restrained such that a reasonable person would have believed he or she was not free to leave. *Id.* at 170, 783 P.2d at 480. The standard of review is that if different inferences can be drawn from the facts, the question of whether a person is accosted and restrained in such a way is a factual question subject to the substantial evidence standard. *Id.* This standard is significantly different from the "independent judgment" standard set forth in *People v. Bailey,* 176 Cal.App.3d 402, 222 Cal.Rptr. 235 (Ct.App.1985), relied on in the dissent.

Defendants argue that the *Lopez* standard of review essentially abrogates the de novo review that they contend is required whenever there is not a direct conflict in the testimony. The state argues the evidence in this case as though no question of law whatsoever is involved. We disagree with both parties' extreme positions and take this opportunity to clarify *Lopez*'s dual standard of review.

Lopez's statement of the standard of review is not, as defendants contend, an "irrational" and "artificial" thwarting of the appellate court's proper role. Rather, it is a simple recognition that trial courts are in a better position than appellate courts to find the facts, and that such fact-finding frequently involves determining which inferences to draw.

For example, in this case, the testimony of the officer involved was internally contradictory as to whether defendants were free to leave. As an initial factual question, it was for the trial court to determine whether, in the officer's mind, defendants were free to leave or not. Of course, what is in the officer's mind is not determinative. The issue under *Lopez* is how a reasonable person in defendants' circumstances would have felt. Nonetheless, people have nonverbal ways of communicating what is on their minds, and a trial court could find, based on what is on an officer's mind together with surrounding circumstances, that if the officer believes that the defendants are not free to leave it may be more likely that the defendants would feel that they are not free to leave. The contrary would also be true: if the trial court finds that the officer believed that the defendants were free to leave, it may be more likely that they would feel they are free to leave.

The above discussion shows that factual conflicts are to be determined by the trial court. It further shows that even when the facts do not appear to be in dispute, it is possible that different inferences may be drawn from the facts. When such is the case, it is for the trial court to decide the facts, including the drawing of inferences. *See State v. McGhee,* 103 N.M. 100, 103, 703 P.2d 877, 880 (1985). Defendants' complaint that this could result in two disparate decisions on the same facts is essentially a complaint about the nature of appellate review. Yet, it is well established that it is inherent in the nature of review that different trial courts may reach different conclusions, and that does not compel a reversal. *State v. Anderson,* 107 N.M. 165, 168, 754 P.2d 542, 545 (Ct.App.1988). Defendants' complaint that different conclusions should not be allowed on the same facts in constitutional cases ignores the fact that there are rarely cases with identical facts.

Nonetheless, it appears to us that the trial court in this case may have misapplied the law in applying it to the facts as found. Actually, we do not know exactly what facts the trial court found. Defendants'

suppression motion was denied in an order without stating reasons. Additionally, we do not even know exactly on what theory the trial court denied the motion to suppress. The state had argued that (1) there was not a stop; (2) if there was, it was supported by reasonable suspicion; and (3) even if not, defendants freely consented to the search under permissible circumstances. In cases such as this, in which we do not know the trial court's rationale, particularly when the evidence supporting the trial court's decision is as thin as it is here, it is appropriate to remand to the trial court for a redetermination in accordance with the law that we are clarifying today. *See, e.g., State v. Tindle,* 104 N.M. 195, 200, 718 P.2d 705, 710 (Ct.App.1986). We shall explain why we believe the evidence supporting the trial court's decision is thin after we discuss the applicable law.

Both parties cite cases involving the use of flashing lights by police officers. To the extent that defendants' cases involve moving vehicles that stopped in response to the flashing lights, we believe those cases are distinguishable and of little assistance. To the extent that the state's cases involve pedestrians unaware that the flashing lights were intended to be signalling them, they too are distinguishable and of little assistance.

Two cases, however, deserve more discussion. They are *State v. Walp,* 65 Or. App. 781, 672 P.2d 374 (1983), and *State v. Stroud,* 30 Wash.App. 392, 634 P.2d 316 (1981), *review denied,* 96 Wash.2d 1025 (1982). Both involved factual circumstances similar to those here in that the officers pulled up behind stopped vehicles and activated their emergency lights. *Walp* was a defendant's appeal in which the trial court's ruling that there was no seizure was reversed. *Stroud* was a state's appeal in which the trial court's ruling that there was a seizure was affirmed. While the procedural posture of *Walp* better supports defendants' position here, we are not impressed with *Walp*'s reasoning or result and do not adopt it in New Mexico. While the procedural posture of *Stroud* does not support defendants' position as much, we are more impressed with its reasoning and commend it to the trial court on remand here.

Walp involved a woman in a stopped car. An officer thought the woman was having mechanical difficulty and turned on his lights to investigate. *Walp* was based in part on a statute making it a crime to drive after police lights are activated. However, to the extent that it holds that, as a matter of law, a stop that must be supported by at least reasonable suspicion occurs whenever lights are activated, regardless of the officer's motive and actions and regardless of facts supporting a belief that the stopped driver is free to leave, we disagree with it.

We can conceive of many situations in which people in stopped cars approached by officers flashing their lights would be free to leave because the officers would be simply communicating with them to ascertain that they are not in trouble. Under such circumstances, depending on the facts, the officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists. We are loathe to create a situation in which officers would be discouraged from acting to help stranded motorists, from acting in the interest of the safety of the travelling public, or from acting in the interest of their own safety.

On the other hand, we find it hard to conceive of a situation where officers activate their emergency lights to investigate a suspicious situation and approach the situation with many accusatory questions in which a reasonable stopped motorist would feel free to leave. We view *Stroud* as an example of such a case. The *Stroud* court relied on a statute similar to New Mexico's resisting arrest statute. The court concluded that the defendants there were seized because they arguably could have been charged under the statute had they left. The appellate court agreed with the trial court that this was a show of authority sufficient to convey to a reasonable person that departure was not a realistic alternative. While we have a similar statute in New Mexico, NMSA 1978, Section 30–22–1(C) (Repl.Pamp.1984), we do not believe

that it would apply to a driver already stopped when the officer approached. This statute proscribes refusing to bring the vehicle to a stop. It does not apply to stopped vehicles. (Of course, if the stopped driver knows that the officer is trying to effectuate an arrest, then NMSA 1978, Section 30-22-1(B) (Repl.Pamp.1984) would apply if the driver tried to leave.)

As indicated above, the trial court has a difficult and sensitive task on remand. It should focus on the question set forth in *Lopez:* whether, due to physical restraint or a show of authority, a reasonable person in defendants' situation would feel free to leave under all of the circumstances of the case. The trial court should consider the officer's subjective intent only to the extent that it would bear on the beliefs of reasonable people in defendants' shoes. The trial court should consider the statute, § 30-22-1(C), to the same extent. The trial court should consider the sequence of the officer's actions and determine how that would bear on the beliefs of reasonable people being confronted in the same manner.

By way of example, we believe that a trial court should ordinarily find a stop that must be justified by reasonable suspicion whenever officers pull up behind a stopped car, activate their lights, and approach the car in an accusatory manner, asking for license and registration and an account of the occupants' activities. On the other hand, a trial court should ordinarily find no stop whenever officers pull up behind a stopped car, activate their lights, and approach the car in a deferential manner asking first whether the occupants need help.

Finally, we leave to the trial court's discretion the choice of whether or not to take any additional testimony. While there are many questions on which the evidence could have been more clear, the trial court may wish to find on these questions against the party with the burden of proof instead of taking new evidence. In this case, on the issue of whether there was a stop that rises to the level of a seizure, it appears that defendants bear the burden of proof. *See* 4 Wayne R. LaFave, *Search and Seizure* § 11.2(b) & n. 45.3 (2d ed. 1987 & pkt. part 1992) (citing *Russell v. State,* 717 S.W.2d 7 (Tex.Crim.App.1986) (en banc)). This is consistent with New Mexico law to the effect that defendants have the burden to raise an issue as to their illegal search and seizure claims. *See State v. Gardner,* 95 N.M. 171, 175, 619 P.2d 847, 851 (Ct.App.1980), *cert. denied,* October 6, 1980. Once they have done so, the burden shifts to the state to justify the warrantless search. *See State v. Mann,* 103 N.M. 660, 663, 712 P.2d 6, 9 (Ct.App. 1985), *cert. denied,* 103 N.M. 740, 713 P.2d 556 (1986).

The state contends that even if a stop amounting to a seizure is found, it was supported by ample reasonable suspicion and defendants consented to the search of the car in any event. We disagree. The degree of suspicion in this case was no more reasonable than that we held to be insufficient in *State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977). For the consent to be valid, it must be attenuated from seizure. *State v. Bedolla,* 111 N.M. 448, 456, 806 P.2d 588, 596 (Ct.App.), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991). The facts of this case show no attenuation. *See id.*

We reverse and remand this case for the trial court to redetermine the issues on the motion to suppress in accordance with the views expressed herein.

IT IS SO ORDERED.

ALARID, C.J., concurs.

APODACA, J., dissents.

APODACA, Judge, dissenting.

I respectfully dissent from the majority's opinion and would hold as a matter of law that, when the police officer activated his emergency lights, a reasonable person would not have believed he or she was free to leave. Consequently, I would hold that, as a matter of law, defendants were seized within the meaning of the Fourth Amendment at the moment the officer activated his emergency lights. The majority, on the other hand, has apparently opted not to

determine whether, as a matter of law, the officer's initial encounter with defendants was lawful or unlawful, and appears to hold that the officer's activation of his emergency lights is simply one factor to be considered in determining whether a reasonable person would feel free to leave.

Although I would hold that defendants were seized, I nonetheless readily concede that the officer's initial stop was reasonable within the Fourth Amendment. Our inquiry should not end there, however. In my view, both parties' briefs concentrate an inordinate amount of discussion on the legality of the initial stop. The majority, too, seems to suggest that the only relevant inquiry is the validity of the initial stop. Instead, the focus in this appeal should be on the validity of the continued detention, and not on the validity of the initial stop. The parties, however, do not address the issue of whether (and at what point) the initially lawful stop or detention might have become unreasonable and thus in violation of the Fourth Amendment. If the initially lawful stop became unreasonable, defendants' consent to search the car would have been tainted by the illegal detention and the evidence seized should have been suppressed. Consequently, the focus should be on whether the officer had reasonable suspicion to continue to detain defendants once he had learned that defendants were parked alongside the road because they had run out of gasoline. Based on the facts presented in this appeal, I would hold that no reasonable suspicion arose to justify the continued detention. It follows that defendants' motions to suppress should have been granted.

It is true that not all police-citizen encounters are seizures. *State v. Montoya,* 94 N.M. 542, 543, 612 P.2d 1353, 1354 (Ct. App.1980) (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). " 'Only when the officer, by means of physical force or *show of authority,* has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' " *Id.* (quoting *Terry,* 392 U.S. at 19 n. 16, 88 S.Ct. at 1879 n. 16) (emphasis added). "Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *United States v. Mendenhall,* 446 U.S. 544, 553, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). In *United States v. Rose,* 889 F.2d 1490, 1493 (6th Cir.1989), the Sixth Circuit Court of Appeals noted:

> What constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary with the police conduct at issue and the setting in which the conduct occurred. This test, while flexible enough to be applied to a wide range of police conduct, requires consistent application to every police encounter regardless of the particular individual's response to the policemen's actions. This "reasonable person" standard further ensures that the scope of the fourth amendment protection does not vary with the state of mind of the particular individual involved. The subjective intent of the officers is relevant to an assessment of the fourth amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted. [Citations omitted.]

In similar fact situations, other jurisdictions have concluded that a police officer's use of his or her car's emergency lights is a sufficient show of authority that a reasonable person would not feel free to leave and is therefore seized at the moment the officer turns on the lights. *People v. Bailey,* 176 Cal.App.3d 402, 222 Cal.Rptr. 235 (1985); *State v. Walp,* 65 Or.App. 781, 672 P.2d 374 (1983); *State v. Stroud,* 30 Wash. App. 392, 634 P.2d 316 (1981), *review denied,* 96 Wash.2d 1025 (1982). I agree with the rationale of these persuasive authorities, which, in my view, cannot be distinguished.

In *Bailey,* the defendant was parked in a parking lot of a closed department store. The area was often the location of illegal drug use. A police officer wanted to check what the defendant was doing. He pulled the police car behind the defendant's car and activated his emergency lights. The officer approached the automobile and smelled marijuana. He asked for permission to search, which the defendant granted. Marijuana was subsequently found.

Bailey, 222 Cal.Rptr. at 236. The California Court of Appeal posed the issue as "the validity of a consent to search given in the presence of an officer who has directed a red light toward appellant's vehicle." *Id.* The court stated:

> A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer. Any reasonable person in a similar situation would expect that if he drove off, the officer would respond by following with red light on and siren sounding in order to accomplish control of the individual * * *.
>
> The circumstances thus show an exercise of official authority such that [the defendant], under the standard of a reasonable person, would have believed he was not free to leave. He was seized, under the detention category of contact, without the necessary basis therefor, and his consent was therefore involuntary.

Id. at 237. The court additionally concluded that "[t]he show of authority began when the red light went on." *Id.*

Additionally, the courts in *Walp* and *Stroud* considered statutes very similar to our statute, NMSA 1978, Section 30–22–1 (Repl.Pamp.1984). That statute states:

> Resisting, evading or obstructing an officer consists of:
>
> * * * * * *
>
> C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle[.]
>
> * * * * * *
>
> Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

In *Walp,* as police officers followed the defendant's vehicle in their car, the defendant voluntarily pulled over to the side of the road and stopped. The officers activated their emergency lights and stopped behind her. They had no suspicion of illegal activity. *Walp,* 672 P.2d at 374–75. The applicable statute in Oregon made it an offense to continue to drive once a police officer activated his emergency lights. *Id.* at 375 n. 1. The Oregon Court of Appeals concluded that "[a] reasonable person would not feel free to drive away once the officer turned on the emergency lights. Use of the overhead lights was a sufficient show of authority." *Id.* at 375. The court thus held that the motion to suppress should have been granted.

The facts of *Stroud* are even more similar to the facts in this appeal. The defendant there was a passenger in a vehicle parked late at night in an industrial area. Although the car was legally parked and the officers saw no illegal activity, they nonetheless turned on their flashing lights, put their headlights on bright, and pulled up behind the parked vehicle. *Stroud,* 634 P.2d at 317. The trial court suppressed the evidence subsequently seized and the reviewing court affirmed. The court noted that, under Washington law, "[h]ad the operator of the vehicle attempted to drive off after being so signaled, he could arguably have been charged with a misdemeanor." *Id.* at 318. As a result, the court reasoned, the passenger was equally restrained. Additionally, "[u]nder the totality of the circumstances, the officers' attempt to summon the occupants of the parked car with both their emergency lights and high beam headlights constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative." *Id.* at 319. Having determined that the seizure occurred when the officers pulled in behind defendant's vehicle, the *Stroud* court then considered whether the seizure was reasonable and concluded that, because the stop was predicated only on the facts that the car was parked in a high-crime area and that this was unusual, though not unlawful, the stop was unreasonable and the evidence was properly suppressed. *Id.* at 320.

I agree with most of the reasoning and the results in *Bailey, Walp,* and *Stroud.* The majority attempts to distinguish *Walp* and *Stroud* and to minimize the effect of

Section 30-22-1(C) by concluding that the statute does not apply to a vehicle that is already stopped when the officer pulls up behind it with the emergency lights flashing. However, motorists in New Mexico know that they are required by law to stop when signalled by a police officer's emergency lights. It would be reasonable for a parked motorist to conclude in such a situation that, if he or she attempted to drive off after an officer had signalled with his or her emergency lights, the officer would follow and definitely signal for the motorist to pull over. It is illogical to conclude that Fourth Amendment protections would apply if the motorist attempted to leave the scene, but would not if he or she opted to remain parked.

However, I disagree with defendants and with the conclusions of those cases holding that the initial stop is deemed illegal because not based on reasonable suspicion. The overriding goal of the Fourth Amendment is to assure that an individual's reasonable expectation of privacy and security is not subject to arbitrary invasions solely at the discretion of police officers. *Delaware v. Prouse,* 440 U.S. 648, 654-55, 99 S.Ct. 1391, 1396-97, 59 L.Ed.2d 660 (1979); *see also United States v. Brignoni-Ponce,* 422 U.S. 873, 882, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975). Generally, the Fourth Amendment requires that a seizure be based on specific objective facts indicating that society's legitimate interests require the seizure of the specific individual or that the seizure must be carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers. *See Prouse,* 440 U.S. at 663, 99 S.Ct. at 1401. However, the touchstone of Fourth Amendment law is reasonableness. *See City of Las Cruces v. Betancourt,* 105 N.M. 655, 657, 735 P.2d 1161, 1163 (Ct. App.) ("The essence of the fourth amendment prohibition against unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials by imposing a standard of reasonableness upon the exercise of those officials' discretion."), *cert. denied,* 105 N.M. 618, 735 P.2d 535 (1987). The reasonableness of government officials' actions are determined by balancing the gravity of the governmental or public interest, the degree to which the concern is advanced, and the degree of interference with personal liberty. *Id.* at 658, 735 P.2d at 1164. Thus, officers may briefly detain individuals in the absence of reasonable suspicion in certain circumstances. *See, e.g., id.* at 660, 735 P.2d at 1166 (upholding validity of sobriety roadblocks pursuant to neutral criteria); *see also Brignoni-Ponce,* 422 U.S. at 881, 95 S.Ct. at 2580 (Fourth Amendment allows properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search in certain circumstances).

Although an initial brief stop may be reasonable, an officer's subsequent action may make the continued detention unreasonable and therefore unlawful. *State v. Estrada,* 111 N.M. 798, 802, 810 P.2d 817, 821 (Ct.App.1991) (holding that once original purpose of a lawful checkpoint stop has been satisfied, further detention of a vehicle or person must be based on at least reasonable suspicion); *United States v. Rivera,* 867 F.2d 1261, 1263 (10th Cir.1989) ("[E]ven if the initial stop and investigation are valid, the officer's action may at some point become unreasonable and comprise an unlawful detention."); *United States v. Guzman,* 864 F.2d 1512, 1519 (10th Cir. 1988) (detention for routine traffic stop limited to time necessary to check license and vehicle registration, run computer check, and issue citation, unless officer in that time develops reasonable suspicion of a serious crime). I agree that it is not unreasonable for an officer to approach a stranded motorist and inquire whether the motorist needs assistance. However, in the absence of reasonable suspicion, it is not reasonable to detain individuals for longer than is needed to make the inquiry and to offer any necessary assistance.

The state nevertheless argues that, even if the stop was illegal, defendants' voluntary consent validated the search of the car. However, the state fails to recognize that, even if the initial stop was reasonable and therefore valid, the subsequent search

was not necessarily valid unless the continued detention was also valid. *See Estrada,* 111 N.M. at 801, 810 P.2d at 820; *cf. State v. Bolton,* 111 N.M. 28, 42, 801 P.2d 98, 112 (Ct.App.) (holding that additional facts obtained during initial detention provided at least reasonable suspicion to support continued detention of defendants at roadblock to check licenses and registration), *cert. denied,* 111 N.M. 16, 801 P.2d 86 (1990). This Court has stated:

> Consent will validate a warrantless search and seizure. The voluntariness of a consent to search is a question of fact for the trial court. On appeal, we determine whether the evidence, viewed in the light most favorable to the trial court's finding, substantially supports that finding. The determination of voluntariness involves a three-tiered analysis: (1) there must be clear and positive testimony that the consent was specific and unequivocal; (2) the consent must be given without duress and coercion; and (3) the first two factors are to be viewed in light of the presumption that disfavors the waiver of constitutional rights. In warrantless search situations, the state has the heavy burden of proving by clear and convincing evidence the absence of duress, coercion, or other factors that would vitiate the voluntary nature of the consent.

State v. Lara, 110 N.M. 507, 514–15, 797 P.2d 296, 303–04 (Ct.App.) (citations omitted), *cert. denied,* 110 N.M. 330, 795 P.2d 1022 (1990). In this appeal, the state had the burden of producing facts sufficient to show that the continued detention and search were valid. *See State v. Vasquez,* 112 N.M. 363, 366, 815 P.2d 659, 662 (Ct. App.), *cert. denied,* 112 N.M. 388, 815 P.2d 1178 (1991). The majority would remand for, I assume, further fact-finding on the issue of whether defendants were seized and, if so, whether the seizure tainted the consent to search the car. However, since I would hold that defendants were seized at the time the officer activated his emergency lights, I conclude that remand for such a purpose is unnecessary.

Also, because the parties agree on the relevant facts, I believe this Court can determine as a matter of law that the continued detention of defendants was unlawful because it was not based on reasonable suspicion. *See Estrada,* 111 N.M. at 801, 810 P.2d at 820 (reviewing parties' stipulated facts to determine if reasonable suspicion justified continued detention once purpose of checkpoint accomplished). As the majority acknowledges, no evidence indicated that the officer had reasonable suspicion of criminal activity to support additional detention and investigation. I would therefore reverse the trial court's denial of the motions to suppress.

Additionally, I am not clear on what the majority means by its statement that, "on the issue of whether there was a stop that rises to the level of a seizure, it appears that the defendants have the burden of proof." If the majority is stating that defendants have the burden of producing sufficient evidence to raise the issue of an illegal search and seizure, *see State v. Gardner,* 95 N.M. 171, 175, 619 P.2d 847, 851 (Ct.App.1980), then I agree. However, if the majority means that defendants have the burden of proving that there was a seizure, *see Russell v. State,* 717 S.W.2d 7, 9–10 (Tex.Crim.App.1986) (en banc), I am not certain that that is the law in New Mexico. *Cf. State v. Mann,* 103 N.M. 660, 663, 712 P.2d 6, 9 (Ct.App.1985) (stating that a defendant is required to put in issue facts alleging that officers conducted a warrantless search and seizure before burden shifts to state to produce evidence the search and seizure fell within an exception to Fourth Amendment requirements), *cert. denied,* 103 N.M. 740, 713 P.2d 556 (1986). Nonetheless, whether that is or is not the law in New Mexico, I believe that, under the facts of this appeal, defendants met their burden by placing in issue facts demonstrating that the officer used his emergency lights. The issue is then the legal significance of the officer's use of the emergency lights.

I recognize that my proposed holding might require a reconsideration or clarification of this Court's holding in *State v. Lopez,* 109 N.M. 169, 783 P.2d 479 (Ct. App.), *cert. quashed,* 109 N.M. 131, 782 P.2d 384 (1989), on which the majority re-

lies. In *Lopez,* this Court recognized that, under *Mendenhall,* "as a matter of law, a person is seized when the facts show accosting and restraint such that a reasonable person would believe he is not free to leave." *Id.* at 170, 783 P.2d at 480. *Lopez* then concluded that "the question of whether defendant was seized, thereby invoking fourth amendment protections, is a legal question. However, whether defendant was accosted and restrained such that a reasonable person in the same circumstances would believe he was not free to leave is a factual question." *Id.* The majority interprets this language as meaning that, if different inferences can be drawn from the facts, the district court's ruling concerning whether a reasonable person would have felt free to leave is reviewed under a substantial evidence standard. Additionally, the majority notes that the trial court is in a better position to determine the facts and that this fact-finding function includes drawing inferences from the facts.

I question this interpretation of *Lopez.* First of all, it appears to me that the two questions, as described in *Lopez,* are actually the same question in that, if the answer to the question "would a reasonable person have not felt free to leave under these facts" is "yes," then the legal conclusion is that the person has been seized. Second, I question the majority's categorization of the legal conclusion of whether, under the facts as found by the trial court, a reasonable person would have felt free to leave as a factual "inference" drawn by the trial court to which this Court should defer. The issue is not whether a particular person felt free to leave in certain circumstances; I readily agree that deference should be accorded the trial court's finding on such an issue. I further agree that deference should be accorded to the trial court's determination on what the circumstances were. However, under *Mendenhall,* the issue is whether a reasonable person in the circumstances *as found by the trial court* would have felt free to leave. The "reasonable person" standard is intended to ensure that the scope of Fourth Amendment protection does not vary with the state of mind of the individual involved. *Rose,* 889 F.2d at 1493. The legal effect of the facts is freely reviewable by this Court, and labeling them an "inference" should not make the trial court's legal conclusion any less reviewable. *See Edens v. New Mexico Health & Social Servs. Dep't,* 89 N.M. 60, 62, 547 P.2d 65, 67 (1976) (whether a determination is a finding of fact or conclusion of law is a question of law and therefore freely reviewable). To do otherwise, in my opinion, would make the scope of Fourth Amendment protection variable.

The majority apparently considers the officer's use of the emergency lights as simply one factor that the trial court should consider in determining whether defendants were seized. I disagree. I, for one, cannot conceive of any possible factual scenario in which any motorist, no matter the reason why he or she was stopped or parked alongside any roadway and regardless of how relieved a stranded motorist may feel upon seeing the officer, would feel free to leave after a law enforcement officer has stopped with the emergency equipment activated. It simply does not make sense that the motorist would believe he or she was at liberty to move on without explanation. I also do not believe that the holding I propose would dissuade officers from stopping to help stranded motorists or to place themselves in danger by not signalling that they were law enforcement officers. Instead, such a holding would clearly set the constitutionally permissible limits on an officer's ability to intrude on an individual's privacy in such situations when reasonable suspicion of criminal activity is lacking. Additionally, I recognize that emergency lights are used for many purposes. However, the fact that the emergency lights may be used for purposes other than demonstrating police authority does not mitigate the fact that they do indeed demonstrate police authority. This Court should recognize this premise and issue rulings based on that premise, so that the courts, government officials, and the public will have clear guidelines to follow.

847 P.2d 761

JOHNSON CONTROLS WORLD SERVICES, INC., Defendant–Appellant,

v.

Doug BARNES, Plaintiff–Appellee.

No. 13604.

Court of Appeals of New Mexico.

Jan. 5, 1993.

Certiorari Denied Feb. 15, 1993.

Bradford V. Coryell, Compton, Coryell, Hickey & Ives, P.A., Santa Fe, for defendant-appellant.

Richard Rosenstock, Santa Fe, Jeffrey J. Buckels, Albuquerque, for plaintiff-appellee.

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

OPINION

DONNELLY, Judge.

Defendant Johnson Controls World Services, Inc. (Johnson) pursues this interlocutory appeal from an order of the district court denying its motion to dismiss Plaintiff's claims for personal injuries which arose out of and in the course of his employment with Johnson. The central issue presented on appeal is whether the district court erred in holding that Count I of Plaintiff's complaint sets forth a valid claim for damages for personal injuries outside the exclusivity provision of our workers' compensation statute, NMSA 1978, Section 52–1–9 (Repl.Pamp.1991). For the reasons discussed herein, we reverse.

Plaintiff was employed by Johnson as a heavy equipment operator. On June 2, 1988, Plaintiff was directed to operate a trackhoe machine and assist in removing several underground storage tanks which had previously been used to store petroleum products or other hazardous substances at the Los Alamos National Laboratory. Johnson had been hired by the University of California (the University), the operator of the Los Alamos National Laboratory (Laboratory), to excavate and remove underground tanks.

Plaintiff's amended complaint contained three counts. Counts I and II referred to Johnson and other defendants. Count II alleged intentional commission of a wrongful act and/or reckless infliction of injury. Count III applied only to the defendant University. Neither Count II nor Count III is the subject of this appeal.

Count I alleged, among other things, that Johnson intentionally engaged in unsafe work practices and ordered Plaintiff to perform work even though it was aware that physical contact with toxic wastes contained in the tanks would cause injury to him; that Plaintiff was injured when he was splashed with toxic liquid while operating a machine during removal of the tanks; that because the work of removing the tanks involved potential danger to workers, the University had issued detailed safety precautions and written procedures for removal of the structures, but that Johnson and other named defendants "deliberately and intentionally failed to adequately warn [him] of the known dangers involved." Count I also alleged that Johnson failed to provide Plaintiff "with appropriate protective clothing and eye wear"; "falsely informed [him] that the tanks he was to excavate that day had been properly and completely drained of hazardous liquid"; and that because of these acts and omissions Johnson knew that "injuries such as those suffered by Plaintiff were substantially certain to result."

Johnson's answer to Plaintiff's complaint denied liability on its part and raised an affirmative defense asserting that the claims raised against it were barred because Plaintiff had received benefits under the Workers' Compensation Act, and that the Act provided Plaintiff's exclusive remedy. Subsequent to filing its answer, Johnson also filed a motion to dismiss or in the alternative for summary judgment. The motion was accompanied by an affidavit of an insurance claims representative which recited that Plaintiff was receiving workers' compensation and medical benefits. Plaintiff filed a response to the motion, together with an affidavit which stated that he felt his injuries were caused by the "intentional" or "reckless" conduct of Johnson; that Johnson intentionally withheld information from him; that Johnson falsely told him the tanks had been properly drained; and that Johnson "knew that injuries were substantially certain" to result from the work he was assigned to perform. Johnson moved to strike the affidavit and materials submitted by Plaintiff in his response to Johnson's motion to dismiss.

Following a hearing, the district court denied Johnson's motion to dismiss Count I of the amended complaint and granted its motion to dismiss Count II. The court declined to consider any of the material

submitted by the parties and limited its ruling to the motion to dismiss. Johnson pursues this appeal from the order denying its motion to dismiss Count I.

SUFFICIENCY OF THE COMPLAINT

Johnson argues that because Count I of Plaintiff's amended complaint did not allege that it possessed an actual intent to harm Plaintiff but, instead, alleged that the acts and omissions of Johnson "were substantially certain" to result in injury to Plaintiff, these allegations fail to set forth matters bringing this cause within an exception to the exclusivity provision (§ 52–1–9) of the Workers' Compensation Act. We agree.

A motion to dismiss for failure to state a claim under SCRA 1986, 1–012(B)(6) (Repl.1992) tests the formal sufficiency of the complaint, not the facts that support the allegations contained in the pleading. *Shea v. H.S. Pickrell Co.*, 106 N.M. 683, 685, 748 P.2d 980, 982 (Ct.App.1987). In considering a motion to dismiss, both the district court and the reviewing court accepts as true all facts well pleaded and determines whether the plaintiff could prevail under any state of facts provable under the claim. *California First Bank v. State*, 111 N.M. 64, 801 P.2d 646 (1990); *Environmental Improvement Div. v. Aguayo*, 99 N.M. 497, 660 P.2d 587 (1983).

Section 52–1–9 of the Workers' Compensation Act provides that the "right to the compensation provided [herein is] in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury [or death] *accidentally sustained*" where at the time of the accident, the employer has complied with the insurance provisions of the Act; "the employee is performing service arising out of and in the course of his employment"; and "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." Section 52–1–9(B), (C) (emphasis added).

A common feature of workers' compensation statutes is a provision specifying that the rights and remedies provided under the Act are exclusive of all other remedies of the employee for injury or death resulting from an accident which occurred in the scope and course of his or her employment. *See* 2A Arthur Larson, *The Law of Workmen's Compensation* §§ 68.00 to 69.10 (1992) (hereinafter Larson); *see generally* 82 Am.Jur. *Workers' Compensation* § 62 (1992).

Our Supreme Court in *Dickson v. Mountain States Mutual Casualty Co.*, 98 N.M. 479, 480, 650 P.2d 1, 2 (1982), noted that "[t]he exclusivity provided for by the New Mexico Workmen's Compensation Act is the product of a legislative balancing of the employer's assumption of liability without fault with the compensation benefits to the employee." The Court in *Dickson* also quoted with approval from its decision in *Mountain States Telephone & Telegraph Co. v. Montoya*, 91 N.M. 788, 791, 581 P.2d 1283, 1286 (1978), observing that " '[o]nce a workman's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier.' " *Dickson*, 98 N.M. at 481, 650 P.2d at 3.

The exclusivity provision of our statute, Section 52–1–9, does not bar a common-law action for damages, however, where the injury in question is not accidentally sustained but, instead, stems from an actual intent of the employer to injure the worker. *See Sanford v. Presto Mfg. Co.*, 92 N.M. 746, 594 P.2d 1202 (Ct.App.1979) (common-law liability of employer outside Workers' Compensation Act is limited to injuries deliberately inflicted); *see also Gallegos v. Chastain*, 95 N.M. 551, 624 P.2d 60 (Ct.App.1981) (basis for employer's liability outside the Act is "an actual intent" to injure on the part of the employer); *Maestas v. El Paso Natural Gas Co.*, 110 N.M. 609, 798 P.2d 210 (Ct.App.1990) (common-law claims against employer by employee for injury sustained during scope and course of employment are restricted to injuries deliberately or intentionally inflicted).

In *Sanford* this Court upheld the dismissal of the worker's complaint which alleged that the employer's tolerance of toxic fumes emanating from an oven constituted battery. In reviewing the sufficiency of the complaint, the Court examined out-of-state authority and quoted with approval Larson, *supra,* Section 68.13 (1976), concluding that in order to allege matters which will render an employer liable in tort outside the Workers' Compensation Act, the plaintiff must allege matters indicating that the employer intended to injure the plaintiff. In such context, the intent required to be alleged and proven is a "deliberate infliction of harm." *Sanford,* 92 N.M. at 748, 594 P.2d at 1204.

In *Gallegos* this Court noted *Sanford*'s discussion of Larson, *supra,* regarding the requirement of an allegation and proof of an intent on the part of an employer to injure an employee, and concluded that "the basis for the employer's liability outside the Act *is an actual intent to injure on the part of the employer.*" *Gallegos,* 95 N.M. at 553, 624 P.2d at 62 (emphasis added). The *Gallegos* Court upheld an order granting summary judgment in favor of the employer on the basis that the worker's claims, which alleged negligent supervision and vicarious liability, were controlled by the exclusivity provision of the Workers' Compensation Act.

This Court, in *Maestas,* followed the path laid out by our Supreme Court in *Williams v. Amax Chemical Corp.,* 104 N.M. 293, 720 P.2d 1234 (1986), which declined to recognize a claim in tort for retaliatory discharge, and held that if an employer and employee are covered by the Act, their rights and remedies are governed by the Act. In *Maestas* the worker sought damages for physical, emotional, and psychological injuries alleged to have been sustained by him. The worker alleged his injuries resulted from the employer's negligence, and that the employer had engaged in intentional, willful, and wanton misconduct by ordering that a highly explosive mixture be combined in a pipe on which the defendant was welding. On appeal, this Court affirmed the trial court's order dismissing one count of the plaintiff's complaint for failure to state a claim upon which relief can be granted under Rule 1-012(B)(6), and reversed the trial court's order denying the defendant's motion to dismiss the remaining counts. *Maestas* noted that *Sanford* distinguished between intentionally ordered acts and intentional injuries, and that an "employer must intend to injure an employee before he can be held liable outside the Act." *Maestas,* 110 N.M. at 612, 798 P.2d at 213. *Maestas* also held that the employer's knowledge that an employee was engaged in performing work that was inherently dangerous does not, in itself, constitute a basis for the initiation of a tort action outside of the Workers' Compensation Act. *Id.*

Professor Larson, a leading authority in this area of the law, in discussing the requisite showing which must be made in order to permit an injured worker to overcome the exclusivity provision of a worker's compensation statute, notes that "the almost unanimous rule" followed by courts which have addressed this issue is that the intent required to be shown involves a conscious and deliberate intent to injure. Larson, *supra,* § 68.13. Professor Larson observes:

> Since the legal justification for the common-law action is the nonaccidental character of the injury * * *, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.

Id. (footnotes omitted).

Both Plaintiff and Amicus argue that this Court should adopt a different interpretation of Section 52-1-9 than the "almost unanimous rule" discussed by Professor Larson. They also contend that this Court's decisions in *Maestas, Gallegos,* and *Sanford* are distinguishable from the facts of the present case because, among other things, Plaintiff here alleged that Johnson

misrepresented the nature of the danger to him. Both Plaintiff and Amicus also argue that Johnson's reliance upon the exclusivity provision of Section 52–1–9 contravenes public policies that underlie legislative and judicial decisions distinguishing between workers' compensation coverage and common-law causes of action for intentional torts.

To support their argument for a different interpretation of Section 52–1–9, Plaintiff and Amicus rely on language contained in *California First Bank.* They argue that our Supreme Court recognized that commission of an intentional wrong under our tort law does not require proof of a malicious intent to cause harm, and that "the term 'intent' also denotes '[situations where] the actor believes that the consequences are substantially certain to result from [the action taken].' " *Id.*, 111 N.M. at 73 n. 6, 801 P.2d at 655 n. 6.

California First Bank did not involve the exclusivity provision of the Workers' Compensation Act, and did not purport to construe the statute or legislative intent leading to the enactment of Section 52–1–9. Instead, our Supreme Court focused on the issue of whether the plaintiff's complaint stated a cause of action for wrongful death and personal injury against a county based on vicarious liability for negligence of deputy sheriffs in failing to enforce liquor control laws and drunk driving statutes. In view of our Supreme Court's prior statements interpreting the exclusivity provision of our Workers' Compensation Act, we do not think the Court in *California First Bank* intended to modify its prior decisions which substantially limit exceptions to the exclusivity provision contained in Section 52–1–9. *See also Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980); *Dickson,* 98 N.M. at 481, 650 P.2d at 3; *Mountain States Tel. & Tel. Co.*, 91 N.M. at 791, 581 P.2d at 1286; *Briggs v. Pymm Thermometer Corp.*, 147 A.D.2d 433, 537 N.Y.S.2d 553, 556 (1989); *see generally* Wanda Ellen Wakefield, Annotation, *Employer's Tort Liability to Worker for Concealing Workplace Hazard or Nature or Extent of Injury,* 9 A.L.R.4th 778, § 3 (1981).

Plaintiff and Amicus also urge this Court to follow the rationale adopted by the Michigan Supreme Court in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986), when it approved the substantial certainty test. *See also Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 501 A.2d 505 (1985). We find these arguments inconsistent with the plain language of Section 52–1–9, and the prior interpretation of the statute in *Pedrazza* and *Williams.* In *Pedrazza* our Supreme Court observed:

> It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined exclusively by the Act. § 52–1–9, N.M.S.A.1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act.

Id., 94 N.M. at 61, 607 P.2d at 599.

The reasoning of the Michigan Court in *Beauchamp* is inconsistent with the language of Section 52–1–9 and prior decisions of both our Supreme Court and this Court. Moreover, following the decision in *Beauchamp,* the Michigan Legislature amended its statute so as to legislatively reject the "substantial-certainty standard" recognized by the Illinois Court. *See Copass v. Illinois Power Co.*, 211 Ill.App.3d 205, 155 Ill.Dec. 600, 604–05, 569 N.E.2d 1211, 1215–16 (1991) (holding that the modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer acted deliberately with the specific intent to injure the employee).

Plaintiff also argues that since the allegations of his complaint alleged that Johnson engaged in fraudulent conduct, these acts rendered its conduct so egregious that it knew the injury that resulted was substantially certain to occur. Plaintiff reasons that his allegations of fraud distinguish this case from factual situations existing in earlier decisions of both our Supreme Court and this Court, and necessitate an expanded interpretation of the common-law exception to our exclusivi-

ty statute. We think the answer to this argument is governed by the plain language of Section 52–1–9. The words "accidentally sustained," as used in Section 52–1–9, refer to injury or death arising from an unintended or unexpected event. *Cf. Aranbula v. Banner Min. Co.*, 49 N.M. 253, 161 P.2d 867 (1945); *Bufalino v. Safeway Stores, Inc.*, 98 N.M. 560, 650 P.2d 844 (Ct.App.1982).

Additionally, the inquiry is not whether the employer had an intent to deceive or misrepresent facts, *see* § 52–1–9 (all injuries "accidentally" sustained are subject to the exclusivity provision of the Act), but rather whether the employer had an intent to injure the worker. An injury may unintentionally result even though an employer set the stage for the injury by deceiving or misrepresenting facts to the worker.

The majority of jurisdictions that have considered the question appear to agree that a mere showing of misrepresentation or deceit is insufficient to defeat the exclusivity provisions of their respective worker's compensation statutes. *See generally* Larson, *supra*, § 68.32(a). Instead, the intent issue should involve two steps. First, did the employer intend to commit the alleged act? Second, do the circumstances support a reasonable inference that the employer directly intended to harm the worker? The latter question involves the "true intent" requirement discussed above. Under this analysis, fraudulent misrepresentation, like any other act by the employer, may or may not remove an action from the exclusivity provision of the Act.

Applying this two-step analysis to the complaint, we accept as true Plaintiff's allegation that Johnson falsely informed him on the day of the injury that the tank had been drained and that he was ordered to jerk the pipes out before they had been disconnected in order to speed up the removal operation.

Accepting these allegations as true, Plaintiff has satisfied the first prong of the test. We therefore look to Plaintiff's description of the incident to see whether it was an "accident" or whether it may be characterized as a deliberate consequence of Johnson's behavior. The complaint states that Plaintiff picked up a pipe with the trackhoe and the pipe "flew up, hit the trackhoe and sprayed a gasoline-benzene liquid all over [Plaintiff]." Based on this description of how Plaintiff was injured, we do not believe that it is reasonable to infer that Johnson truly intended this series of events to occur. Therefore, even if we assume as true Plaintiff's allegation that Johnson's conduct fraudulently misrepresented the hazard to Plaintiff, the facts do not show that Johnson's conduct was equivalent to a "left jab to the chin." *See Sanford*, 92 N.M. at 748, 594 P.2d at 1204; Larson, *supra*, §§ 68.13 to 68.15, at 13–10 to 13–68.

Plaintiff and Amicus argue that public policy demands a broader interpretation of Section 52–1–9 than adopted by the trilogy of New Mexico cases discussed earlier in this opinion. They urge that interpreting the exclusivity provision to allow tort actions only where the employer intended to injure the worker discourages safety, one of the basic objectives of the modern workers' compensation program. Plaintiff and Amicus claim that subjecting an employer to tort actions where a worker is sent to perform work that involves almost certain injury or even death would encourage safer work practices.

We do not doubt that exposure to tort actions does in some instances provide a deterrent to unsafe practices. That argument, however, does not, in our view, require abandonment of the long-established goals of exclusiveness: to maintain the balance of sacrifices between employer and worker in the substitution of no-fault liability for tort liability, *Dickson*, 98 N.M. at 480, 650 P.2d at 2, and, second, to minimize litigation, even litigation of undoubted merit. Larson, *supra*, § 68.15, at 13–65.

As Professor Larson notes, there is a fallacy in importing tort concepts into workers' compensation law. "Exclusiveness is a compensation law question, not a tort law question. It is based on compensation policy—indeed, on one of the most fundamental components of that policy." *Id.*

Opening the doors to the infusion of tort concepts may undermine the very goals prescribed by our legislature for workers' compensation proceedings. Moreover, we cannot ignore the efforts of the legislature in the last six years to find ways to preserve the compensation system. In the face of that effort, we think Plaintiff's arguments that this Court should authorize the introduction of tort law concepts is at odds with legislative policy underlying our Act, and is contrary to clear Supreme Court precedent.

Any modification or departure from the language of the exclusivity statute rests with the legislature and not the courts. *See Williams,* 104 N.M. at 294, 720 P.2d at 1235 (wisdom of making changes in workers' compensation statutes, or rights thereunder, rests with legislature); *Irvine v. St. Joseph Hosp., Inc.,* 102 N.M. 572, 576, 698 P.2d 442, 446 (Ct.App.1984) (legislative policy is a matter for the legislature, not the courts); *Varos v. Union Oil Co.,* 101 N.M. 713, 715, 688 P.2d 31, 33 (Ct.App.1984) (modification of Workers' Compensation Act requires legislative therapy, not judicial surgery); *Miller v. Ensco, Inc.,* 286 Ark. 458, 692 S.W.2d 615, 617 (1985) (allegation of fraud, failure to provide safe work place, and violation of safety statutes does not constitute intentional tort for purposes of exclusivity provision).

Absent an allegation in the complaint asserting that the injury sustained by Plaintiff was intentionally inflicted by Johnson, we think the language of Section 52–1–9, and the exclusivity provision of our Workers' Compensation Act, is determinative of this issue.

An employee seeking to impose liability upon an employer outside the ambit of Section 52–1–9 must plead and prove an actual intent to injure the employee on the part of the employer. *See Gallegos,* 95 N.M. at 554, 624 P.2d at 63; *see also Phifer v. Union Carbide Corp.,* 492 F.Supp. 483, 485 (E.D.Ark.1980) (to avoid exclusivity provision of statute, plaintiff required to allege and prove a deliberate intent to injure); *Copass,* 155 Ill.Dec. at 604–06, 569 N.E.2d at 1215–17 (in order to state a claim of employer complicity in a co-employee's intentional tort, the allegations must indicate that the employer " 'committed, commanded or expressly authorized' the intentional tort.") Quoting *Meerbrey v. Marshall Field & Co.,* 139 Ill.2d 455, 151 Ill. Dec. 560, 565, 564 N.E.2d 1222, 1227 (1990)).

CONCLUSION

The order of the district court is reversed and the cause is remanded for entry of an amended order dismissing Count I of the amended complaint.

IT IS SO ORDERED.

BIVINS and CHAVEZ, JJ., concur.

847 P.2d 1377

STATE of New Mexico,
Plaintiff–Appellee,

v.

Reva ORGAIN, Defendant–Appellant.

No. 13473.

Court of Appeals of New Mexico.

Jan. 11, 1993.

Certiorari Denied Feb. 19, 1993.

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

Susan Gibbs, Santa Fe, for defendant-appellant.

OPINION

PICKARD, Judge.

Defendant appeals her convictions for multiple counts of forgery and conspiracy to commit forgery. On appeal, she contends that (1) there is insufficient evidence to support the convictions for a variety of reasons; and (2) the number of convictions violates the prohibition against double jeopardy, again for a variety of reasons. We address only the reasons necessary to our disposition. Defendant raised two additional issues in the docketing statement, which have not been briefed and are therefore deemed abandoned. *See State v. Fish,* 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We reverse in part and affirm in part and remand to the district court with instructions to file a new judgment and sentence.

FACTS

Defendant and Moises Alvarez were charged with sixteen counts of forgery and conspiracy to commit forgery, based on the passing of four stolen checks. Each of the checks resulted in four charges. For each check, defendant was accused of one count of forgery under a "making or altering" theory, NMSA 1978, § 30–16–10(A) (Repl. Pamp.1984), one count of forgery under an "issuing or transferring" theory, NMSA 1978, § 30–16–10(B) (Repl. Pamp.1984), one count of conspiracy to commit forgery by "making or altering," and one count of conspiracy to commit forgery by "issuing or transferring."

Defendant concedes that the four checks were stolen from their owner under circumstances from which the jury could infer that she was the thief. The parties stipulated that Elizabeth Cordova, who was defendant's friend and Alvarez's girlfriend, wrote out all the checks to Alvarez. Alvarez and defendant were caught as Alvarez was trying to pass the fourth check; defendant was in the car with him. The teller who cashed the third check described the people who passed that check in a manner that fit Alvarez and defendant. The first, third, and fourth checks were passed at the same branch of Sunwest Bank on December 11, 1989, December 26, 1989, and January 9, 1990; the second check was passed at a different branch of Sunwest Bank on December 20, 1989.

Cordova testified that Alvarez asked her to make out all of the checks, that she did so at the same time using different pens, and that she was to get a portion of the proceeds. Alvarez testified that he passed the first, third, and fourth checks after defendant brought him the checks already filled out; that the checks were in payment for moving furniture for different people; and that he and defendant shared the proceeds.

Although the checks were not designated as exhibits on appeal, *see* SCRA 1986, 12–212(A) (Repl.1992), we called for them on our own motion, *see* SCRA 1986, 12–212(C) (Repl.1992). The four checks all bear the endorsement of Moises Alvarez in handwriting that a jury could have found to be remarkably similar. A bank teller explained that part of the duties of tellers is to require identification when checks are presented to be cashed. Thus, the jury could have found that Alvarez passed all the checks, contrary to his testimony that he had nothing to do with the second check.

The jury, having been instructed on accomplice liability, convicted defendant on all eight conspiracy charges and on six of the forgery charges, those relating to the first, second, and fourth checks. We note that the judgment and sentence incorrectly states that defendant was found guilty of the forgery counts related to the third check but not guilty of the forgery counts related to the fourth check. The trial court shall correct this technical error when it enters a new judgment.

DISCUSSION

1. *Double Jeopardy*

Defendant raises two issues related to double jeopardy. First, she contends that she should not be convicted of two separate counts of forgery and two of conspiracy based on the same check, the only difference between the two counts being the theory of forgery charged. Second, she contends that there was only one conspiracy. We address the second contention in our discussion of the sufficiency of the evidence. We agree with defendant's first contention, as does the state.

The scope of the double jeopardy protection is a matter of legislative intent, and it is the legislature that defines the unit of prosecution. *See Herron v. State,* 111 N.M. 357, 359, 805 P.2d 624, 626 (1991). The different subsections of the forgery statute, which are stated in the alternative, provide for alternative means of prosecution. *See State v. Ruffins,* 109 N.M. 668, 670–71, 789 P.2d 616, 618–19 (1990). Accordingly, it appears to us that the legislature intended only one conviction for each forgery related to the same facts involving the same check.

Because of this, defendant should have been convicted only on one count of forgery and at most one count of conspiracy relating to each check. Thus, for the error described in this issue, three forgery convictions and four conspiracy convictions should be vacated, leaving three forgery convictions and four conspiracy convictions.

We disagree with defendant's contention that she should get a new trial because the state charged sixteen counts instead of eight. She relies on a quotation from *Ball v. United States,* 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), to the effect that multiple charges enhance the possibility of conviction. She argues that the state should not be allowed to bring "multiplicitous" charges without risk and, therefore, if we should find insufficient evidence of any charge or that certain charges merge we should award a new trial.

We disagree with defendant's contention for two reasons. First, it does not appear to us that defendant was unduly prejudiced. The jury did, after all, acquit defendant of two charges submitted to it. *Cf. State v. Montano,* 93 N.M. 436, 439–40, 601 P.2d 69, 72–73 (Ct.App.) (failure to sever counts not reversible error when defendant was unable to show prejudice because jury demonstrated that it could carefully apply the evidence to the charges by acquitting on some counts and convicting on others), *cert. denied,* 93 N.M. 683, 604 P.2d 821 (1979).

Second, defendant does not suggest a logical line to separate those cases which

require new trials from those cases which do not. For example, is a new trial required whenever a trial court directs a verdict on a count? Is one required whenever the appellate court finds insufficient evidence on a count or that offenses should have been merged? The relief we award defendant is consistent with that awarded in past cases, reversal of the convictions upon which we find insufficient evidence or merger. *See Herron,* 111 N.M. at 363, 805 P.2d at 630.

2. *Sufficiency of the Evidence*

Defendant first contends that there is no evidence to support any of the convictions. We disagree.

We review the evidence in the light most favorable to the verdict, resolving all conflicts therein and indulging all reasonable inferences therefrom in support of the judgment. *See State v. Lankford,* 92 N.M. 1, 2, 582 P.2d 378, 379 (1978). While defendant contends that the supreme court disavowed this standard in *State v. Garcia,* 114 N.M. 269, 837 P.2d 862 (1992), we believe that *Garcia* merely reiterated the established law that the standard must be viewed in the context of the state's burden below—to prove each element of the crime beyond a reasonable doubt. *See State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988); *State v. Carter,* 93 N.M. 500, 503, 601 P.2d 733, 736 (Ct.App.) ("we must determine whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt with respect to every element essential to a conviction"), *cert. denied,* 93 N.M. 683, 604 P.2d 821 (1979). Thus, *Garcia* reminds us that our review involves a two-step process: deference to the resolution of factual conflicts and inferences derived therefrom, and a legal determination of whether the evidence viewed in this manner could support the conviction. *See Garcia,* 114 N.M. at 273–74, 837 P.2d at 866–67.

A. Forgery convictions for first and fourth checks

Defendant relies on *State v. Hermosillo,* 88 N.M. 424, 540 P.2d 1313 (Ct.App.1975), and contends that the evidence was insufficient because she was never seen handling the checks, the handwriting on them was Cordova's, and defendant was merely present in the car when the checks were passed. *Hermosillo,* however, does not control this case. In this case, the evidence is more compelling than it was in *Hermosillo.*

The evidence here was that defendant stole the checks and gave at least the first, third, and fourth checks to Alvarez. According to his testimony and that of the bank teller, defendant arranged for and accompanied Alvarez on the trips to the bank and agreed to share in the proceeds. We believe that this is sufficient to support the "community of purpose" necessary to convict her under an aiding and abetting theory for forgery of the first and fourth checks. *See State v. Martinez,* 85 N.M. 198, 200, 510 P.2d 916, 918 (Ct.App.1973). The jury could infer that defendant stole the checks, had Cordova fill them in, and agreed with Alvarez to split the proceeds if he would cash them. *See* SCRA 1986, 14–2823 (aiding and abetting may be shown by acts, conduct, words of defendant); *see also State v. Gardner,* 103 N.M. 320, 324, 706 P.2d 862, 866 (Ct.App.) (fraudulent intent may be shown by defendant's statements and conduct), *cert. denied,* 103 N.M. 287, 705 P.2d 1138 (1985). Finally, it was the exclusive province of the jury to resolve the factual inconsistency between Cordova's testimony that she received the checks from Alvarez and Alvarez's testimony that he received the checks already filled in from defendant. *See Lankford,* 92 N.M. at 2, 582 P.2d at 379 (when testimony is conflicting, such conflict raises questions of fact for a jury to decide).

B. Forgery conviction for second check

Because Alvarez denied any involvement with the second check and because it was cashed at a different bank from the other three checks, a different situation is presented with regard to the second check. However, we find sufficient evidence to

convict defendant of the forgery of this check, too.

The evidence linking defendant to the forgery of this check was that defendant stole all the checks and participated in the forgery of three of them. The circumstances under which Cordova filled them out, together with the evidence indicating that Alvarez cashed all of them, readily leads to the inference that defendant arranged with Cordova and Alvarez that Cordova would fill out the checks and Alvarez would cash them periodically, with enough time between checks to avoid suspicion. When viewed in light of the applicable standard of review, *see Garcia,* 114 N.M. at 273, 837 P.2d at 866, this evidence was sufficient to justify a rational trier of fact to find guilt beyond a reasonable doubt on the forgery of the second check.

C. Conspiracy convictions

Thus, we are left with three forgery convictions and four conspiracy convictions, one each for the first, second, and fourth checks and a conspiracy conviction relating to the third check. Defendant's contention that there was no evidence to support any conspiracy convictions views the evidence or inferences in the light most favorable to herself, contrary to the applicable standard of review. *See Lankford,* 92 N.M. at 2, 582 P.2d at 379. Based on the evidence, the jury could readily infer that she, Cordova, and Alvarez agreed to fill out the checks she stole, and that she and Alvarez agreed to cash them.

Defendant's contention that there was no evidence of more than one conspiracy fares much better. Defendant relies on *State v. Ross,* 86 N.M. 212, 521 P.2d 1161 (Ct.App.1974), which merged two conspiracy convictions stemming from a single agreement to ransack and burn a business. *Ross* held that a single agreement may not serve as the predicate for separate conspiracy convictions simply because the agreement was directed at the commission of separate felonies; the focus is on the number of agreements. *Id.* at 214–15, 521 P.2d at 1163–64. However, *State v. Hernandez,* 104 N.M. 268, 278, 720 P.2d 303, 313 (Ct. App.), *cert. denied,* 104 N.M. 201, 718 P.2d 1349 (1986), indicates that the question of whether there was one agreement or several is tested by the same substantial evidence principles as in other sufficiency-of-the-evidence issues. Although we recognize that, despite *Hernandez,* there is a question, not fully analyzed in any of our cases, concerning the appropriate type of review for this issue, we need not resolve the question in this case because defendant prevails even under the most deferential type of review, the substantial evidence test. *Compare United States v. Alberti,* 727 F.2d 1055, 1059 (11th Cir.) (issue of whether there is one conspiracy or several is a classic jury question), *cert. denied,* 469 U.S. 862, 105 S.Ct. 199, 83 L.Ed.2d 131 (1984) *with State v. Kamienski,* 254 N.J.Super. 75, 603 A.2d 78, 98 (App.Div. 1992) (appellate court disagrees with both jury and trial court on merger issue) *and Herron,* 111 N.M. at 362, 805 P.2d at 629 ("While we have framed our analysis today in terms of the legal limitations on charging a single offense in different counts, we are cognizant that, when reasonable minds may differ, the question of what constitutes a separate and distinct offense under [a statute] may well reside with the jury. That question is not before us.")

Thus, the question we answer here is whether there was evidence upon which a rational jury could find beyond a reasonable doubt the existence of four separate agreements. The only way the jury could have found separate agreements would have been to believe Alvarez's testimony that defendant came to him separately each time she had a check to be cashed, but to disbelieve his testimony that he was not involved in the second check. We believe this would necessitate fragmenting the testimony to the point of distorting it. *See State v. Manus,* 93 N.M. 95, 100–01, 597 P.2d 280, 285–86 (1979). Moreover, we have above upheld the forgery conviction for the second check by upholding the jury's ability to find a conspiracy that involved all the checks. For these reasons, we must reverse the four separate conspiracy convictions.

CONCLUSION

Three of the six forgery convictions are affirmed. One of the conspiracy convictions is affirmed. All the remaining convictions are vacated. This case is remanded so that the trial court may enter an amended judgment and sentence consistent herewith.

IT IS SO ORDERED.

BLACK, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

I concur in the result and in all of Judge Pickard's opinion except for Section 2C, entitled "Conspiracy convictions."

In my view it is not necessary for us to determine whether the evidence would permit a finding that Defendant entered into four distinct agreements—one for each check. Even if there were four such agreements, Defendant could be convicted of only one conspiracy because the four forgeries would be the object of a "continuous conspiratorial relationship."

This conclusion follows once one "identif[ies] the appropriate unit of prosecution." *Herron v. State,* 111 N.M. 357, 359, 805 P.2d 624, 626 (1991). *Herron* held that the New Mexico criminal-sexual-penetration statute, NMSA 1978, § 30-9-11, did not necessarily "punish separately each penetration occurring during a continuous attack," *id.* at 361, 805 P.2d at 628, even though each penetration, viewed in isolation, would constitute a violation of the statute. Whether two penetrations constitute distinct offenses depends on such factors as the temporal proximity of the penetrations, the location of the victim during each penetration, the existence of an intervening event, the sequencing of penetrations, the defendant's intent, and the number of victims. *Id. State v. Mares,* 112 N.M. 193, 812 P.2d 1341 (Ct.App.1991), followed *Herron* and held that even though the defendant had choked and hit the victim several times, there was only one battery.

These decisions raise the question whether several closely related agreements constitute only one prosecutable conspiracy, even though each agreement viewed in isolation would constitute the offense. Model Penal Code Section 5.03 (Official Draft & Revised Comments 1985) provides helpful guidance. Subsection 5.03(3) states:

> *Conspiracy with Multiple Criminal Objectives.* If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

The comment to the section claims, "The rule embodied in Subsection (3) reflects previously prevailing doctrine." *Id.* at 435. This claim is certainly true with respect to multiple crimes that are the object of the same agreement. Indeed, that is the law in New Mexico, as set forth in *State v. Ross,* 86 N.M. 212, 214-15, 521 P.2d 1161, 1163-64 (Ct.App.1974), which the comment cites in support of the above-quoted statement. But the comment seems to stretch matters a bit when it claims that the prevailing doctrine had been that a person who conspires to commit a number of crimes is guilty of only one conspiracy if the multiple crimes are the object of the same "continuous conspiratorial relationship." Courts have not explicitly adopted the "continuous conspiratorial relationship" test. *But see People v. Bolla,* 114 Ill.App.3d 442, 70 Ill. Dec. 118, 124, 448 N.E.2d 996, 1002 (1983).

Nevertheless, the Model Penal Code formulation appears to capture what courts have done, if not what they have said. A number of courts have adopted multi-factor tests to determine whether the evidence establishes multiple conspiracies or a single conspiracy. *United States v. Ragins,* 840 F.2d 1184, 1189 (4th Cir.1988), considered the degree of overlap in the time periods covered by the alleged conspiracies, the places where the conspiracies allegedly occurred, the persons charged as co-conspirators, the nature and scope of the activities being prosecuted, and the substantive statutes allegedly violated. Although the issue in *Ragins* was whether double-jeopardy doctrine barred a second prosecution, an issue that raises somewhat different con-

siderations from those pertinent to whether the evidence in a single prosecution can justify convictions for multiple conspiracies, a multi-factor approach has also been adopted in the latter context. *See Sharp v. State,* 569 N.E.2d 962, 969–70 (Ind.Ct.App. 1991) (factors include nature of the criminal scheme, overlapping participants, proximity in time, and the frequency, quality, and duration of the co-conspirators' involvement in each crime); *Commonwealth v. Cerveny,* 387 Mass. 280, 439 N.E.2d 754, 758–59 (1982) (notes identity of the parties, objectives, and means); *State v. Kamienski,* 254 N.J.Super. 75, 603 A.2d 78, 98 (App.Div.1992) (looks at time, place, objective, and relationship between conspiracies); *State v. Wilson,* 106 N.C.App. 342, 416 S.E.2d 603, 605 (1992) (considers nature of the agreements, time intervals, participants, objectives, and number of meetings); *Commonwealth v. Savage,* 388 Pa.Super. 561, 566 A.2d 272, 278–81 (1989) (considers number of overt acts in common, overlap in personnel, time period, similarity in methods of operation, location of the alleged acts, extent of shared objectives, and degree of interdependence).

The courts in these cases may speak in terms of deciding whether there is a single agreement, but the multi-factor approach is probably better understood as a means of determining whether there was a "continuous conspiratorial relationship." For example, when the evidence shows repeated burglaries by the same participants in the same neighborhood over a limited period of time, there may well have been specific separate agreements with respect to each burglary. If the conclusion of the multi-factor approach in such circumstances is that there was only one conspiracy, this is not because there must necessarily have been an original agreement to engage in all the burglaries; rather, the conclusion derives from the implicit view that for purposes of punishment it is proper to consider the arrangement as a single conspiracy even if there were additional agreements as the project continued. Thus, courts say that a single conspiracy may mature and expand as more conspirators and objectives are added. *See Blumenthal v. United States,* 332 U.S. 539, 556, 68 S.Ct. 248, 256, 92 L.Ed. 154 (1947). The notions of maturation and expansion make more sense as descriptions of a continuous conspiratorial *relationship* than as descriptions of a specific *agreement.* In other words, when one speaks of an agreement as maturing or expanding, the word "agreement" is being used to mean a type of "relationship." One dictionary provides as the first two definitions of "agreement": "1. act of agreeing or coming to a mutual agreement; state of being in accord. 2. the arrangement itself." *The Random House Dictionary of the English Language* 29 (1971). For clarity of analysis it is essential to distinguish between (1) the act of coming to an agreement—which constitutes the offense—and (2) the arrangement (or relationship)—which fixes the unit of punishment.

The comment to Model Penal Code Section 5.03 criticizes the effort to determine "whether different objectives executed over a period of time were implicit in the same 'agreement.'" Model Penal Code at 439. As the comment states:

> Insofar as this requires inquiry into the precise time at which each objective was conceived, it is unrealistic and serves no useful purpose; indeed a finding of separately punishable conspiracies if the objectives were conceived at different times "tends to place a premium upon foresight in crime." The courts generally avoid such inquiries and results by finding that the original agreement subsequently came to "embrace" additional objects. The Code provision avoids them more directly by its alternative test of whether all the crimes were the object of the same "continuous conspiratorial relationship." This criterion focuses on the more significant question whether there was a single and continuous association for criminal purposes.

Id. (footnote omitted). I agree that the critical issue is "whether there was a single and continuous association for criminal purposes." This approach makes sense as policy and appears to account for the results generally reached by the courts.

Moreover, this approach conforms to the language of the New Mexico conspiracy

statute, NMSA 1978, § 30–28–2 (Repl.Pamp.1984), which states, "Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." I would not unduly emphasize the specific words of our statute, because New Mexico courts have freely relied on the conspiracy decisions of other jurisdictions without reference to the statutory language in those jurisdictions. *E.g., Ross* (relying on *Braverman v. United States,* 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942)). Yet our statutory language "combining with another" lends itself to a construction that one offense arises from one "combination" and a "combination" is a "continuous conspiratorial relationship." Therefore, I would adopt Model Penal Code Subsection 5.03(3) as an expression of the law of New Mexico.

Applying the law to the present case, the verdicts establish that the jury found that Defendant stole four checks on one occasion and had them delivered (on one or multiple occasions) to Alvarez for the purpose of forging them. Even if there were four separate transactions and perhaps four separate "agreements," the similarity in the location, actions, and participants, and the short time frame in which the offenses were committed, requires a determination that the agreements were part of a "continuous conspiratorial relationship." (I need not reach whether this is a jury question, although I doubt that it is.) For that reason I would hold that only one conviction of conspiracy can stand.

848 P.2d 1

STATE of New Mexico, Plaintiff–Appellant,

v.

Timothy Lee WERNER, Defendant–Appellee.

No. 13431.

Court of Appeals of New Mexico.

Sept. 3, 1992.

Certiorari Granted Oct. 30, 1992.

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

Jay L. Faurot, P.A., William C. Birdsall, William C. Birdsall, P.C., Farmington, for defendant-appellee.

OPINION

PICKARD, Judge.

The state appeals the grant of a suppression motion. The motion was granted on the basis of the trial court's finding that the detention to which defendant was subjected was a *de facto* arrest without probable cause. We disagree and hold that defendant was the subject of an investigatory detention for which there was ample reasonable suspicion.

We note at the outset that probable cause is not an issue in this appeal. The state stipulated below that probable cause was absent, and it does not contend on appeal that there was probable cause for an arrest. As observed in *State v. Lopez,* 99 N.M. 385, 387, 658 P.2d 460, 462 (Ct.App.), *cert. denied,* 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 113 (1983), the state, as any other party, is subject to the rule that it must make its contentions known in the trial court. Thus, although the existence of probable cause is a question of law for the trial court to decide when there are no factual issues to resolve and is therefore freely reviewable on appeal, *see State v. Goss,* 111 N.M. 530, 807 P.2d 228 (Ct.App. 1991), we should not address an issue the state conceded in the trial court. We should also not address an issue not briefed. The exceptions to the general rule of addressing only those issues raised by the parties, both below and on appeal, should be applied sparingly and "only where there could be no valid reason for the lower court's action." *New Mexico Dep't of Human Servs., Income Support Div. v. Tapia,* 97 N.M. 632, 634, 642 P.2d 1091, 1093 (1982). Those exceptions do not apply here.

The parties stipulated to the following facts at the hearing on the motion to suppress. On February 16, 1991, at approximately 2:00 p.m., Gennie Garcia, an employee of a store called Gene's Rent to Own in Farmington, discovered that a Fisher 8mm camcorder was missing from the store. She called the police, and Officer Ron McNeal arrived at approximately 2:46 p.m. Garcia noticed that the battery pack for the missing camcorder was still in the shipping box. Knowing that the battery pack was necessary for operation of the camcorder, Garcia contacted area stores to discover whether anyone was attempting to purchase camcorder accessories. Brian Barrowclaugh, manager of a store called Paradise Village, told Garcia that two men had been in his store to purchase accessories for a Fisher camcorder at approximately 1:45 that day, and he gave her a description of the two men. Garcia remembered two men of that general description having been in her store.

Upon receiving this information, Garcia again contacted the police. Responding to her information, McNeal went to Paradise Village at approximately 3:26 p.m. Employees there gave him a description of the two men. One employee was able to identify one of the men as defendant, Tim Werner, based on his previous visits to the store. Employees told McNeal that the two men had come into the store, carrying a Fisher camcorder in a brown knapsack. Defendant's companion, Roger Smith, had told employees that the camcorder belonged to his mother and that the battery pack had been lost. Paradise Village was not able to provide the necessary battery pack. The two left the store in a blue Camaro.

McNeal, who was personally familiar with defendant, obtained the location of his residence and went there at approximately

4:25 p.m. No one was there, but as he left, he saw defendant driving down the street in a blue Camaro. McNeal turned around and stopped the Camaro after it pulled into a trailer park. Defendant exited the Camaro as McNeal radioed for back up. McNeal approached defendant and took a folding knife from him. He then looked into the Camaro at Smith. At that time, he noticed a brown knapsack on the back seat, partially covered by a Levi jacket.

At approximately 4:45 p.m., McNeal told defendant and Smith that they were being detained and they were not free to leave. He then placed them in the rear seat of his locked squad car. At this point, the officers asked for permission to search the car. Defendant refused to give his consent to the search because the car was owned by someone else.

McNeal then requested that the Paradise Village employees come to the scene to identify defendant and Smith. They arrived at approximately 5:00 p.m. Defendant and Smith were removed from the squad car and were positively identified as the two men who had come to the store requesting a battery pack for a Fisher camcorder. Defendant and Smith were then returned to the squad car. Then Garcia was brought to the scene. She positively identified Smith, but could only say that defendant was possibly the other man.

McNeal then called the district attorney's office. He was concerned about whether he needed a search warrant to search the Camaro. He received advice to arrest defendant and Smith and perform an inventory search of the vehicle according to police procedures. McNeal then told defendant and Smith that they were under arrest for felony shoplifting. They were handcuffed and returned to the squad car. The officers then opened the Camaro, found the brown knapsack on the back seat, unzipped it, and found the stolen camcorder inside.

Based on these facts, the trial court found that the initial stop was a lawful investigatory stop. The trial court then found that the initial stop became a *de facto* arrest when defendant was informed that he was being detained and was placed in a locked police unit. The standard of review for rulings on suppression motions is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct. App.1983). This court is not bound, however, by a trial court's ruling when it is predicated upon a mistake of law. *Id.* We believe that such is the case here.

The distinction between a stop and an arrest is one of degree, so there is no bright line test for determining when a stop becomes an arrest. *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Some of the factors to consider include the law enforcement purposes served by the detention, the diligence of the police in pursuing the investigation, the intrusiveness of the detention, and its duration. *Id.* at 685–86, 105 S.Ct. at 1575. The cases recognize that the length of the detention may be extended and the scope of the investigation enlarged when information obtained after the initial stop arouses further suspicion. *See, e.g., People v. Lidgren,* 739 P.2d 895 (Colo.Ct.App.1987); *State v. Watson,* 165 Conn. 577, 345 A.2d 532 (1973). The ultimate test is one of reasonableness of the detention under the circumstances. *See State v. Cohen,* 103 N.M. 558, 711 P.2d 3 (1985), *cert. denied,* 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). The court must determine whether the detention was reasonable by balancing the competing interests of the individual and the government. *State v. Lovato,* 112 N.M. 517, 817 P.2d 251 (Ct. App.1991).

In some instances, the question of whether a person is arrested might be a factual question on which there is disputed evidence. In these instances, the question would be one of fact for the trial court, subject to the substantial evidence test on review. *See Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986). In other instances, the question of whether a person is arrested appears to involve more of a balancing of factors based on undisputed facts. *Lovato* and *Sharpe* appear to be in this latter category in that they measure whether the

actions of the police are reasonable by balancing the circumstances prompting the police into action against the defendants' privacy rights.

In *Lovato,* the question was whether it was reasonable in the context of a stop for a drive-by shooting to make the occupants get out of a car with their fingers laced behind their heads, make them walk backwards toward the police, and handcuff them while the police had guns drawn. Although this seemed like an arrest, we held that it was permissible activity for the officers' safety in connection with an investigatory stop for a violent offense.

Similarly, in *Sharpe,* the Court said that in determining whether a stop turned into a *de facto* arrest, it needed to consider the purposes to be served by the stop together with the amount of time reasonably needed to effectuate those purposes. *Sharpe* holds that if the police are diligently proceeding with a means of investigation designed to confirm or dispel their suspicions, then there is no arrest. Moreover, the *Sharpe* Court cautioned against second-guessing the police.

Determining questions of reasonableness and balancing factors in the context of police conduct are generally issues of law for the trial court, where conclusions are freely reversible on appeal. *Cf. State v. Sheetz,* 113 N.M. 324, 825 P.2d 614 (Ct.App. 1991) (determination of proper standards of police investigation in an entrapment case is a question of law and policy to be decided by court). Therefore, we review this issue without using the deferential substantial evidence standard of review.

First, we must consider whether there were legitimate law enforcement purposes served by placing defendant in the squad car. Several of those interests include preventing flight if incriminating evidence is found, protecting officers from harm, and allowing orderly completion of the investigation. *See Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Here, police had already removed a knife from defendant's person. They had also observed a brown knapsack similar to that reportedly containing the stolen camcorder. It was reasonable for the police to remove defendant from his vehicle so that he could not flee or destroy the evidence. While the back of a squad car may not be the ideal location for the purposes of detention, *see United States v. Manbeck,* 744 F.2d 360, 377 (4th Cir.1984), *cert. denied,* 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985), it was reasonable for the officers not to allow defendant back into his car. Furthermore, by placing him in the squad car, the officers were preventing defendant from fleeing on foot.

Both parties appear to agree that defendant is not subjected to a *per se* arrest simply by his placement in the back seat of a squad car. *United States v. Lego,* 855 F.2d 542 (8th Cir.1988); *Manbeck,* 744 F.2d at 377; *United States v. Moore,* 638 F.2d 1171 (9th Cir.1980), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981). The concern here is with the duration of the detention in combination with its location. No court has set a limit on the duration of an investigatory detention, except to say that it must last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In fact, the United States Supreme Court has said that while the brevity of the investigatory detention is an important factor, the courts must consider the purposes of the stop and the time needed to effectuate those purposes. *Sharpe,* 470 U.S. at 685–86, 105 S.Ct. at 1575. The key is whether the police are diligently engaging in investigation that will confirm or dispel the suspicions leading to the stop. *Id.*

Here, the police sought consent to search the vehicle in order to confirm that defendant and Smith had the stolen camcorder. In light of the fact that the suspicions of the police were greatly aroused once they saw the brown knapsack in the car, the police chose to pursue another method of investigation when consent was denied. They had the witnesses who saw the two men in the stores brought to identify them. Such show-ups are valid investigatory procedures and have been held to be a valid

reason for detaining suspects. *People v. Bowen,* 195 Cal.App.3d 269, 240 Cal.Rptr. 466 (1987); *State v. Mitchell,* 204 Conn. 187, 527 A.2d 1168, *cert. denied,* 484 U.S. 927, 108 S.Ct. 293, 98 L.Ed.2d 252 (1987); *State v. Merklein,* 388 So.2d 218 (Fla.Dist. Ct.App.1980); *People v. Hicks,* 68 N.Y.2d 234, 508 N.Y.S.2d 163, 500 N.E.2d 861 (1986); *State v. Wilkens,* 159 Wis.2d 618, 465 N.W.2d 206 (Ct.App.1990); *see Summers,* 452 U.S. at 701–02 n. 14, 101 S.Ct. at 2594 n. 14; *State v. Moffatt,* 450 N.W.2d 116 (Minn.1990). The detentions in these cases ranged from thirty minutes to more than an hour and were upheld as valid investigatory stops because the police were diligent in pursuing investigation.

The evidence here showed that the police were diligent in pursuing their investigation with regard to defendant. As soon as consent to search was denied, the witnesses were brought to identify defendant. There are no facts indicating any unnecessary delay. There are no facts suggesting that the police attempted to intimidate defendant and Smith into giving up rights defendant and Smith asserted. Simply because the police might have investigated in a different way, arguably taking less time, does not mean they acted unreasonably. *See id.* at 119. We believe that the officers in this case acted reasonably under the circumstances in holding defendant in their squad car until witnesses could identify him, thereby confirming their suspicions that defendant shoplifted the camcorder.

[redacted] Accordingly, the trial court erred in finding that defendant was arrested when he was detained and placed in the squad car and therefore erred in suppressing the evidence on this ground. Defendant nonetheless contends that the order should be affirmed because (1) the state did not preserve a claim that the show-up identification was tainted by the arrest, and (2) the trial court was right for the wrong reason because the show-up was unnecessarily suggestive. We disagree. The whole point of the suppression hearing was to suppress evidence tainted by an allegedly unlawful arrest. Nor was the show-up unnecessarily suggestive under the facts of this case, especially inasmuch as one of the store employees knew defendant by name from previous visits to the store. *See State v. Torres,* 88 N.M. 574, 544 P.2d 289 (Ct.App.1975).

The order of suppression is reversed and the case remanded to the trial court for further proceedings.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

[redacted]

848 P.2d 5

Barbara PHIFER, Plaintiff–Appellant,

v.

John HERBERT, Silver City Ford–Lincoln–Mercury, a New Mexico corporation, and Ford Motor Company, a foreign corporation, Defendants–Appellees.

No. 12752.

Court of Appeals of New Mexico.

Jan. 28, 1993.

[redacted]

John W. Reynolds, Silver City, for plaintiff-appellant.

Duane C. Gilkey, Ogden M. Reid, Barbara G. Stephenson, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee Ford Motor Company.

H.R. Quintero, Robinson & Quintero, P.C., Silver City, for defendants-appellees John Herbert and Silver City Ford–Lincoln–Mercury.

OPINION

FLORES, Judge.

This is an action for damages allegedly caused by sexual harassment on the job. Plaintiff appeals from the district court's order dismissing her complaint on the grounds that Plaintiff failed to exhaust her administrative remedies pursuant to the New Mexico Human Rights Act, NMSA 1978, §§ 28–1–1 to –7, 28–1–9 to –14 (Repl.Pamp.1987) (NMHRA), and thus the district court had no jurisdiction. The sole issue on appeal is whether Plaintiff's complaint comes under the mandatory remedial provisions of NMHRA or whether it states an independent action in tort. We reverse and remand.

BACKGROUND

Barbara Phifer (Plaintiff) is a resident of Silver City, Grant County, New Mexico. Plaintiff was an employee of Silver City Ford–Lincoln–Mercury (Silver City Ford), a car dealership, for approximately four months in 1989. During this period of time, John Herbert (Herbert) was the acting sales manager for Silver City Ford. Ford Motor Company is a shareholder in Silver City Ford.

On August 23, 1989, Plaintiff filed a complaint, in the district court, for sexual harassment against Herbert, Silver City Ford, and Ford Motor Company (collectively, Defendants). The complaint essentially alleged that Herbert and another employee of Silver City Ford had made explicit and implied sexual remarks and improper overtures toward Plaintiff which embarrassed, shamed, and degraded her and caused her mental anguish. The complaint further alleged that because of this treatment, Plaintiff was forced to quit her job with Silver City Ford.

Plaintiff admits that she has taken no action to notify or file a complaint with the Equal Employment Opportunity Commission (EEOC) or the New Mexico Human

Rights Commission regarding the alleged sexual harassment.

Pursuant to motions to dismiss filed by Defendants, the district court, by letter-decision dated October 19, 1990, decided that there was no tort of sexual harassment in New Mexico and that Plaintiff's complaint of sexual harassment was in essence a claim of discrimination in the conditions of employment subject to the NMHRA. Accordingly, on October 26, 1990, it entered an order dismissing Plaintiff's complaint with prejudice on the grounds that Plaintiff failed to exhaust her administrative remedies under the NMHRA and that the court had no jurisdiction. It is from this order that Plaintiff appeals.

DISCUSSION

Plaintiff had initially briefed and argued that she was entitled to relief pursuant to 42 U.S.C. § 1983 (1988) as well as under the Fifth and Fourteenth Amendments to the United States Constitution. In her reply brief, however, Plaintiff conceded that 42 U.S.C. § 1983 did not apply. Regarding Plaintiff's other constitutional arguments, these are without merit because the constitutional provisions on which Plaintiff relies do not prohibit or mandate conduct by private parties. *Cf. State v. Johnston,* 108 N.M. 778, 779 P.2d 556 (Ct.App.) (fourth amendment does not apply to intrusions by private persons), *cert. denied,* 108 N.M. 771, 779 P.2d 549 (1989).

Defendants, in support of their position that the district court was correct in dismissing Plaintiff's complaint, argue that Plaintiff's complaint, both in substance and form, is basically one for sexual harassment. They argue that the complaint is a single count complaint denominated "Complaint for Sexual Harassment" and that it alleges that all incidents of misconduct and all damages flow from the alleged sexual harassment.

Defendants contend that "sexual harassment" has been defined by the EEOC guidelines as follows: "verbal or physical conduct of a sexual nature constitute[s] sexual harassment when * * * (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11 (1991).

Defendants contend that the conduct Plaintiff complains of falls within the EEOC guideline definition and that Plaintiff's cause of action comes under the NMHRA. They argue that the NMHRA provides a remedy for all types of sexual discrimination, including sexual harassment, and that the grievance procedure provided by Section 28–1–10 is mandatory and must be exhausted before the injured party can invoke the jurisdiction of the district court.

Section 28–1–7 of the NMHRA defines unlawful discriminatory practices. Section 28–1–7(A) of the NMHRA states that it is an unlawful discriminatory practice for "an employer, unless based on a bona fide occupational qualification, to * * * discriminate in matters of * * * terms, conditions or privileges of employment against any person otherwise qualified because of * * * sex."

Section 28–1–10(A) of the NMHRA sets out the procedure for initiating an action for unlawful discriminatory practice. As part of this grievance procedure, this section provides, in material part, that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice * * * may file with the [human rights] division a written complaint."

Plaintiff does not contest the mandatory provisions of the NMHRA, but instead argues that the district court erred in dismissing her complaint because it alleges more than a claim under the NMHRA. She contends that her suit is not only one for unlawful discriminatory practices, but also one for damages for sexual harassment on the job. Specifically, Plaintiff contends that this action is an action in tort for the intentional infliction of emotional distress called the law of outrage. *See Dominguez v. Stone,* 97 N.M. 211, 638 P.2d 423 (Ct. App.1981).

Defendants contend that Plaintiff's issue concerning the tort of outrage is not properly before us because she did not argue this theory to the trial court. While it is true that a party cannot ordinarily argue issues on appeal that were not presented to the trial court, *see Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct.App.1987), a different rule applies when the party opposing summary judgment seeks to call the appellate court's attention to facts in the record not specifically brought to the trial court's attention. *See Pharmaseal Labs., Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977); *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (Ct.App.1979). Inasmuch as both summary judgments and dismissals for failure to state a claim are to be granted sparingly, *Pharmaseal Labs.*, 90 N.M. at 756, 568 P.2d at 592; *Las Luminarias v. Isengard*, 92 N.M. 297, 587 P.2d 444 (Ct. App.1978), we apply the same exception to the preservation requirement in this case involving a dismissal for failure to state a claim as we would had the case been an appeal from a grant of summary judgment. Thus, we consider all of Plaintiff's arguments concerning the facts she alleges she will be able to prove under the claim.

We believe the district court correctly determined that Plaintiff could not sue under the NMHRA unless she exhausted her administrative remedies. Compliance with the grievance procedure of the NMHRA is a prerequisite to suit under this Act. *Jaramillo v. J.C. Penney Co.*, 102 N.M. 272, 694 P.2d 528 (Ct.App.1985). However, the requirement that administrative remedies for employment discrimination claims recognized by statute be exhausted does not prevent an employee from filing a complaint based on a common law tort without first resorting to such administrative remedies. *See Cummings v. Walsh Constr. Co.*, 561 F.Supp. 872 (S.D.Ga.1983); *Stewart v. Thomas*, 538 F.Supp. 891 (D.D.C.1982).

To the extent that Plaintiff's complaint could be liberally construed to state a common law tort theory, it was error for the district court to dismiss the complaint with prejudice. In this regard, we note that:

> The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds upon which they are based * * * * [N]otice pleading does not require that every theory be denominated in the pleadings—general allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief.

Schmitz v. Smentowski, 109 N.M. 386, 389–90, 785 P.2d 726, 729–30 (1990); *see also Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 111 N.M. 6, 800 P.2d 1063 (1990). Notwithstanding that Plaintiff's complaint is denominated as a "Complaint For Sexual Harassment," "we are not governed by the nomenclature of a pleading so long as the substance of the pleading conforms with the applicable rule." *State v. Peppers*, 110 N.M. 393, 397, 796 P.2d 614, 618 (Ct.App.), *cert. denied*, 110 N.M. 260, 794 P.2d 734 (1990); *see also Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978); SCRA 1986, 1–008(A).

Plaintiff's complaint alleges that she has been "sexually harassed, mortified, embarassed [sic], degraded and humiliated"; that "explicit and implied sexual remarks and overtures" were made toward her; that certain remarks made by Defendant Herbert "devastated [her], embarassed [sic], shamed and degraded her, and caused her much mental anguish"; and that Defendant Herbert's treatment caused her damages including "[m]ental anguish, humiliation, shame and embarassment [sic]."

Whether the plaintiff's claim of intentional infliction of emotional distress was so extreme and outrageous as to allow the plaintiff to recover on that claim is not an issue to be resolved on a motion to dismiss. *Blessing v. County of Lancaster*, 609 F.Supp. 485 (E.D.Pa.1985). Here, whether the conduct alleged amounted to intentional infliction of emotional distress cannot be

determined from the bare allegations of the complaint. *See Rogers v. Loews L'Enfant Plaza Hotel,* 526 F.Supp. 523 (D.D.C.1981) (recognizing that complaint does not need to contain details).

When the dismissal of a suit is for failure to state a claim upon which relief can be granted, the issue is whether the plaintiff would be entitled to recover under any state of facts provable from the complaint. *Tapia v. McKenzie,* 83 N.M. 116, 489 P.2d 181 (Ct.App.1971). When the trial court grants a motion to dismiss, the appellate court must accept the allegations as true and resolve all doubts in favor of the sufficiency of the pleading. *Bottijliso v. Hutchison Fruit Co.,* 96 N.M. 789, 635 P.2d 992 (Ct.App.1981); *Pillsbury v. Blumenthal,* 58 N.M. 422, 272 P.2d 326 (1954). Based on a liberal reading of the pleadings, Plaintiff may be able to prove facts under her claim that would entitle her to relief under the tort of outrage.

Plaintiff's complaint makes certain allegations of conduct sufficient to show that, if true, and if the details of which are sufficiently outrageous, she is entitled to relief. *See Stewart v. Thomas.* The averments are sufficient to give the parties and the court fair notice of the action Plaintiff is complaining about and the basis for relief. *See Schmitz,* 109 N.M. at 389–90, 785 P.2d at 729–30. Accordingly, we hold that Plaintiff's complaint sufficiently, although admittedly not too clearly, states a claim for relief as to the tort of intentional infliction of emotional distress under the law of outrage. *See* Rule 1–008(A)(2). We so hold, notwithstanding that this case, in part, involves an employer-employee relationship and that the underlying acts allegedly involve or relate to sexual conduct.

In *Dominguez,* this Court stated that the tort of intentional infliction of emotional distress, called the law of outrage, was recognized in *Mantz v. Follingstad,* 84 N.M. 473, 505 P.2d 68 (Ct.App.1972). The court in *Dominguez* quoted certain relevant sections from Restatement (Second) of Torts § 46 (1965) as follows:

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

Comment (d), entitled "Extreme and outrageous conduct" reads in part as follows:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Comment j of Restatement (Second) of Torts, § 46 (1965), reads as follows:

> *Severe emotional distress.* The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no

> reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed * * * *
>
> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.

Dominguez, 97 N.M. at 214–15, 638 P.2d at 426–27.

Whether the alleged conduct as set forth in Plaintiff's complaint satisfies a claim for intentional infliction of emotional distress cannot be determined from the bare allegations of her complaint. The district court must now proceed to determine whether, on the evidence, Defendants by extreme and outrageous conduct intentionally or recklessly caused Plaintiff severe emotional distress.

By not addressing the issue of whether Defendants Silver City Ford and Ford Motor Company are vicariously liable, we do not suggest there is such liability.

CONCLUSION

Based on the foregoing, the order of the district court dismissing Plaintiff's complaint with prejudice is reversed and the cause is remanded for further proceedings consistent with this opinion. Plaintiff is awarded costs on appeal to be paid by Defendants.

IT IS SO ORDERED.

PICKARD and BLACK, JJ., concur.

848 P.2d 527

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Plaintiff-Counter-Defendant-Appellee,

v.

Jacqueline MARTINEZ, Defendant-Counter-Plaintiff-Appellant.

No. 20161.

Supreme Court of New Mexico.

Jan. 6, 1993.

Rehearing Denied March 8, 1993.

Montoya, Murphy & Garcia, Donald D. Montoya, Santa Fe, for appellant.

Modrall, Sperling, Roehl, Harris & Sisk, Thomas L. Johnson, Albuquerque, for appellee.

OPINION

FROST, Justice.

Jennifer Roybal rear-ended a truck on Interstate 25, and her passenger, Jacqueline Martinez, was seriously injured. Roybal had an automobile insurance policy with Mountain States Mutual Casualty Company (Mountain States) providing for $60,000 in liability coverage per accident and $60,000 in uninsured/underinsured coverage per accident. Mountain States paid Martinez the limits of Roybal's liability coverage, $60,000 less the $1,287 it paid to the owner of the truck. Martinez' damages exceeded $58,713, so she made a claim against Mountain States' underinsured coverage, claiming that Roybal was an underinsured driver. Mountain States filed a declaratory judgment action seeking judicial enforcement of language limiting its underinsured coverage. The limiting language reads:

2. Any amount payable under this insurance *shall be reduced by:*

   (b) All sums paid by or for anyone who is legally responsible, including *all sums paid under the policy's LIABILITY INSURANCE.*

(Emphasis added). Because Martinez received liability benefits on the Mountain States policy, this liability offset provision would prevent Martinez from recovering underinsured benefits on the same policy. The trial court granted summary judgment in favor of Mountain States, upholding the liability offset provision. We affirm.

The issue on appeal is whether a guest passenger should be allowed to recover for public policy reasons under both the liability and underinsured motorist provisions of a negligent host driver's insurance policy, even though a provision in the policy would prevent the double recovery. This is an issue of first impression in New Mexico. Recent cases have held that the only statutory conditions for recovery of underin-

sured motorist benefits are that (1) the insured be legally entitled to recover damages, and (2) the negligent driver be underinsured. *See, e.g., Padilla v. Dairyland Ins. Co.*, 109 N.M. 555, 557, 787 P.2d 835, 837 (1990); *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). Martinez contends that any additional limitations on underinsured motorist coverage are unenforceable, whether the limitation applies to a Class I named insured or to a Class II passenger insured such as herself. Under the policy in question, Class I insureds are the named insured as stated in the policy, the spouse, and relatives residing in the household, whereas Class II insureds are those persons merely occupying an insured motor vehicle. *See Konnick v. Farmers Ins. Co. of Ariz.*, 103 N.M. 112, 115, 703 P.2d 889, 892 (1985).

Mountain States notes that the statute requires an insurance company to offer underinsured coverage only to those who purchase liability insurance, or Class I insureds. It contends, therefore, that the statute was not primarily designed to protect Class II passenger insureds such as Martinez. For this reason, Mountain States claims that public policy would not protect Class II insureds like Martinez from the basic operation of contract law supporting the liability offset provision. We agree with Mountain States.

Our Uninsured Motorists' Insurance statute states in relevant part that "[n]o motor vehicle or automobile liability policy insuring against loss resulting from liability ... shall be delivered ... unless coverage is provided ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of *uninsured* motor vehicles...." NMSA 1978, § 66-5-301(A) (Repl.Pamp.1989) (emphasis added). Coverage must also be provided for the protection of persons entitled to recover from owners or operators of *underinsured* motor vehicles. *Id.* at § 66-5-301(B) (emphasis added).

In *Sullivan v. State Farm Mutual Automobile Insurance Co.*, 513 So.2d 992 (Ala.1987), the Alabama Supreme Court upheld a liability offset provision applied against a Class II insured. The Alabama Court's interpretation of its similar Uninsured Motor Vehicle Coverage statute was the crucial factor in its determination. It stated that the statute was primarily designed to protect persons who purchased liability insurance for themselves and their families, Class I insureds. *Id.* at 996. It also reasoned that Class II insured passengers are insured by virtue of their host driver's underinsured provision, not by mandate of the statute. *Id.* Thus, it concluded that a Class II insured's coverage may be limited by the terms of an insurance contract without thwarting public policy. *Id.* On this basis, the Alabama Court upheld the liability offset provision before it. The Supreme Courts of Arizona and Hawaii have reached the same result when applying statutory provisions substantially identical to the uninsured motorist statute of New Mexico. *See Duran v. Hartford Ins. Co.*, 160 Ariz. 223, 772 P.2d 577, 578 (1989); *Kang v. State Farm Mut. Auto. Ins. Co.*, 72 Haw. 251, 815 P.2d 1020, 1022 (1991). We adopt the rationale of these cases.

Martinez benefitted from underinsurance coverage under Roybal's liability policy, but she was also subject to that policy's exclusionary language requiring an offset of any proceeds paid under its liability coverage against underinsured benefits. The legislature mandated that underinsured coverage be included in every automobile liability insurance policy for the protection of Class I insureds. Mountain States' policy limits the recovery of underinsured benefits by Class II insureds. The offset provision in Mountain States' policy, therefore, does not contravene public policy or run afoul of legislative intent.

Further support for our conclusion is found in *Millers Casualty Insurance Co. of Texas v. Briggs*, 100 Wash.2d 1, 665 P.2d 891 (1983), wherein the Supreme Court of Washington upheld a definition of "underinsured motor vehicle" that in effect prevented a Class II passenger insured from recovering underinsured motorist benefits

in addition to liability benefits under a negligent host driver's policy. The *Briggs* court correctly observed that not to sustain such a limitation on coverage would transform underinsured motorist insurance into liability insurance and thus create a duplication of liability benefits. The court further explained:

> This result would cause insurance companies to charge substantially more for underinsured motorist coverage in order to match the cost of that coverage with the presently more expensive liability coverage. This increase in cost would discourage consumers from purchasing underinsured coverage, an important protection presently available for a minimal cost.

Id. at 895. *Accord Poehls v. Guaranty Nat'l Ins. Co.*, 436 N.W.2d 62, 64 (Iowa 1989), *Wolgemuth v. Harleysville Mut. Ins. Co.*, 370 Pa.Super. 51, 535 A.2d 1145, 1149, *cert. denied*, 520 Pa. 590, 551 A.2d 216 (1988).

When there are no overriding public policy considerations to the contrary, the obligations of an insurer on an underinsured motorist policy are determined by applying principles of contract law. *See March v. Mountain States Mut. Casualty Co.*, 101 N.M. 689, 691, 687 P.2d 1040, 1042 (1984). In the case at hand, Martinez' underinsured motorist coverage was unambiguously limited by the liability benefits she received under her host driver's policy. This sort of contractual limitation does not breach public policy as applied to a Class II insured like Martinez and will be enforced.

In a recent opinion of this Court, we distinguished the claimant's rights in *Briggs* on the basis of his Class II status and allowed a Class I insured to recover benefits for public policy reasons on both the liability and underinsured portions of her policy, despite an exclusion that might have prevented this dual recovery. *See Padilla v. Dairyland Ins. Co.*, 109 N.M. 555, 559, 787 P.2d 835, 839 (1990). In that case, Christina Padilla was seriously injured in a one-car accident. The vehicle was driven by Padilla's sister, an underinsured driver by statutory definition. As a member of the household, Padilla was a Class I insured on her father's policy.

In *Padilla* we discussed *Briggs* and similar cases and the concern that if Padilla recovered both liability benefits for her sister's negligent driving and underinsured benefits because the liability benefits were inadequate, underinsured coverage would in essence become liability coverage. *See id.* Nevertheless, we allowed Padilla to recover both liability and underinsured benefits on the same policy because of her Class I status, the crucial factor being that Padilla had "a contractual relationship with the insured along with an attendant reasonable expectation" of underinsured coverage. *Id.* at 560, 787 P.2d at 840. Moreover, "[Class I] insureds generally 'are covered by policies no matter where they are *or in what circumstances they may be;* coverage is not limited to a particular vehicle,' " as it is with Class II insureds. *Id.* at 559, 787 P.2d at 839 (quoting *Gamboa v. Allstate Ins. Co.*, 104 N.M. 756, 758, 726 P.2d 1386, 1388 (1986)). In other words, Padilla's father paid a premium for his daughter as a Class I insured, and consequently that coverage should follow her into any underinsured vehicle, even her own family's vehicle. Most importantly, our underinsured motorist statute was specifically designed to protect Class I insureds like Padilla, thereby preventing limitations not authorized by the statute.

None of these considerations apply to Martinez, a Class II insured. Martinez did not pay a premium to Roybal's insurer; thus, she had no contractual expectation of underinsured coverage on the policy. Accordingly, Mountain States and Roybal limited Martinez' underinsured benefits by contract without interfering in any way with Martinez' reasonable expectations. Neither did the contract limitation prohibit Martinez from receiving compensation. She received compensation in the form of liability benefits, and she will recover underinsured motorist benefits on policies on which she is a Class I insured.

In the event a passenger wishes to be protected beyond the legal liability minimum, he or she should purchase a greater

amount of underinsured motorist insurance than that statutorily prescribed. Conversely, in the event a negligent host driver wishes to be protected from personal liability, he or she should purchase a greater amount of liability insurance than that statutorily prescribed. Public policy does not mandate that we interfere with the balance of these incentives. For all of these reasons, and the fact that our underinsured motorist statute was not primarily designed to protect Class II insureds like Martinez, we affirm the trial court in giving full force and effect to the Mountain States liability offset provision.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

ON MOTION FOR REHEARING

RANSOM, Chief Justice (specially concurring).

A motion for rehearing having been denied, I specially concur to note that, because the stacking issue that is at the foundation of this case is nowhere developed in the Court's opinion, it may appear to the reader that nothing more is involved than policy language that effects the rule in *Schmick:* any amount payable for underinsured coverage shall be reduced by all sums paid under liability insurance. The clause at the end of the penultimate paragraph, that "she will recover underinsured motorist benefits on policies on which she is a Class I insured," may be lost on the reader.

The briefs of the parties demonstrate that, as a member of the family of the named insured under policies covering vehicles owned by her parents, Martinez is a Class I insured to the extent of $75,000. The Class I and Class II coverages total $135,000. The author of the Court's opinion correctly observes that this case directly involves only the Class II coverage of $60,000. Damages suffered by Martinez exceed all policy limits, and she seeks to prorate the off-set for liability coverage and collect approximately $33,900 under the Mountain States policy after giving that coverage a 60/135th credit for the liability payment.

I am compelled to express the view that pro rata credit in cases of primary Class II and excess Class I coverage has been rejected in the very recent case of *Tarango v. Farmers Insurance Co. of Arizona,* —— N.M. ——, 849 P.2d 368 (1993). The "pro rata credit" affirmed in *Morro v. Farmers Insurance Group,* 106 N.M. 669, 673, 748 P.2d 512, 516 (1988), should be limited to concurrent insurance of the same class. In *Morro,* the Court simply found nothing unfair to the primary Class II carrier in the pro rata allocation of credit toward the liability of both the primary and excess carriers. Pursuant to *Tarango,* applying the *Schmick* formula, the aggregate amount of underinsured motorist coverage in *Morro* should have been reduced by the liability payment, and the primary Class II carrier should have paid the full amount of its $25,000 coverage before the excess Class I carrier paid the balance of the net aggregate. However, the excess Class I carrier did not question the fairness of what the trial court did in that case. Here, as in *Morro,* we must decide the question raised, briefed and argued on this appeal. We have not considered whether Martinez's Class I coverage would or would not be reduced by the liability payment that effected any reduction of Class II coverage payable under the Mountain States policy.

848 P.2d 532

COLFAX COUNTY, A New Mexico County, Selma Gutierrez, Colfax County Treasurer, Mary Ann Hunter, E.K. Sunny Bernard, and Joe Gallegos, Board of County Commissioners, Colfax County, New Mexico, Plaintiffs–Appellants,

v.

ANGEL FIRE CORPORATION, Sangre De Cristo Limited Partnership I, Sangre De Cristo Limited Partnership II, Sangre De Cristo Limited Partnership III, Sangre De Cristo Limited Partnership IV, Gary D. Plante, Ronald L. Evans, Moreno Valley, Inc., Angel Fire Ski Corporation, Starfire Resorts, Inc., Agency Del Sol, Inc., Portfolio Services, Inc., Two Moreno Valley Inc., and Guaranty Federal Savings Bank, Greycas, Inc., State of New Mexico Taxation and Revenue Department, Greyhound Real Estate Finance Company, Banquest First National Bank, Investors Mortgage Corporation, Resolution Trust Corporation, and First Federal Savings and Loan Association (to the extent said association exists), Defendants–Appellees.

No. 12502.

Court of Appeals of New Mexico.

Feb. 9, 1993.

Harold Breen, Colfax County Atty., Taos, for plaintiffs-appellants.

Elvin Kanter, Kanter & Everage, P.A., Jacqueline De Oliveira Bregman, Albuquerque, for defendants-appellees Paragraph One.

Bernard Kolbor, Charlotte H. Hetherington, Simons, Cuddy & Friedman, Santa Fe, for defendants-appellees Greyhound Real Estate Finance Co. and Greycas, Inc.

William J. Arland, Butt, Thornton & Baehr, P.C., Albuquerque, for defendant-appellee Resolution Trust Corp.

Daniel A. Bryant, Parsons & Bryant, P.A., Otero County Attys., Ruidoso, Kent Cooper, Luna County Atty., Deming, Warren Frost, Curry County Atty., Clovis, Val Ann Van Buren, Asst. Dist. Atty., County of Roosevelt, Portales, David Pederson, McKinley County Atty., Gallup, Mark I. Bannister, Dist. Attorney's Office, County of Quay, Tucumcari, Bill Baggett, San Juan County Atty., Aztec, Terry Brennan, Santa Fe County Atty., Santa Fe, amicus curiae, Counties of Otero, Curry, Luna, McKinley, Quay, Roosevelt, San Juan, and Santa Fe.

Gerald B. Richardson, Sp. Asst. Atty. Gen., Taxation and Revenue Dept., Santa

Fe, amicus curiae New Mexico Taxation and Revenue Dept.

OPINION

ALARID, Judge.

Colfax County, the Colfax County Treasurer, and members of the Colfax County Commission (hereinafter "Appellants") seek reversal of the district court's ruling granting summary judgment and dismissing their complaint for the collection of delinquent property taxes. Two issues are raised on appeal: (1) whether the county treasurer has the authority to file suit to enforce the personal obligation of owners of real property for the collection of delinquent property taxes; and (2) whether the county treasurer can proceed against property subject to a statutorily created tax lien and thereby force the sale of the property upon which taxes are owed.

The district court held that (1) county treasurers are granted no authority in the tax code to file suit to enforce the personal obligation of owners of real property for collection of delinquent property taxes; and (2) the New Mexico Taxation and Revenue Department has the exclusive authority to proceed against property subject to delinquent real property taxes and, as a consequence, county treasurers are granted no authority to either foreclose real property tax liens or to cause the sale of real property. We affirm.

FACTS

Appellants brought suit in February 1990 against certain Colfax County property owners (hereinafter "Angel Fire") and lienholders (hereinafter "Security Defendants"). Appellants claimed Angel Fire failed to pay property taxes to the Colfax County Treasurer pursuant to NMSA 1978, Section 7–38–46 (Repl.Pamp.1990). Specifically, Appellants sought personal judgment against the owners of the Colfax County property for payment of taxes and to foreclose property tax liens created by NMSA 1978, Section 7–38–48 (Repl.Pamp.1990). Moreover, Appellants sought a judicial order demanding sale of the property upon which the taxes were owed "in accordance with the course and practice of [the district] court." Each Security Defendant was alleged to have an interest in the property owned by Angel Fire. By naming all of Angel Fire's Security Defendants, the treasurer sought to establish a statutory lien preference over those secured parties.

After the initial complaint was filed in district court, Angel Fire and one Security Defendant filed separate motions to dismiss. Thereafter, an Amended Complaint was filed, the Motions to Dismiss were renewed, and a second Security Defendant filed a Motion for Summary Judgment. Subsequently, the district court held a hearing on the motions on May 17, 1990, and granted both the Motion for Summary Judgment and the Motions to Dismiss. Specifically, the district court found that the "Taxation and Revenue Department of the State of New Mexico has the exclusive authority to proceed against property subject to delinquent real property taxes" and that Appellants had "no authority to either foreclose a real property tax lien or to cause the sale of real property pursuant to the Property Tax Code."

In addition, the district court found that neither county treasurers nor county commissioners are granted authority by the Property Tax Code to file suit to enforce the personal obligation of owners of real property to pay the delinquent taxes on their real property. After an Amended Final Judgment and Order was entered, this appeal followed.

DISCUSSION

County Treasurers' Authority

The controlling issue in this appeal is whether New Mexico county treasurers have the authority to enforce two statutory provisions concerning the collection of delinquent property taxes. As a preliminary matter, we note that property tax law in New Mexico is governed by the provisions of the Property Tax Code, NMSA 1978, Chapter 7, Articles 35 through 38 (Repl.Pamp.1990). Specifically, Article 38 "applies to the administration and enforcement of all taxes imposed under the Property Tax Code." § 7–38–1.

Section 7–38–47 states that "[p]roperty taxes ... are the personal obligation of the person owning the property ... and a personal judgment may be rendered against him for the payment of property taxes that are delinquent together with any penalty and interest on the delinquent taxes." However, the statute does not inform the reader which governmental body or subdivision is authorized to seek the personal judgment, nor are there any annotated cases aiding in the interpretation of this statutory provision. Accordingly, we note that the issue in this appeal presents a question of first impression for this Court.

In an attempt to persuade us to uphold the district court, Angel Fire and various Security Defendants point out the absence of specific language authorizing county treasurers to enforce this provision in court. Appellants, however, counter that the language of the statute does not explicitly prohibit them from enforcing this statutory provision. Appellants also argue that the district court's ruling effectively "writes-in" additional language into Section 7–38–47, restricting the right to seek a personal judgment for delinquent taxes to the Taxation and Revenue Department.

As evidence of the legislature's intent to grant to county treasurers the authority to seek personal judgments against property owners, Appellants point to Section 7–38–42. Section 7–38–42(A) states that county treasurers have "the responsibility and authority for collection of taxes and any penalties or interest due under the Property Tax Code ... except for the collection of delinquent taxes, penalties and interest authorized to be collected by the [taxation and revenue] department under Section 7–38–62." In short, we believe Appellants base their entire appeal on this language found in Section 7–38–42.

However, we are not persuaded by this argument and disagree that the legislature intended for both the Taxation and Revenue Department and county treasurers to be able to enforce the personal obligation provision found in the Property Tax Code. The rule of construction of tax statutes in New Mexico provides:

> Statutes imposing taxes and providing means for the collection of the same should be construed strictly in so far as they may operate to deprive the citizen of his property by summary proceedings or to impose penalties or forfeitures upon him; but otherwise tax laws ought to be construed with fairness, if not liberality, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve.

Southern Pac. Ry. Co. v. State, 34 N.M. 479, 481, 284 P. 117, 117 (1930); *see N B S Corp. v. Valdez,* 75 N.M. 379, 405 P.2d 224 (1965); *Beatty v. City of Santa Fe,* 57 N.M. 759, 263 P.2d 697 (1953); *Amarillo–Pecos Valley Truck Lines, Inc. v. Gallegos,* 44 N.M. 120, 99 P.2d 447 (1940).

We believe, because Section 7–38–47 fails to expressly state that county treasurers are authorized to bring collection actions in district court and because we can find no other explicit statutory authorization for them to do so, that county treasurers are forbidden from enforcing the personal obligation provision found in the Property Tax Code. If a tax statute is ambiguous or doubtful in meaning or intent, it is to be construed strictly against the taxing authority. *Molycorp, Inc. v. State Corp. Comm'n,* 95 N.M. 613, 624 P.2d 1010 (1981). We consider it significant, as Angel Fire and Security Defendants point out, that the statute which does authorize the Taxation and Revenue Department to enforce the personal obligation provision is explicit in its description of the Department's use of this enforcement power. *See* § 7–38–62 (the authority of the Taxation and Revenue Department to collect delinquent taxes "includes bringing collection actions in the district courts based upon the personal liability of the property owner for taxes as well as for the actions authorized in the Property Tax Code ... for proceeding against the property subject to the tax for collection of delinquent taxes").

As further evidence of our belief that the legislature intended that the Taxation and Revenue Department should be the only governmental subdivision to enforce this

provision, we take note that NMSA 1978, Section 4-43-2 (Repl.Pamp.1992), listing the duties for county treasurers in the State of New Mexico, is devoid of any authorization for county treasurers to bring enforcement actions. County treasurers' specific statutory duties listed in that section are: keeping account of all moneys received and disbursed; keeping regular accounts of all warrants drawn on the treasury and paid; and keeping the books, papers, and moneys pertaining to the office ready for inspection by the county commissioners at all times. *Id.* There is a noticeable lack of authority for county treasurers to initiate collection actions.

Nonetheless, we do acknowledge that limited statutory authorization for county treasurers' tax collection activities can be found in NMSA 1978, Section 4-43-3 (Repl.Pamp.1992). However, that section merely states that the "treasurers of the several counties are ex-officio collectors for their respective counties and have all the powers and duties provided by law for county collectors." Our research concerning explicit authority for county treasurers to act as county tax collectors uncovers authorization for treasurers to collect delinquent property taxes only on personal property. *See* § 7-38-53 (a county treasurer may collect delinquent property taxes on personal property by asserting a claim against the owner's personal property). Thus, although we believe it could be possible to construe this broad language as granting to treasurers the authority to enforce the personal obligation provision found in the tax code, we decline to do so. Our duty in examining tax statutes is to find that interpretation which can most fairly be said to be imbedded in the statute in the sense of being most harmonious with its scheme and the general purpose that the legislation manifested. *Pittsburgh & Midway Coal Min. Co. v. Revenue Div.*, 99 N.M. 545, 559, 660 P.2d 1027, 1041 (Ct. App.), *appeal dismissed*, 464 U.S. 923, 104 S.Ct. 323, 78 L.Ed.2d 296 (1983).

We believe the legislature's explicit grant of authority to the Taxation and Revenue Department to enforce the personal obligation provision in district court, and the legislature's explicit grant of authority to county treasurers to only collect delinquent taxes on personal property, is reflective of the legislature's practice of authorizing tax collection procedures in specific and explicit terms. A county is but a political subdivision of the state, and it possesses only such powers as are expressly granted to it by the legislature, together with those necessarily implied to implement those express powers. *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs* 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976).

We apply this same reasoning to the question of whether county treasurers are authorized to enforce real property tax obligations by suits in district court. Accordingly, we hold that, in the absence of express statutory authorization, the county treasurers do not have such authority.

Property Tax Lien

Section 7-38-48 instructs us that "[t]axes on real property are a lien against the real property." Section 7-38-48 also states that the "lien runs in favor of the state and secures the payment of taxes on the real property and any penalty and interest that becomes due." As with the problem noted above in Section 7-38-47, Section 7-38-48 fails to inform us which specific governmental body is authorized to foreclose the statutorily created tax lien.

Nevertheless, Appellants contend that Section 7-38-48 empowers county treasurers to proceed against property subject to the statutorily created tax lien and thereby force the sale of the property upon which taxes are owed. We disagree and briefly outline the pertinent statutory provisions which govern the sale of real property for the collection of delinquent property taxes.

Section 7-38-61 informs us that county treasurers shall prepare a property tax delinquency list of all property for which taxes have been delinquent for more than two years. In addition, Section 7-38-61 instructs us that the county treasurers shall make a notation on the property tax schedule indicating that the account has

been transferred to the Property Tax Division of the Taxation and Revenue Department for collection. Likewise, Section 7–37–62 informs us that after receiving the tax delinquency list, the Taxation and Revenue Department has the "exclusive authority" to take all action necessary to collect delinquent property taxes. *See Johnson v. Rodgers,* 112 N.M. 137, 138 n. 2, 812 P.2d 791, 792 n. 2 (1991) (the Department has the responsibility and exclusive authority for collection of property taxes which are on the delinquent property tax list).

Thus, Sections 7–38–61 and 7–38–62 shift the responsibility for the collection of delinquent property taxes from county treasurers to the Taxation and Revenue Department. Moreover, Section 7–38–62 explicitly provides that the Taxation and Revenue Department's authority to collect delinquent taxes "includes bringing collection actions in the district courts based upon the personal liability of the property owner for taxes as well as the actions authorized in the Property Tax Code ... for proceeding against the property subject to the tax for collection of delinquent taxes."

We think it of great importance that the statutory provisions which authorize the collection of delinquent taxes on real property, by the selling of the real property, identify the Taxation and Revenue Department as the only governmental body expressly granted that authority. *See* § 7–38–65 (the Taxation and Revenue Department may collect delinquent taxes on real property by selling the real property on which the taxes have become delinquent). As further evidence, we note that Sections 7–38–66 and 7–38–67, which set forth the statutory notice and public sale requirements for the sale of real property, inform us that the Taxation and Revenue Department, and not county treasurers, is charged with the responsibility of notifying the owners of real property subject to the sale, and with the responsibility of publishing notice of the public sale in a newspaper. *See Patrick v. Rice,* 112 N.M. 285, 814 P.2d 463 (Ct.App.1991) (Section 7–38–66(A) requires the Taxation and Revenue Department to send notice to delinquent taxpayers via certified mail, return receipt requested; this requirement implicitly requires the Taxation and Revenue Department to send the notice to the correct address; the Taxation and Revenue Department has the affirmative duty to seek out, by "diligent search and inquiry," the correct address of each property owner, and failure to do so may violate due process). We find it curious that, if the legislature intended for both the Taxation and Revenue Department and county treasurers to enforce this provision, the legislature would only list the Taxation and Revenue Department as the governmental body entrusted with these important notice and sale responsibilities.

Moreover, our final rationale for affirming the district court involves combining these two collection statutes as proposed by Appellants in the present action. Appellants want this Court to approve of county treasurers obtaining personal judgments against owners of real property for payment of delinquent property taxes. Next, Appellants want this Court to condone county treasurers executing these personal obligation judgments by causing the sale of the property upon which the taxes are delinquent.

If we interpreted these statutes in this manner, then such a ruling would enable real property to be sold after the taxes became delinquent and as soon as the county treasurers were able to obtain personal judgments and initiate judicial proceedings against the property. *See* § 7–38–46 (property taxes that are not paid within thirty days after the date on which they are due are delinquent). Such an interpretation would effectively defeat the explicit statutory Property Tax Code requirement that real property may not be sold for delinquent taxes until after the expiration of three years from the first date upon which the taxes became delinquent. *See* §§ 7–38–65(A) and 7–38–76(A).

Of critical import in this regard, we note that the current Property Tax Code does not contain a right of redemption, or a right of repurchase for owners of real property sold at a tax sale. *See Chavez v. Derek J. Sharvell, M.D., P.A.,* 106 N.M.

793, 750 P.2d 1119 (Ct.App.1988) (quoting *Cano v. Lovato,* 105 N.M. 522, 734 P.2d 762 (Ct.App.1986)) (the new Property Tax Code eliminated the right of redemption and the right of repurchase). Accordingly, we do not believe it the intent of the legislature to allow county treasurers to initiate proceedings against property owners within as little as thirty days after the date which the taxes are due and thereby risk losing their property before the three-year waiting period has lapsed. *See Miller v. New Mexico Dep't of Transp.,* 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987) (statutes should be construed so as to facilitate their operation and achievement of the goals as specified by the legislature); *see also City of Las Cruces v. Garcia,* 102 N.M. 25, 690 P.2d 1019 (1984) (the interpretation of a statute must be consistent with the legislature's intent and must be accompanied by adopting construction which will not render a statute's application absurd, unreasonable, or unjust).

CONCLUSION

The cardinal rule of statutory construction informs us that our primary focus is to ascertain and give effect to the intent of the legislature. *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). As manifested by the express statutory provisions noted above, we believe the intent of the legislature is to place the authority to enforce the personal obligation provision and the authority to proceed against property subject to a statutorily created tax lien in the Taxation and Revenue Department only. We therefore affirm the judgment of the district court.

IT IS SO ORDERED.

CHAVEZ and PICKARD, JJ., concur.

848 P.2d 1079

HINKLE, COX, EATON, COFFIELD & HENSLEY, a partnership, Plaintiff-Appellee, and Cross-Appellant,

v.

CADLE COMPANY OF OHIO, INC., Defendant-Appellant, and Cross-Appellee.

No. 20332.

Supreme Court of New Mexico.

Feb. 23, 1993.

Cynthia A. Fry, Albuquerque, for appellant.

Hinkle, Cox, Eaton, Coffield & Hensley, Stuart D. Shanor and Gregory S. Wheeler, Roswell, for appellee.

OPINION

MONTGOMERY, Justice.

This is an appeal and a cross-appeal from a judgment in favor of the plaintiff, a law firm, awarding it the amount sought in its complaint as fees allegedly earned in representing the defendant over a period of time (plus prejudgment interest, costs, and attorney's fees), and dismissing the defendant's counterclaims. Defendant, Cadle Company of Ohio, Inc. ("Cadle"),[1] challenges the trial court's orders granting summary judgment to the plaintiff, Hinkle, Cox, Eaton, Coffield & Hensley ("Hinkle"), on Hinkle's complaint and on Cadle's counterclaims to recover amounts previously paid during the course of Hinkle's previous representation. By its cross-appeal, Hinkle attacks the trial court's refusal to award, as part of Hinkle's claim for attorney's fees as the prevailing party in the present litigation, amounts representing the value of services performed by a Hinkle associate. The case presents issues on allocation of the burden of establishing reasonableness in connection with a claim for attorney's fees allegedly earned in the past by a lawyer or a law firm, the requirements for the defense of "account stated" in resisting a claim by a former client for refund of fees previously paid, recovery of attorney's fees to a prevailing party for work related to the defense of counterclaims, and the requirements for asserting a claim for "in-house" attorney's fees in connection with a claim for attorney's fees recoverable in an action. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

Cadle is an Ohio corporation engaged in the business of purchasing commercial paper at a discount from the Federal Deposit Insurance Corporation and the Resolution Trust Corporation. Cadle often employs outside legal counsel to assist it in collecting such commercial paper and in liquidating any collateral securing it. In 1988 Cadle employed Hinkle to represent it in the collection of amounts due under certain promissory notes.

Cadle and Hinkle did not enter into a written fee agreement to govern Hinkle's fees for its services. Rather, according to Cadle's President, Daniel Cadle, the parties orally agreed that Hinkle would bill Cadle on an hourly basis, based on Hinkle's customary and reasonable hourly rate. Daniel Cadle testified by deposition that Stuart Shanor, a managing and senior partner of Hinkle, told him that the hourly rate would vary, depending on who performed the legal work.

Hinkle began the collection work and sent Cadle monthly invoices for the work performed. From approximately July 1988 to May 1989, Cadle paid Hinkle a total amount of between $26,572.13 and $27,364.54 (the exact amount was disputed). Thereafter, Hinkle continued to send Cadle monthly invoices, but Cadle refused to pay them.

In May 1990 Hinkle sued Cadle, seeking to recover $14,968.64 for unpaid legal services that it allegedly had rendered in collecting or attempting to collect on the promissory notes. Hinkle sought recovery based on theories of open account, account stated, and breach of contract. Cadle answered the complaint, denying that it owed any amounts to Hinkle. Cadle also asserted two counterclaims, seeking recovery of amounts it had already paid for previously rendered legal services. Its counterclaims alleged breach of contract and unfair trade practices.

Subsequently, during discovery, Cadle indicated that it was going to rely on the

1. The correct name of the defendant is "The Cadle Company," not "Cadle Company of Ohio, Inc.". In this opinion we shall refer to the defendant simply as "Cadle."

testimony of an expert witness, Louis Puccini, to establish that Hinkle's fees were unreasonable. Hinkle therefore sought to depose Puccini before trial. Hinkle attempted to schedule Puccini's deposition, but Cadle repeatedly delayed the deposition because it had not provided Puccini with the necessary documentation to enable him to express an expert opinion. Because of Cadle's delays, the trial court entered an order on August 22, 1991, compelling Puccini's deposition by August 30. Hinkle then deposed Puccini by telephone on August 30; however, Puccini could not express an opinion as to the reasonableness of Hinkle's fees because Puccini still had not received sufficient documentation on which to base an opinion.

Hinkle then moved to dismiss Cadle's counterclaims as a discovery sanction against Cadle. Hinkle alleged that Cadle's failure to provide Puccini with the necessary documentation was willful and deliberate. The trial court denied Hinkle's motion, but did impose an alternative sanction: It struck Puccini as a witness and prohibited Cadle from offering any other expert testimony in the case.

Hinkle next filed two motions for summary judgment, seeking judgment on its complaint and on Cadle's counterclaims. In support of the motion on its complaint, Hinkle submitted monthly invoices it had sent to Cadle and which remained unpaid. The invoices itemized the tasks performed by Hinkle, the attorney who performed each task, the amount of time spent on each task, and the amount billed for each task. The invoices also listed Hinkle's expenses incurred in representing Cadle. Along with the invoices, Hinkle submitted the affidavit of Stuart Shanor, who stated that the invoices represented actual work performed and expenses incurred and that the legal work and expenses were reasonable in amount and necessarily incurred.

Hinkle's other motion for summary judgment, addressed to Cadle's counterclaims, was based on the theory of an account stated. Hinkle asserted that Cadle could not recover amounts it had already paid Hinkle because Cadle had assented to those amounts by paying them without objection.

Cadle responded to Hinkle's motions by submitting affidavits signed by Timothy Taber, Vice President and General Counsel of Cadle. In his affidavit in response to Hinkle's motion on the complaint, Taber stated that since May 1989 he had been primarily responsible for hiring outside counsel for Cadle and that he had reviewed invoices from approximately 100 outside counsel, including four New Mexico firms. He then stated that he was familiar with Hinkle's representation, that he had reviewed Hinkle's invoices, and that Hinkle's legal fees were unreasonable. Taber's affidavit incorporated by reference two of Cadle's answers to Hinkle's discovery interrogatories. In the answers, Cadle listed the items from Hinkle's invoices that Cadle found objectionable and generally objected to "paying for [Hinkle's] legal education" and to being charged for intraoffice conferences and memos, unnecessary research projects, and excessive time allegedly spent on certain procedures.

In his affidavit in response to Hinkle's motion on the counterclaims, Taber again said that Hinkle's legal fees were unreasonable. This affidavit incorporated by reference a portion of Daniel Cadle's deposition, in which he referred to his previous discussions with attorneys at Hinkle, in which he had objected to the amount of Hinkle's bills.

The trial court considered Hinkle's motions at a hearing in October 1991. Initially, the court struck the affidavits of Timothy Taber insofar as they "purport[ed] to assert any expert opinion." The court reasoned that Cadle could not rely on Taber's affidavits because of the court's earlier discovery sanction prohibiting Cadle from relying on any expert opinion and that Taber was in any event incompetent to offer any expert opinions in the case.

The court then granted Hinkle's motions for summary judgment on the complaint and on the issue of account stated. In connection with the summary judgment on the issue of account stated, the court found that Cadle had assented to the charges it had already paid. It stated that "[t]here is uncontradicted testimony of record of the

manifestation of assent by [Cadle] to [Hinkle's] charges which have been paid by [Cadle]." Granting of summary judgment on that issue compelled, and the court accordingly ordered, dismissal of the counterclaims.

In granting Hinkle summary judgment on its complaint, the court found it undisputed that Hinkle had performed legal services for Cadle as set forth in Hinkle's invoices and that the charges remained unpaid. It then stated that "[u]nrebutted expert legal opinion has confirmed that the legal work and expenses as set forth in the various invoices ... were necessarily incurred ... and that said sums are reasonable in amount." Accordingly, the court entered an order granting Hinkle summary judgment on its claim for $14,968.64.

Following entry of this order, Hinkle, as the prevailing party in this action to recover on an open account, requested attorney's fees pursuant to NMSA 1978, Section 39–2–2.1 (Repl.Pamp.1991).[2] Hinkle requested a total amount of $17,093.56, consisting of $4,426.56 for in-house counsel fees and $12,667.00 for fees incurred by its retained counsel. At a hearing in November 1991, the court awarded Hinkle attorney's fees of $12,667.00. The court denied all of Hinkle's in-house fees, stating that it was the court's practice never to allow attorney's fees "when the attorney is doing their own work."

On appeal, Cadle argues that the trial court erred in granting summary judgment on both the complaint and the counterclaims. On its cross-appeal, Hinkle argues that the trial court erred in denying its in-house attorney's fees.

II. ANALYSIS

A. Summary Judgment on Hinkle's Complaint

Cadle makes two arguments in support of its position that the trial court erred in granting summary judgment on Hinkle's complaint: First, that Hinkle failed to present a prima facie case because it did not establish the reasonableness of its fees; second, that even if Hinkle did present a prima facie case, Cadle rebutted that prima facie case and raised a genuine issue of fact as to the reasonableness of the fees. We consider each of Cadle's arguments separately.

1. Requirements of a Prima Facie Case

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. *Peck v. Title USA Ins. Corp.*, 108 N.M. 30, 32, 766 P.2d 290, 292 (1988). The moving party must first make a prima facie showing of entitlement to summary judgment. *Id.* If a prima facie case is made, the burden shifts to the party opposing summary judgment to demonstrate a genuine issue of material fact. *See id.* Accordingly, when Hinkle moved for summary judgment on its complaint, it had the initial burden of showing that no genuine issues of material fact existed and that it was entitled to judgment as a matter of law.

The first issue debated by the parties is whether Hinkle's burden of showing that it was entitled to judgment as a matter of law required it to demonstrate the reasonableness of its fees. Cadle, citing *Calderon v. Navarette,* 111 N.M. 1, 800 P.2d 1058 (1990), asserts that an attorney seeking to recover on a contract with a client has the burden of proving that its fees are reasonable. *See id.* at 3, 800 P.2d at 1060 ("It is fundamental that the attorney bears the burden of proving the value of the legal services rendered."). Hinkle responds by distinguishing *Calderon,* in which an attorney sought recovery based on quantum meruit, from the present situation, in which Hinkle seeks recovery based on contract. It argues that the attorney in *Calderon,* by suing in quantum meruit, placed the value of his services in issue. In contrast, Hinkle argues that because it is suing in contract, it has not placed the value of its services in issue and therefore should not bear the burden of proof of reasonableness.

2. Section 39–2–2.1 provides for allowance to the prevailing party of a reasonable attorney's fee, to be set by the court and taxed and collected as costs, in any action to recover on an open account.

We think that Hinkle bore the burden of establishing the reasonableness of at least part of its fee. As stated above, the fee agreement was not for an agreed amount. While the parties apparently agreed to an hourly rate, they did not agree to the number of hours to be expended. Hinkle had the burden of establishing the reasonableness of the terms not expressly agreed to by the parties, *i.e.*, the burden of showing that the amount of time expended was reasonable and that the time was "fairly and properly used." *See Jacobs v. Holston*, 70 Ohio App.2d 55, 434 N.E.2d 738, 742 (1980) (when attorney and client had agreed to a fee based on a stated hourly rate, attorney seeking to enforce the agreement had burden of proving reasonableness of time expended).

We further believe that Hinkle met its burden of showing reasonableness. Cadle argues that the affidavit of Stuart Shanor, who stated that Hinkle's charges "were reasonable in amount and necessarily incurred," was conclusory and insufficient to establish reasonableness. Cadle asserts that "the attorney must present evidence substantively supporting the reasonableness of the fee."

We agree that Shanor's affidavit alone was insufficient to prove reasonableness. However, Cadle virtually ignores the additional "substantive" evidence that Hinkle submitted in support of its motion: the monthly invoices that itemized the tasks performed by Hinkle, the attorney who performed each task, the amount of time expended on each task, and the amount billed for each task. Those invoices, along with Shanor's affidavit, established that Hinkle had performed its claimed legal services and that those services were reasonable in amount. It would be impractical to require Hinkle to present more detailed evidence, as suggested by Cadle, of the skill involved in the various tasks Hinkle performed and the results it obtained. Accordingly, we find that Hinkle presented a prima facie case of the reasonableness of its fees, and that the burden then shifted to Cadle to show the existence of a genuine issue of material fact on this issue.

2. Rebutting the Prima Facie Case

As previously noted, Cadle submitted an affidavit by Timothy Taber in response to Hinkle's motion, incorporating by reference two of Cadle's answers to Hinkle's interrogatories. The trial court struck Taber's affidavit insofar as it offered expert opinion and then concluded that "[u]nrebutted expert legal opinion" established that Hinkle's fees were reasonable. The trial court apparently believed that expert testimony was necessary to raise an issue of fact as to the reasonableness or unreasonableness of an attorney's fee. Consequently, not only did it refuse to consider Taber's affidavit insofar as it purported to express expert opinion, but it also refused to consider the affidavit and the answers to interrogatories attached to it as nonexpert testimonial and documentary evidence.

The trial court erred to the extent it believed expert testimony is always necessary to create a genuine issue of fact concerning the reasonableness of attorney's fees. As a general rule, "*any one sufficiently familiar* with the commercial value" of services may testify to the value of those services. 3 John H. Wigmore, *Evidence in Trials at Common Law* § 715, at 52 (rev. ed. 1970); *see also* 2 Stuart M. Speiser, *Attorneys' Fees* § 18:14 (1973) (testimony of expert witness is generally not essential on question of value of legal services). When the issue concerns the value of professional services, such as legal services, some courts hold that only a member of the particular profession is sufficiently familiar; other courts disagree. Wigmore, *supra*, § 715, at 52.

Taber was sufficiently familiar with the commercial value of Hinkle's legal services to testify on the alleged unreasonableness of Hinkle's charges. As noted, Taber is the Vice President and General Counsel of Cadle. Taber testified in his affidavit that since 1989 he had reviewed invoices from approximately 100 outside counsel for Cadle, including four New Mexico firms (excluding Hinkle). He also stated that he was familiar with Hinkle's representation of Cadle and had reviewed Hinkle's invoices. This knowledge made Taber

qualified to testify as to the unreasonableness of the fees, notwithstanding the trial court's finding that Taber was not competent to offer *expert* testimony.

We further hold that Taber's affidavit, when considered with the answers to interrogatories, rebutted Hinkle's prima facie case and raised a genuine issue of fact on the reasonableness of the fees. The answers to interrogatories identified the specific charges that Cadle found objectionable and gave various reasons why Cadle objected to those charges. These objections were sufficiently detailed to raise a question of fact concerning the reasonableness of Hinkle's fees. Accordingly, the trial court erred in granting summary judgment to Hinkle on its complaint.

B. Summary Judgment on Cadle's Counterclaims

The court dismissed Cadle's counterclaims after granting summary judgment to Hinkle on the issue of account stated. The *Restatement of Contracts* defines an account stated as "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." Restatement (Second) of Contracts § 282(1) (1979). New Mexico case law similarly defines an account stated as " 'an account balanced, and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance.' " *Leonard v. Greenleaf,* 21 N.M. 180, 184, 153 P. 807, 808 (1915) (quoting *Comer v. Way,* 107 Ala. 300, 19 So. 966, 967 (1895)). Once an account stated is established, it operates as an admission by each party that a certain sum of money is due. *See* Restatement (Second) of Contracts § 282(2). Neither party, in the absence of fraud or mistake, can question the correctness of the stated sum. *Leonard,* 21 N.M. at 187, 153 P. at 809 (quoting *Brown & Manzanares Co. v. Gise,* 14 N.M. 282, 287, 91 P. 716, 717 (1907)).

The trial court concluded that Cadle had impliedly assented to the amounts it had previously paid Hinkle by paying those amounts without objection. The court found "uncontradicted testimony of record of the manifestation of assent by [Cadle] to [Hinkle's] charges which have been paid by [Cadle]." It further found no evidence of fraud or mutual mistake.

Cadle argues that the trial court erred in granting summary judgment because Cadle presented evidence showing that it had not assented to the amounts it had previously paid. Cadle points out that Daniel Cadle met with attorneys at Hinkle to discuss objections to Hinkle's bills. It also relies on Daniel Cadle's testimony that payment of Hinkle's invoices did not necessarily indicate that Cadle had no objections to the bills.

Cadle's argument is not persuasive. While Daniel Cadle did testify that he met with attorneys at Hinkle in early 1989 to discuss Cadle's concern that Hinkle's bills were too high, Cadle also admitted that after these discussions he paid Hinkle's bills without protest or any noted reservation of right. Such payments, occurring after Daniel Cadle reviewed the invoices and even discussed some of them with Hinkle, demonstrated Cadle's assent to those amounts. This assent constituted an account stated. Absent a recognized ground for avoidance, such as fraud or mutual mistake, which the trial court found to be absent, Cadle cannot now argue that the amounts it has already paid were unreasonable. *See Tabet Lumber Co. v. Chalamidas,* 83 N.M. 172, 174, 489 P.2d 885, 887 (Ct.App.1971) (assuming that reasonableness of amount involved is a defense to account stated, defendant's agreement to the amount is evidence of its reasonableness). Accordingly, we affirm the trial court's summary judgment in favor of Hinkle on the counterclaims.

C. Award of Attorney's Fees

We now consider the trial court's award of attorney's fees, which the court granted to Hinkle as the prevailing party in its suit on an open account (*see supra* note 2). The court awarded attorney's fees for work related both to the prosecution of Hinkle's complaint and to its defense to Cadle's counterclaims.

1. Work Related to Counterclaims

Clearly, our reversal of the summary judgment on Hinkle's complaint requires reversal of the award of attorney's fees insofar as it allows fees for work related to prosecution of the complaint. Arguably, our affirmance of the summary judgment on the counterclaims might permit affirmance of the award of attorney's fees related to defense of the counterclaims. However, we do not believe there was any authority to award attorney's fees for defense of the counterclaims. While Section 39–2–2.1 clearly authorizes attorney's fees to Hinkle if it prevails in its action on an open account, the statute does not authorize attorney's fees for defending against Cadle's counterclaims, because those claims were resolved on the basis of an account stated. *See Tabet Lumber Co.,* 83 N.M. at 174, 489 P.2d at 887 (reversing award of attorney's fees under predecessor to § 39–2–2.1 when facts supported finding of account stated rather than open account); *see also Hiatt v. Keil,* 106 N.M. 3, 4–5, 738 P.2d 121, 122–23 (1987) (stating that fees generally should be allowed only for work on principal cause of action for which there is statutory or contractual authority for award of fees, although refusing to foreclose possibility that fees can never be awarded for defending a counterclaim); *cf. Thompson Drilling, Inc. v. Romig,* 105 N.M. 701, 706, 736 P.2d 979, 984 (1987) (In a claim for attorney's fees based on contract, "it is appropriate to distinguish between the amount of the attorney's fees incurred for prosecution of the complaint and counsel's fees for defense of a counterclaim."). Some of the work may be inextricably intertwined, making it difficult or impossible to segregate some of the time worked on the complaint from work related to the counterclaims. Nevertheless, the trial court should attempt to distinguish between the two types of work to the extent possible. Accordingly, we vacate the entire award of attorney's fees. If, on remand, Hinkle prevails on its complaint and the trial court awards a reasonable attorney's fee, the award should be limited, to the extent feasible, to work related to prosecution of the complaint.

2. Work Performed by In–House Attorneys

Our vacation of the attorney's fee award makes it unnecessary to consider Hinkle's argument on its cross-appeal that the trial court erred in denying the firm's in-house attorney's fees. Nevertheless, because the issue may arise again should Hinkle prevail on its complaint at trial, we address the issue to provide guidance to the trial court on remand. *See Brown v. General Ins. Co. of Am.,* 70 N.M. 46, 52, 369 P.2d 968, 972 (1962) (following reversal on one ground, court considered remaining issues so that issues would not arise again as result of second trial).

The trial court erred to the extent it ruled, as a matter of law, that attorneys who represent themselves cannot be awarded attorney's fees for such representation. While there may be dangers in some cases in allowing recovery of such fees, *see Weaver v. Laub,* 574 P.2d 609, 612 (Okla.1977) (discussing reasons why courts have denied attorney's fees for self-representation), there are compelling reasons for awarding them in many cases. *See id.* at 612–13 (discussing reasons why courts have allowed attorney's fees for self-representation). It would be unjust to deny fees to an attorney or law firm for self-representation when the attorney or firm, in rendering services for itself, has potentially incurred as much pecuniary loss as if it had employed outside counsel. *See id.* at 613. Additionally, it should be of no significance to the party bound to pay attorney's fees whether the award of fees is to an attorney or firm representing itself or is to retained counsel. *Id.* Therefore, if Hinkle prevails on its complaint on remand, the trial court should permit recovery of Hinkle's in-house fees to the extent that they are reasonable in amount, necessarily incurred, and not duplicative of services rendered by Hinkle's retained counsel. *Cf. id.* at 613–14 (setting forth requirements for recovery of attorney's fees by attorneys who represent themselves).

For the foregoing reasons, we reverse the summary judgment in favor of Hinkle on its complaint, affirm the summary judg-

ment in favor of Hinkle on Cadle's counterclaims, vacate the award of attorney's fees, and remand this case to the trial court for further proceedings consistent with this opinion. In light of Cadle's concession in this Court that it was incorrectly named in the complaint and that it was the client for whom Hinkle did the legal work involved in the lawsuit, the trial court on remand should enter an appropriate order correcting the name of the defendant.

IT IS SO ORDERED.

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

848 P.2d 1086

Ross Sterling HYDEN, Plaintiff–Appellant,

v.

The LAW FIRM OF McCORMICK, FORBES, CARAWAY & TABOR, a New Mexico partnership; J.W. Forbes, individually; and Cas Tabor, individually, Defendants–Appellees.

No. 12916.

Court of Appeals of New Mexico.

Jan. 12, 1993.

Certiorari Denied Feb. 16, 1993.

Perry C. Abernethy, Marek & Yarbro, P.A., Carlsbad, for plaintiff-appellant.

Robert E. Sabin, Jeffery D. Tatum, Atwood, Malone, Mann & Turner, P.A., Roswell, for defendants-appellees.

OPINION

PICKARD, Judge.

Plaintiff sued defendants for legal malpractice. The trial court granted summary judgment to defendants, and plaintiff has appealed. The issue before us is whether summary judgment was improperly granted. In making this decision, we are also called on to decide the subsidiary issues of whether the trial court correctly applied collateral estoppel against plaintiff based on proceedings in an earlier lawsuit, and whether in doing so the trial court erroneously considered two affidavits from the presiding judge in the underlying case. We reverse.

The genesis of the case before us lies in an earlier suit for breach of contract, fraud, and negligent misrepresentation. The parties to the earlier suit were plaintiff, who owned an automobile dealership, and Scott Tubb, who contracted to buy the dealership. Tubb and his father initiated discussions with plaintiff for the purchase of the dealership in March 1985. The elder Tubb had previously approached plaintiff on several occasions in 1982–83 about selling the dealership, but no sale agreement resulted during that time. In 1985, when sale discussions resumed, the Tubbs asked for financial data, which plaintiff provided. The parties reached a general understanding and agreement on the sale of the business. The Tubbs asked defendant Cas Tabor, an attorney with the defendant law firm, to draft the written contract for purchase and sale of the dealership. At the time, plaintiff had had a fifteen-year attorney-client relationship with the law firm, which regularly represented him primarily through the person of its senior partner, defendant J.W. Forbes.

Tabor recognized the potential conflict of interest involved in drafting the contract for the Tubbs in light of the firm's prior relationship with plaintiff, and he consulted briefly with Forbes on the propriety of taking on the work at the request of the Tubbs. Forbes encouraged Tabor to undertake the representation in order to enhance the likelihood that the firm could maintain the automobile dealership as a client after Tubb purchased it. Tabor proceeded to represent the Tubbs in the purchase of the dealership.

After Tabor had prepared the first two drafts of the contract, Scott Tubb asked Tabor to include language imposing warranty obligations on plaintiff with respect to the financial statements provided to Tubb. When Forbes discovered the warranty language in a draft of the agreement, he contacted plaintiff and asked whether plaintiff could in fact warrant the financial information. Plaintiff communicated his uncertainty to Forbes about doing so, and Forbes told plaintiff that he was going to change "that language." However, other warranty language was retained in the final agreement, and, according to plaintiff, defendants failed to advise him of the risks involved in their dual representation of him and Tubb. Plaintiff also contends that defendants failed to explain what misrepresentation entails or the extent of his exposure for any misrepresentations he might have made. *Cf. First Nat'l Bank v. Diane, Inc.,* 102 N.M. 548, 553, 698 P.2d 5, 10 (Ct.App.1985) (recognizing attorney's duty to warn client of potential liability and exposure under existing law).

The purchase price for the dealership was $920,000. Under the final agreement, Tubb made a partial payment, which purchased 49% of the stock in the business, and obtained an option to purchase the remaining 51% at a later date. After the final agreement but before exercising that option, Tubb discovered that some of the financial records provided by plaintiff during sale negotiations were inaccurate. Tubb sued plaintiff based on the warranty language. That language required plaintiff to warrant the accuracy of financial information and held him liable for any inaccuracies discovered within two years of the sale. Tubb sought either rescission or damages.

The matter of Tubb versus plaintiff was tried in the district court of Eddy County by Judge Harvey W. Fort without a jury. The defendant law firm represented plaintiff throughout pretrial proceedings and on the first day of trial. After that, Forbes and the firm were disqualified as counsel in order to become witnesses in the case, and new counsel assumed plaintiff's representation. After hearing evidence and argument of counsel, Judge Fort orally denied Tubb's demand for rescission, noting that Tubb had allowed the business to deteriorate during the tenure of his management. Judge Fort similarly found fault with plaintiff, indicating his intent to find that plaintiff knew or should have known about the inaccuracy of the financial documents and that he negligently failed to divulge the information to Tubb. No findings of fact or conclusions of law were ever requested by the parties or entered. Reduced to its essential terms, the written judgment filed after trial on January 31, 1987, provides that (1) "[t]he * * * total consideration of Nine Hundred Twenty Thousand Dollars ($920,000.00) should be reduced to Six Hundred Twenty–One Thousand Dollars ($621,000.00)"; (2) the reduced sum constitutes a complete resolution of all the disputes between the parties arising out of the contract; and (3) Tubb owed plaintiff a total of $621,000 for 100% of the stock in the dealership. No punitive damages were assessed against plaintiff, and each party was ordered to pay his own costs, expenses, and attorney fees. Plaintiff accepted payment from Tubb, and neither party appealed in that case.

Judge Fort retired from the bench on December 31, 1988. After plaintiff filed his complaint in this case, defendants obtained two affidavits from Judge Fort. In the first affidavit, dated April 25, 1989, Judge Fort stated that his decision in the underlying case was not based on the terms of the contractual provisions between the parties, but rather upon his conclusion that plaintiff had defrauded Tubb, and that Judge Fort was prepared to make such a finding based upon clear and convincing evidence. In the second affidavit, dated July 9, 1990, Judge Fort asserted that after a full trial on the merits, he made an oral finding of fact that "[t]he purchase price that a willing buyer would have paid a willing seller if the true facts about the dealership's finances had been disclosed was $621,000.00." He also concluded in the affidavit, based on his oral findings, that plaintiff was liable to Tubb for misrepresenting the finances of the dealership in the amount of the difference between the contractual price of the dealership and the actual value, i.e., "the amount that a willing buyer would have paid a willing seller if the true facts about the dealership's finances had been disclosed."

These affidavits; two affidavits from plaintiff's expert, attorney Barry H. Barnett; and other deposition and documentary evidence were before Judge Ralph W. Gallini, who entered summary judgment for defendants and dismissed plaintiff's complaint with prejudice. Judge Gallini based his ruling primarily upon a determination that the fair market value of the business was ascertained by Judge Fort and that plaintiff was not entitled to relitigate that determination. The briefs do not reveal why Judge Gallini granted summary judgment as to plaintiff's other claims for damages. In fact, defendants have informed us that they do not oppose a remand for trial to determine whether their services fell below the standard of competence and loyalty, and if so, whether that was the proximate cause of expenses incurred by plaintiff in the prior suit or of plaintiff's increased allergies due to stress. Furthermore, in order to avoid a factual dispute on this point, defendants have disclaimed, both below and on appeal, any reliance on Judge Fort's statement in his first affidavit that he was prepared to make a finding that plaintiff defrauded Tubb. Defendants have stated that they are only relying on Judge Fort's oral "finding" that plaintiff was guilty of negligent misrepresentation.

To recover on a claim of legal malpractice based on negligence, a plaintiff must prove three essential elements: (1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence

resulted in and was the proximate cause of loss to the plaintiff. *George v. Caton,* 93 N.M. 370, 373, 600 P.2d 822, 825 (Ct.App. 1979); *see also Sanders v. Smith,* 83 N.M. 706, 709, 496 P.2d 1102, 1105 (Ct.App.1972). As to the second element, a plaintiff must show, usually through expert testimony, that his or her attorney failed to use the skill, prudence, and diligence of an attorney of ordinary skill and capacity. *Collins ex rel. Collins v. Perrine,* 108 N.M. 714, 717, 778 P.2d 912, 915 (Ct.App.1989); *Diane, Inc.,* 102 N.M. at 552, 553, 698 P.2d at 9, 10; *Rodriguez v. Horton,* 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct.App.1980). Plaintiff does not deny that a misrepresentation occurred in the sale of the dealership. Rather, the crux of plaintiff's claim is that it was defendants' malpractice in representing him that proximately caused plaintiff to be sued by Tubb, and that as a result he incurred an unfavorable judgment on the contract, attorney fees, interest, loss of profits, earnings, business opportunities, and an option on a home, as well as personal injuries, mental distress and anxiety, and tax liabilities.

The principles guiding the determination of whether summary judgment was properly granted in any case are well settled in this state. "Summary judgment is a drastic remedy to be used with great caution." *Pharmaseal Lab., Inc. v. Goffe,* 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). It is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, *Paca v. K-Mart Corp.,* 108 N.M. 479, 480, 775 P.2d 245, 246 (1989); *Koenig v. Perez,* 104 N.M. 664, 665, 726 P.2d 341, 342 (1986), or when the material facts are not in dispute and the only question to be resolved is the legal effect of the facts. *Savinsky v. Bromley Group, Ltd.,* 106 N.M. 175, 176, 740 P.2d 1159, 1160 (Ct.App.1987). Thus, whether summary judgment was proper depends upon the peculiar facts of each case. *See Goodman v. Brock,* 83 N.M. 789, 793, 498 P.2d 676, 680 (1972). The party moving for summary judgment bears the burden of making a prima facie showing that no genuine issue of material fact exists. *Savinsky,* 106 N.M. at 176, 740 P.2d at 1160. Upon review, this court looks to the whole record and takes note of any evidence that puts a material fact in issue, and it views the matters presented in the light most favorable to support the right to trial on the issues. *C & H Constr. & Paving Co. v. Citizens Bank,* 93 N.M. 150, 156, 597 P.2d 1190, 1196 (Ct.App.1979). Thus, we review all pleadings, depositions, and affidavits, and the inferences drawn therefrom, in support of the arguments of the party opposing summary judgment. *See Wisehart v. Mountain States Tel. & Tel. Co.,* 80 N.M. 251, 453 P.2d 771 (Ct.App. 1969).

We first address the claims for damages other than the reduction in contract price. The elements of damages other than the reduction in contract price and investment opportunities based thereon are attorney fees; interest; lost profits, earnings, and business opportunities; personal injuries, including mental distress and anxiety; tax liabilities; and a lost option on a home. Plaintiff claims that these damages resulted from defendants' deficient representation of him. Based on the record before us and defendants' partial concession, we find that defendants failed to make a prima facie showing that there are no genuine issues of material fact as to these items.

The New Mexico Supreme Court has defined a prima facie showing as "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman,* 83 N.M. at 792–93, 498 P.2d at 679–80. Defendants have abandoned reliance on references to fraud in the first affidavit of Judge Fort, and therefore we do not consider such findings. However, for reasons set forth more fully in our discussion of collateral estoppel, we do not think it is appropriate to consider either of Judge Fort's affidavits in any case. Even were we to consider the second affidavit, neither it nor the other documents attached to the amended motion for summary judgment counter plaintiff's claims as to the non-reduction-in-contract-price damages with sufficient evidence to raise a presumption of fact or to establish his non-entitlement to recovery. If anything, the portion of plaintiff's depo-

sition attached to defendants' amended motion for summary judgment supports plaintiff's claims with some specificity.

We recognize that further factual development of the claims may be warranted, but sparsity in the factual development of the claims is not a reason to uphold the grant of summary judgment as to these matters. *See National Excess Ins. Co. v. Bingham,* 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct.App.1987) (summary judgment should not be granted when the facts before the court are insufficiently developed to appropriately determine the legal issues). Furthermore, the affidavits of plaintiff's expert are sufficient rebuttal, if needed, to create a question of fact with regard to defendants' liability for these items of damage. The trial court's order granting summary judgment is reversed as to these claims, and this cause is remanded for further proceedings, including trial on the merits if necessary, on these or some of these matters. We couch our grant of relief in these terms because it is not clear to us that plaintiff can recover all of his requested elements of damages. We do not want to be misunderstood as holding that he can. These matters were not decided below in view of the trial court's grant of summary judgment on collateral estoppel grounds. Being a court of review, we do not express opinions on questions not decided below. *See Miller v. Smith,* 59 N.M. 235, 241, 282 P.2d 715, 719 (1955).

The remaining issue is whether, on the element of damages representing the reduction in contract price, Judge Gallini correctly applied the principle of collateral estoppel against plaintiff, based on the judgment in *Tubb v. Hyden,* Eddy County No. CV-86-234-F. "Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Under collateral estoppel, or 'issue preclusion,' the cause of action in the second suit need not be identical with the first suit." *Silva v. State,* 106 N.M. 472, 474, 745 P.2d 380, 382 (1987). In addition to the requirement that the issue have been actually and necessarily decided, fundamental fairness requires that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* To invoke collateral estoppel, then, the moving party must show that (1) the subject matter or causes of action in the two suits are different; (2) the ultimate fact or issue was actually litigated; (3) the ultimate fact or issue was necessarily determined; and (4) the party to be bound by collateral estoppel had a full and fair opportunity to litigate the issue in the prior suit. *Reeves v. Wimberly,* 107 N.M. 231, 233, 755 P.2d 75, 77 (Ct.App.1988). Even when these elements are present, the trial court must consider whether countervailing equities such as lack of prior incentive for vigorous defense, inconsistencies, lack of procedural opportunities, and inconvenience of forum militate against application of the doctrine. *Id.* at 235, 755 P.2d at 79; *Silva,* 106 N.M. at 476, 745 P.2d at 384.

New Mexico recognizes both defensive and offensive collateral estoppel. *Id.* Defendants here seek application of defensive collateral estoppel, which may be applied to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost, regardless of whether the defendant was privy to the prior suit. *Id.; see also Edwards v. First Fed. Sav. & Loan Ass'n,* 102 N.M. 396, 404-05, 696 P.2d 484, 492-93 (Ct.App.1985). Defendants bear the burden of establishing the applicability of the doctrine by introducing sufficient evidence to support it. *See Silva,* 106 N.M. at 476, 745 P.2d at 384. Neither defensive nor offensive collateral estoppel is to be applied when the record is insufficient to determine what issues were actually and necessarily determined by prior litigation. *Id.; Howell v. Anaya,* 102 N.M. 583, 585, 698 P.2d 453, 455 (Ct.App. 1985).

Defendants do not deny their relationship with plaintiff, nor do they contend that their representation of both Tubb and plaintiff was free from conflict. They argue only that defensive collateral estoppel is appropriate with regard to the third prong of plaintiff's case, in which he must show that their negligence resulted in and was the proximate cause of his losses. *See George,* 93 N.M. at 373, 378, 600 P.2d at

825, 830. Defendants argue that plaintiff is seeking to relitigate the value of the dealership and that this issue was actually and necessarily determined in *Tubb v. Hyden* because Judge Fort determined the fair market value of the dealership to be $621,000 if the dealership's financial condition had been properly disclosed. They argue that because plaintiff received payment equal to the fair market value, plaintiff is not entitled to recover damages for Judge Fort's reduction in the price below the original contract figure. Defendants rely in part on Judge Fort's affidavits to substantiate their claim that the fair market value was decided in the first trial.

Plaintiff argues that such reliance is erroneous because (1) the first affidavit is contradictory to the record in *Tubb v. Hyden;* (2) the two affidavits are inconsistent with one another, thereby raising factual questions rather than resolving them; and (3) the after-the-fact affidavit of a trial judge is not admissible in a subsequent proceeding to contradict or explain the judgment entered in a prior case. *See Rodriguez v. State,* 86 N.M. 535, 537, 525 P.2d 895, 897 (Ct.App.1974) ("[w]here the testimony of a single witness conflicts on a material fact summary judgment is improper"); *see also Silva,* 106 N.M. at 476, 745 P.2d at 384 (collateral estoppel is not to be applied when the record is insufficient to determine what issues were actually and necessarily determined by prior litigation). Although plaintiff makes these arguments primarily to show that Judge Fort did not determine any fraud issues, we do not understand plaintiff's briefs to concede that the fair market value of the business was necessarily determined.

We agree with plaintiff's third rationale. We recognize that the supreme court has indicated that post-trial testimony or affidavits of trial judges may be appropriate in some instances. *See, e.g., Collins ex rel. Collins v. Tabet,* 111 N.M. 391, 405, 806 P.2d 40, 54 (1991) (recognizing policy considerations militating against calling judge as witness but indicating, under facts of case, that testimony might be appropriate to explain judge's intent and expectations in appointing defendant lawyer as guardian ad litem); *Eoff v. Forrest,* 109 N.M. 695, 700, 789 P.2d 1262, 1267 (1990) (considering probate judge's affidavit in suit for fraud); *State v. Pothier,* 104 N.M. 363, 366–67, 721 P.2d 1294, 1297–98 (1986) (when transcript of original contempt occurrence was of record, testimony of district judge before whom contempt occurred was not necessary, but "nothing prevented" defendants from calling judge as witness in later proceeding). We do not think this is such a case, however.

In *Glenn v. Aiken,* 409 Mass. 699, 569 N.E.2d 783, 786 (1991), the Supreme Judicial Court of Massachusetts reviewed the admission of a trial judge's affidavit in a legal malpractice case to explain how the judge would have ruled if the defendant attorney had objected to a certain instruction at trial. The court discussed "the inappropriateness of turning to such extra-record, subjective views and of summoning judges to testify on such matters," and cited the following authorities for the proposition that "[p]robing the mental processes of a trial judge, that are not apparent on the record of the trial proceeding, is not permissible." *Id.* (citing *Day v. Crowley,* 341 Mass. 666, 172 N.E.2d 251, 253 (1961); *Washington v. Strickland,* 693 F.2d 1243, 1263 (5th Cir.1982), *rev'd on other grounds,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Fayerweather v. Ritch,* 195 U.S. 276, 307, 25 S.Ct. 58, 68, 49 L.Ed. 193 (1904) (record ought never to be overthrown or limited by the oral testimony of a judge or juror regarding what he or she had in mind at the time of the decision); *United States v. Crouch,* 566 F.2d 1311, 1316 (5th Cir.1978); *Morrison v. Kimmelman,* 650 F.Supp. 801, 806–07 (D.N.J. 1986)). Respect for the finality of judgments makes resort to judicial affidavits particularly inappropriate when the purpose is to " 'state the secret and unexpressed reasons which actuated' " a judgment. *Day,* 172 N.E.2d at 253 (quoting 2 Abraham C. Freeman, *A Treatise of the Law of Judgments* § 771 (5th ed. 1925)). In light of these authorities, consideration of Judge Fort's affidavits was error.

Defendants also contend that, even apart from Judge Fort's affidavits, the rec-

ord shows that the fair market value of the dealership was litigated and decided in the first trial and therefore cannot be relitigated here. We disagree, both by consideration of the transcript of proceedings in the prior trial and by consideration of a comparison of the issues in the prior trial and the issues in this trial.

Nowhere in the portion of trial proceedings we have before us from *Tubb v. Hyden* does Judge Fort mention fair market value or use the terms "willing buyer" and "willing seller." Nor do the excerpts of testimony of the witnesses, for that matter. What is clear from Judge Fort's remarks is that he was seeking to find an equitable remedy which would take into account the fact that plaintiff had negligently failed to disclose an inaccuracy in the financial data and the Tubbs had allowed the business to deteriorate. In doing so, he recognized that the business was perhaps uniquely attractive to the Tubbs, that their unquestioning reliance on all the financial records they received was less than reasonable, that they had caused the business to decline, and that they should pay a price that the court determined to be fair, in light of the equities in the case. Judge Fort specifically talked about determining what the business was worth to *the parties,* and not simply what the calculation of its fair market value might be. The fact that Judge Fort avoided the term "fair market value" at the time of trial and when he entered the written judgment leads us to conclude that his decision was premised upon a balancing of the equities in the case, and not simply upon the fair market value of the dealership.

Additionally, the issue litigated and determined in *Tubb v. Hyden* involved more than whether the Tubbs were entitled to a reduction in the contract price because of the inaccurate financial data they received. It is true that the measure of damages in a case of misrepresentation is the difference between the value received and the purchase price. *First Interstate Bank v. Foutz,* 107 N.M. 749, 751, 764 P.2d 1307, 1309 (1988). However, in this case, Judge Fort also made adjustments in the judgment for repossession losses, costs, expenses, and attorney fees. Even if the only issue, however, had been the reduction in contract price because of the misrepresentation, the issue presented by this case is, instead, whether defendants' malpractice proximately caused plaintiff to receive less than the contract price for the dealership, and to suffer other losses, as well. These issues are not synonymous. *Cf. Perrine,* 108 N.M. at 719, 778 P.2d at 917 ("Malpractice actions are not attempts to set aside the prior settlement, but are entirely separate actions to recover compensation for the negligent performance of duties."); *accord Bucci v. Rustin,* 227 Ill. App.3d 779, 169 Ill.Dec. 810, 813, 592 N.E.2d 297, 300 (1992) (when the plaintiff's complaint alleged that plaintiff would not have been found guilty of fraud except for the attorneys' negligent representation, the defendant attorneys could not use finding of fraud to establish that their legal representation was not proximate cause of result in case, and this issue is not whether the plaintiff was fraudulent, but whether the attorneys' negligence was proximate cause of bankruptcy court's finding); *Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold,* 356 N.W.2d 333, 335 (Minn.Ct. App.1984) (legal malpractice action is not an action to vacate or set aside settlement in underlying case, but an independent action sounding in negligence).

While the amount of the judgment in *Tubb v. Hyden* may be relevant in determining plaintiff's damages in this case, it does not necessarily represent the value of the business or the outer limit of what plaintiff might be entitled to recover for the loss of the contract price. For instance, plaintiff has averred that he would never have willingly sold the business for $621,000, even had the error in data been pointed out to him prior to execution of the contract. There was evidence to show that the Tubbs were eager to purchase the dealership, and that they had inquired about it more than once. It may be that plaintiff will be able to show that the dealership had particular value to them and that they or some other buyer would have paid something less than $920,000, but more than $621,000, notwithstanding the accounting discrepancy.

The measure of damages in a malpractice case is the amount a plaintiff would have received but for the attorneys' negligence. *Cf. Perrine,* 108 N.M. at 719, 778 P.2d at 917 (measure of damages in legal malpractice suit is amount of the judgment that could have been recovered but for the attorney's negligence in settlement of claim); *George,* 93 N.M. at 378, 600 P.2d at 830 (measure of damages in case charging the attorney's negligence in failure to timely prosecute claim is amount that would have been recovered by the client absent the attorney's negligence). Of course, the defendants in such a case are also entitled to show that the amount the plaintiff actually received was due to reasons other than their malpractice. Thus, both plaintiff and defendants in this case are entitled to have a jury determine whether plaintiff was deprived of the contract price of the dealership and suffered damages as a result of his own negligence, his attorneys' malpractice, or as a result of the combination of these two factors. *See Trujillo v. Treat,* 107 N.M. 58, 60, 752 P.2d 250, 252 (Ct.App.1988) (generally, proximate cause questions are issues of fact to be decided by the jury); *see also Scott v. Rizzo,* 96 N.M. 682, 687, 634 P.2d 1234, 1239 (1981) (adopting the doctrine of comparative negligence in New Mexico).

For the foregoing reasons, the order granting summary judgment and dismissing plaintiff's complaint is reversed, and this cause is remanded for trial on the merits as to all issues.

IT IS SO ORDERED.

CHAVEZ, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

I concur in the reversal of the summary judgment. I regret that I cannot join in the able opinion of Judge Pickard. I have no particular quarrel with the legal analysis in the opinion and fully agree with the discussion of the inappropriateness of the judicial affidavits in this case. Nevertheless, the parties' briefs on appeal have made concessions on the principal matters discussed in the opinion. We should honor those concessions.

First, as I read Plaintiff's briefs, he does not contest that the value of the business was actually and necessarily determined in the first trial. He contends, rather, that in the first trial the value issue was not "actually litigated" and he did not have a "full and fair opportunity" to litigate the issue.

Plaintiff's argument that the value issue was not "actually litigated" focuses on the dearth of evidence on the matter presented at the first trial. But how active the parties were in presenting evidence is not the test of whether a matter was "actually litigated." As stated in Restatement (Second) of Judgments Section 27 cmt. d (1980): "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section." By that test Plaintiff's contention fails. Although the parties may have concentrated their efforts on whether rescission was proper, the pleadings ask for damages for misrepresentation, one element of which is the difference between the contract price and the fair market value. This is not a matter that was stipulated to by the parties or conceded by one of the parties. *See id.* cmt. e.

I am persuaded, however, by Plaintiff's other argument. Plaintiff raises an appropriate ground for denying collateral estoppel in the discussion of his claim that he was denied a "full and fair opportunity" to litigate the value issue in the first trial. His deposition testimony indicates that it was through the fault of Defendants that he failed to put on expert testimony regarding the value of the business. If Defendants were responsible for a substandard presentation of Plaintiff's case with respect to value at the first trial, Plaintiff should not be collaterally estopped in this malpractice action against Defendants by a finding on the value issue at the first trial. Collateral estoppel should not be a weapon to protect one against his or her own wrongdoing. *See id.* § 29(8) (collateral estoppel should not be permitted when "compelling circumstances make it appropriate" to permit relitigation); *Bucci v. Rustin,* 227 Ill.App.3d 779, 169 Ill.Dec. 810, 592 N.E.2d 297 (1992). Although there may be

doubt whether (1) conduct by Defendants could have caused the attorney who represented Plaintiff in the first trial to fail to put on expert testimony regarding value or (2) competent counsel would necessarily have called an expert witness on value, Defendants' brief does not claim the absence of a factual dispute on these matters. Thus, summary judgment was inappropriate with respect to collateral estoppel.

Because Defendants offer no ground in support of any portion of the summary judgment other than the collateral-estoppel ground, there is no need for this court to determine whether there is an independent ground supporting any portion of the summary judgment. Therefore, I concur in reversal of the entire summary judgment.

848 P.2d 1095

BRAZOS LAND, INC., Plaintiff–Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF RIO ARRIBA COUNTY, Defendant–Appellee.

No. 12340.

Court of Appeals of New Mexico.

Jan. 28, 1993.

William D. Winter, Jones, Snead, Wertheim, Rodriguez & Wentworth, P.A., Santa Fe, for plaintiff-appellant.

Anita P. Miller, Albuquerque, for defendant-appellee.

OPINION

CHAVEZ, Judge.

Appellant, Brazos Land, Inc. (Brazos), a subdivider, appeals the decision of the district court of Rio Arriba County which upheld the disapproval of their subdivision plat by appellee, Board of County Commissioners of Rio Arriba County (Board).

Two issues are presented:

1. Whether New Mexico Constitution article IV, section 34 prevented application of a later enacted ordinance to Brazos's subdivision plat;

2. Whether Brazos is entitled to automatic plat approval pursuant to NMSA 1978, Section 47–6–22(C) (Repl.Pamp.1982).

We affirm.

Facts

Brazos submitted its application for preliminary plat approval to the Board on June 4, 1985. The subdivision, "Lakes on the Chama," was, at that time, subject to regulations revised and promulgated as of October 8, 1982 (1982 Regulations).

The Board, in considering subdivision applications, is governed by the New Mexico Subdivision Act, NMSA 1978, §§ 47–6–1 to –29 (Repl.Pamp.1982) (the Act). The subdivision type determines which procedures will govern the approval process. Here, the subdivision was designated a type-two subdivision, as it contained ninety-nine lots with a maximum of 2.8 acres. § 47–6–2(M).

On July 8, 1985, the State Engineer's Office rendered an adverse opinion finding that Brazos's water proposals did not conform with county regulations. The relevant statute states that the Board then "shall hold a public hearing devoted solely to determining whether or not the subdivider's water proposals conform with county regulations." § 47–6–11(H)(3). Within thirty days of the hearing, the "[s]ubdivision plats submitted to the board of county commissioners for approval shall be approved or disapproved...." § 47–6–22(B)(3); *see also* § 47–6–14(E). The Board neither held a public hearing nor rendered a decision on Brazos's plat. Instead, on October 5, 1985, the Board enacted a moratorium on all subdivision approvals for which preliminary plat approval had not been received prior to the date the moratorium went into effect. Initially, the moratorium was to run until March 31, 1986, but it was later extended until June 15, 1986, in order to allow the Board time to develop new, more restrictive county subdivision regulations, which addressed the issues of density controls and groundwater contamination.

On April 25, 1986, Brazos notified the Attorney General in writing that the Board had failed to act on its plat. Brazos relied on Section 47–6–22(C) in giving notice. That section provides:

> Except as provided in Subsection G of Section 47–6–11 NMSA 1978, if the board of county commissioners does not act upon the plat within the required period of time, the plat is deemed to be approved thirty days after the subdivider gives the attorney general written notice of the board of county commissioners' failure to act. If the board of county commissioners fails to approve or reject

the final plat within the thirty days after notice to the attorney general, upon demand, the board of county commissioners shall issue a certificate stating that the plat has been approved:

On May 13, 1986, the Board promulgated new subdivision regulations (1986 Regulations), and the moratorium was subsequently lifted on June 15, 1986. A public hearing was held on Brazos's plat application on August 5, 1986. The Board then applied the 1986 Regulations to the plat and subsequently denied plat approval on September 17, 1986.

Discussion

Application of N.M. Const. art. IV, § 34

Brazos contends that New Mexico Constitution article IV, section 34 requires the Board to apply its 1982 Regulations because they were the regulations that were in effect when Brazos submitted its subdivision application, rather than the amended 1986 Regulations. This section of the constitution provides that "[n]o act of the Legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

Brazos contends that the submission of a subdivision plat application constitutes a pending case and therefore invokes article IV, section 34 of the New Mexico Constitution. In support of this contention, Brazos relies on *State ex rel. Edwards v. City of Clovis,* 94 N.M. 136, 607 P.2d 1154 (1980); *Phelps Dodge Corp. v. Revenue Division of the Department of Taxation & Revenue,* 103 N.M. 20, 702 P.2d 10 (Ct.App. 1985); and *Chilili Corp. Ass'n v. Sundance Mountain Ranches, Inc. (In re Sundance Mountain Ranches, Inc.),* 107 N.M. 192, 754 P.2d 1211 (Ct.App.1988).

We find persuasive the reasoning followed by the court in *Sundance Mountain Ranches,* where a county commission had approved a subdivision and adopted new regulations while a district court case over Sundance's right to subdivide was pending. The court applied a vested rights analysis, even though a pending case existed, and declined to retroactively apply the new regulations. The court determined that the property owner had reasonably relied on the county's grant of approval and had incurred extensive obligations in reliance upon the approval. In reaching this decision, the court in *Sundance Mountain Ranches* relied on *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs,* 89 N.M. 313, 551 P.2d 1360 (1976) (governmental body may be estopped to enforce newly adopted regulations to a proposed subdivision, where property owner is shown to have reasonably relied on county's grant of approval and has incurred extensive obligations in reliance thereon); and *Aragon & McCoy v. Albuquerque National Bank,* 99 N.M. 420, 659 P.2d 306 (1983) (property owners generally have no vested rights in a specific zoning classification). The court in *Sundance Mountain Ranches* relied in dicta only on the *Edwards* article IV, section 34 analysis of pending cases.

In other jurisdictions, the determination of whether a new zoning ordinance will be applied retroactively is analyzed under a vested rights approach. 1 Robert M. Anderson, *American Law of Zoning* § 6.06 (3d ed. 1986); *Raley v. California Tahoe Regional Planning Agency,* 68 Cal. App.3d 965, 137 Cal.Rptr. 699 (1977). There are two prongs that must be met for a vested right to exist. First there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. *Id.* Here, Brazos received no assurance to expect approval and no actual approval of the application. Nor was there any substantial reliance or change in position. Therefore, Brazos had no vested right and is subject to the Board's 1986 Regulations.

The definition of "pending" in the context of the purpose behind article IV, section 34 was clearly set forth in the seminal case of *Stockard v. Hamilton,* 25 N.M. 240, 245, 180 P. 294, 295 (1919):

> The evident intention of the Constitution is to prevent legislation interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state, and which have not been concluded, finished, or determined by a final

judgment. This provision of the Constitution was inserted for the purpose of curing a well-known method, too often used in the days when New Mexico was under a territorial form of government, to win cases in the courts by legislation which changed the rules of evidence and procedure in cases which were then being adjudicated by the various courts of the state.

In light of the purpose of article IV, section 34, which is to prevent legislative interference with adjudication of pending cases, the following language in *Edwards* is unnecessarily broad: "[A] City cannot, by enacting an ordinance, affect or change what would be the result of a pending action before the City Council or Commission or the result of a pending case in court, based upon valid ordinances existing at the time of the application or suit." *Id.*, 94 N.M. at 138, 607 P.2d at 1156. Furthermore, *Edwards* involved a writ of mandamus which was a pending case within the *Stockard* definition because it was in the course of litigation, in the district court, and was not concluded, finished, or determined by a final judgment. Here, there was no litigation, merely an application for preliminary plat approval. Therefore, we are not persuaded that *Edwards* is applicable. *See State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977) (court of appeals can, consistently with *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973), consider whether Supreme Court precedent is applicable), *overruled on other grounds, State v. Reynolds,* 98 N.M. 527, 650 P.2d 811 (1982).

Brazos also cites *Phelps Dodge Corp.* for the proposition that article IV, section 34 precludes retroactive application of the 1986 Regulations. *Phelps Dodge Corp.* resolved an administrative tax refund proceeding wherein a taxpayer filed a request for a refund of taxes previously paid. The court found the proceeding in *Phelps Dodge Corp.* to fall within the article IV, section 34 definition of "pending case" because (1) the statutorily mandated review process required the plaintiff to first make this formal request for relief from government action to the Director of Bureau of Revenue; and (2) the plaintiff had to exhaust the administrative remedies before invoking the jurisdiction of the district court. *Id.*, 103 N.M. at 23, 702 P.2d at 13. While the taxpayer's request was pending, the legislature enacted a bill which affected the outcome of the taxpayer's request. The administrative proceeding in *Phelps Dodge Corp.* was tantamount to the legislature trying to adjudicate a particular case to directly interfere with the outcome. Therefore, application of article IV, section 34 was consistent with policy underlying the constitutional provision. *See Stockard v. Hamilton.* In the case at hand, no such pending case was created administratively or by filing a legal suit before the moratorium or amended regulations were enacted. The only administrative action Brazos took was to submit a preliminary plat application, which the Board has legal discretion to consider and approve or disapprove. *See El Dorado at Santa Fe, Inc. v. Board of County Comm'rs.*

We hold that the Board's 1986 Regulations are applicable to Brazos. Brazos did not establish a vested right; nor does submission of a preliminary plat application achieve pending status. Moreover, for purposes of determining which regulations apply to a subdivision plat application, we believe that a vested rights analysis is the better reasoned approach rather than further semantic refinement of the meaning of "pending" for purposes of a rigid article IV, section 34 analysis.

Applicability of Section 47-6-22(C)

Brazos sought relief under Section 47-6-22(C), which is referred to by the parties as a "default provision" in that, should a board fail to act upon a final plat, the statute allows for automatic plat approval. Brazos first argues that the default provision applies because the Board defaulted in its statutory duties. Brazos contends that the Board had to hold a public hearing on the State Engineer's adverse opinion sixty days after they received notice of the opinion. Section 47-6-11(H)(3) states:

> [I]f, within sixty days of the date the subdivider was notified, the state engineer does not change his opinion or issue

a favorable opinion when one has been withheld because of insufficient information, the board of county commissioners shall hold a public hearing devoted solely to determining whether or not the subdivider's water proposals conform with county regulations.

Brazos interprets the statute as giving the Board a maximum of sixty days within which to hold a public hearing. This public hearing should be followed by a final approval or disapproval within the next thirty days pursuant to Section 47–6–14(E). Because the Board did not carry out either of these duties, Brazos contends that they are entitled to automatic plat approval via the default provision.

The Board reads the statute as allowing the State Engineer sixty days to change his opinion, and then mandating that the Board shall hold a public hearing but within no particular timetable. The Board believes that the legislature intentionally left "gaps" in the subdivision review process to allow counties time to evaluate information. We do not agree entirely with the Board's statutory analysis. However, we agree that Brazos's reading is incorrect.

In a 1980 New Mexico Attorney General explanatory guide to New Mexico subdivision law, former Attorney General Jeff Bingaman recognized in his commentary regarding Section 47–6–22 that there was a conflict among jurisdictions whether or not "a time limitation on administrative action commences only when the plat is in final form, or whether it commences when a preliminary or proposed plat is submitted...." *Subdividing Land in New Mexico: A Guide for Subdividers, Land Use Administrators, Public Officials and Land Purchasers* 107 (Att'y Gen.1980). Although the commentary recognized the uncertainty in the law on this point, it did not resolve it. *Id.* However, the legislature amended Section 47–6–22 in 1981, shortly after the guide was published, to include the use of "final subdivision plat" in Section 47–6–22(B)(1), (2). "Final" was not added to Section 47–6–22(B)(3), the subsection that applies to type-two plats such as Brazos's. However, it was not necessary to add the word "final" to this section because it also does not contain the term "subdivision plat," which is precisely what "final" would be used to modify. Furthermore, the implementation section of the default statute, Section 47–6–22(C), was expressly amended in 1981 to include the limiting phrase "final plat."

Secondly, Brazos had a preliminary plat as defined by the Rio Arriba County, New Mexico Land Subdivision Regulations, article III, section 1 (1982), which defines "Plat Preliminary" as "a map and other submittals as required by these regulations of a proposed land subdivision showing the character and proposed layout of the tract in sufficient detail to indicate the suitability of the proposed subdivision of land." A "Plat Final" is defined in part as "a map of a land subdivision prepared in a form suitable for filing of record with necessary affidavits, dedications and acceptances." *Id.* Rio Arriba's subdivision regulations provide for preliminary approval as a prerequisite to final approval. For preliminary plat approval, the plat must first pass the Planning Commission's review. *Id.*, art. VI, § 2(B)(3). "Approval or conditional approval of a preliminary plat shall not constitute approval of the final plat." *Id.*, § 2(D). As of April 25, 1986, Brazos had neither preliminary nor final plat approval.

In contending that neither a plat's noncompliance with subdivision regulations nor its improper form bar application of the default statute, Brazos suggests that the distinction between "preliminary" and "final" is untenable. We are not persuaded by Brazos's argument. The cases upon which Brazos relies are either memorandum opinions providing scant information regarding the facts or reasoning followed by the courts, or cases involving statutory provisions dissimilar to Section 47–6–22, such as a default statute specifically designed for approval of preliminary plats. *See Fishman v. Arnzen,* 29 A.D.2d 954, 289 N.Y.S.2d 42 (1968); *Wallkill Manor Ltd. v. Coulter,* 40 A.D.2d 828, 337 N.Y.S.2d 366 (1972), *aff'd,* 33 N.Y.2d 783, 350 N.Y.S.2d 416, 305 N.E.2d 494 (1973); *State ex rel. Lozoff v. Board of Trustees,* 55 Wis.2d 64, 197 N.W.2d 798 (1972). We do, however, acknowledge that the general purpose behind default statutes is to en-

sure that planning boards do not deny property owners their rights by mere inaction. Emmett C. Yokley, *Law of Subdivision* § 55 (2d ed. 1981). Furthermore, some jurisdictions reject the distinction between preliminary and final plats precisely because such a distinction is seen as contravening the legislative intent behind default statutes, which is to set a certain number of days for final action. *See, e.g., P.H. English, Inc. v. Koster,* 61 Ohio St.2d 17, 399 N.E.2d 72 (1980).

In construing Section 47–6–22, we believe that the 1981 amendment adding the phrase "final plat" supports the distinction between preliminary and final plats for purposes of application of our default statute. We are persuaded by the reasoning in *Mahopac Isle, Inc. v. Agar,* 39 Misc.2d 1, 239 N.Y.S.2d 614 (Sup.Ct.1963), which interpreted its default statute as applying only to final plats and not preliminary ones because " '[n]o Court should construe a default statute in such a manner as to penalize the future and orderly growth of a community unless there is no other construction open.' " *Id.* 239 N.Y.S.2d at 617 (quoting *In re A.E. Ottaviano, Inc.,* 33 Misc.2d 263, 224 N.Y.S.2d 487, 490 (Sup.Ct. 1961)). We hold that Section 47–6–22(C) applies only to final plats. Therefore, since the remedy sought by Brazos under Section 47–6–22(C) applies to a board's rejection or approval of a final plat, it is not available to Brazos.

On the merits of Brazos's statutory construction and the Board's objections, we tend to think the legislature intended to set a sixty-day period within which the State Engineer might change his opinion or issue a favorable one when one has been withheld for insufficient information and that a public hearing by the Board is mandatory if the State Engineer does neither. However, the language of the statute is not perfectly clear, and the legislature's intent is thus not obvious. We do not think the Board is required to hold a hearing within a designated period of time, but we assume that, in the absence of an expressly-designated period of time, the Board should act within a reasonable period of time.

In this case, we assume but need not decide that a fifteen-month gap would have been unreasonable, absent the moratorium. If the moratorium that was in effect when Brazos gave the Attorney General its notice was a valid exercise of the Board's powers, however, the record supports a conclusion that the Board acted within a reasonable time. The district court held that the moratorium was a valid exercise of "the County's implied planning, zoning and subdivision powers as well as its police powers." We agree.

Brazos contends that the Board's moratorium on subdivision approval was illegal and without statutory authority. We are not persuaded by Brazos's argument. The cases upon which Brazos relies can be distinguished from the case at hand. In *Harlow v. Planning & Zoning Commission of the Town of Westport,* 194 Conn. 187, 479 A.2d 808 (1984), the moratorium by its own terms only applied to future applications; therefore, the court noted that, had the commission wanted to include pending applications, it would have been simple enough for it to have stated those terms expressly. *Id.* 479 A.2d at 812. Furthermore, the same court, on the same day, involving the same moratorium, found that the moratorium was a valid exercise of implied power. *Arnold Bernhard & Co. v. Planning & Zoning Comm'n,* 194 Conn. 152, 479 A.2d 801 (1984). The factors the court considered in finding the moratorium valid are also present in the moratorium at hand: the terms were limited in time and scope and were not substantively unreasonable. *See id.* In *Board of Supervisors v. Horne,* 216 Va. 113, 215 S.E.2d 453 (1975), the moratorium was invalid because there was no express statutory language regarding authority to pass interim legislation, and there was also no necessity behind this particular ordinance. Failure to comply with statutory notice requirements in enacting ordinances was another reason given for failure to uphold certain moratoriums. *City of Gainesville v. GNV Investments, Inc.,* 413 So.2d 770 (Fla.Dist.Ct. App.1982). Finally, Brazos's reliance on *Norco Construction, Inc. v. King County,* 97 Wash.2d 680, 649 P.2d 103 (1982) (en banc), is also misplaced, because the reason the court applied the default statute to the

preliminary plat application was precisely because the county had failed to enact an interim zoning ordinance that would have been within its general welfare power.

The New Mexico State Legislature has conferred police powers to counties through NMSA 1978, Section 4–37–1 (Repl.Pamp.1992), which states that:

> [C]ounties are granted the same powers that are granted municipalities.... Included in this grant of powers ... are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

The Board is given express and implied authority by the legislature to regulate subdivisions within its boundaries. These regulations require water of an acceptable quality for subdivision use, solid and liquid waste disposal, and "any other matter relating to subdivisions which the board of county commissioners feels is necessary to insure that development is well planned." § 47–6–9(A)(11).

Restrictions upon the use of one's property are imposed by state and local governments pursuant to police power. The United States Supreme Court has long held that governments may, pursuant to police power, adopt zoning ordinances that regulate the manner in which real property may be used. *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). "When used to promote the public interest, [zoning] is justified and has been upheld as a legitimate exercise of the police power." *Miller v. City of Albuquerque,* 89 N.M. 503, 505, 554 P.2d 665, 667 (1976); *City of Santa Fe v. Gamble–Skogmo, Inc.,* 73 N.M. 410, 389 P.2d 13 (1964).

Where the Board enacted a moratorium for the purpose of, inter alia, promulgating more stringent waste disposal requirements for subdivisions, and where such requirements and restrictions reasonably advanced a legitimate state interest in the safety and health of the inhabitants of Rio Arriba County, we hold that the Board's moratorium was a valid exercise of its police power and its express and implied authority. *See Abraham v. City of Mandeville,* 638 F.Supp. 1108 (E.D.La.1986) (city council's moratorium on issuance of building permits was a fair exercise of its police power), *aff'd,* 814 F.2d 657 (5th Cir.1987); *see also Sun Ridge Dev., Inc. v. City of Cheyenne,* 787 P.2d 583 (Wyo.1990) (moratorium on building permits was a reasonable response to drainage problems and city's use of a moratorium was a valid exercise of its police power).

Conclusion

We affirm the district court's finding that the Board did not act arbitrarily, capriciously, in abuse of its discretion, or otherwise not in accordance with law.

IT IS SO ORDERED.

MINZNER, C.J., and PICKARD, J., concur.

848 P.2d 1101

STATE of New Mexico, Plaintiff–Appellee,

v.

Daniel SHAW, Defendant–Appellant.

No. 12609.

Court of Appeals of New Mexico.

Feb. 10, 1993.

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

Barbara Bergman, UNM Clinical Law Program, Albuquerque, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals the trial court's denial of his motion to suppress cocaine discovered during a search of his possessions after his arrest on a domestic disturbance charge. Defendant subsequently pled guilty to possession of cocaine, reserving the right to appeal the denial of the suppression motion. The sole issue on appeal is whether the cocaine was discovered during a valid inventory search. We affirm.

FACTS

On April 28, 1990, Defendant was arrested at his home during a domestic disturbance. He was taken to the Dona Ana County Detention Facility where he was booked by Officers Williams and Sellers. Officer Williams patted him down and took

Defendant's wallet and open pack of cigarettes, which he placed on a counter in the booking area. Officer Sellers processed the paperwork while Officer Williams completed the search of Defendant, supervised his change into prison clothes, and listed Defendant's possessions on a booking sheet.

Shortly after the wallet and cigarettes were taken, Defendant asked for the return of his cigarettes. Although his request was denied, he continued to ask for the return of the cigarettes. He was told that detention facility rules precluded return of his cigarettes while he was in custody and that they would be stored with his other possessions. Defendant's repeated requests for his cigarettes aroused Officer Sellers' suspicion that the cigarette pack might contain contraband. Acting on his suspicion, as well as for other reasons, Officer Sellers searched the cigarette pack, taking each cigarette out. He found a packet of white powder in the bottom of the cigarette pack which was later stipulated to be cocaine. Defendant was subsequently charged with possession, and he moved to suppress the cocaine. After a hearing, the motion was denied. He subsequently pled guilty to possession of cocaine.

DISCUSSION

On appeal, Defendant argues that the search of his cigarette pack was impermissible under both the State and Federal Constitutions because the search was not conducted pursuant to an established inventory procedure, and that a search with the sole objective of finding contraband is impermissible under the rules controlling inventory searches. Although we believe the facts in this case presented the trial court with a close question, we affirm.

As an initial matter, we note that 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 trial court was erroneously premised upon the law or facts. *State v. Campos,* 113 N.M. 421, 426, 827 P.2d 136, 141 (Ct.App.1991). Moreover, inventory searches "are a well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine,* 479 U.S. 367, 371, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987); *accord Illinois v. Lafayette,* 462 U.S. 640, 643, 103 S.Ct. 2605, 2608, 77 L.Ed.2d 65 (1983). Like all warrantless searches, however, inventory searches are presumed to be unreasonable and the burden of establishing their validity is on the State. *See United States v. Baca,* 417 F.2d 103 (10th Cir. 1969). Our Supreme Court set forth the elements of a lawful inventory search in *State v. Ruffino,* 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980): (1) the object of the search is in the custody or control of the police; (2) the inventory search is made pursuant to established police regulations; and, (3) the search is reasonable.

Defendant initially argues his Constitutional right to be free from unreasonable searches was violated because none of the permissible purposes of an inventory search were present in this case. We disagree. There is no dispute but that the cigarette pack was in police custody. Defendant does not challenge the legality of his arrest, nor does he assert that the arrest itself was pretextual.

With respect to whether the inventory search was made pursuant to established police regulations, Officer Sellers, who conducted the search of Defendant's cigarette pack, testified that he was taught to search open cigarette packs by taking out and examining each cigarette and then examining the empty pack. Officer Sellers also testified that he searched the cigarette pack to further the general goals of an inventory search: "Whatever comes in as an inventory, the gentleman knows what's his and what's going to be in his property."

In addition, there was testimony at the suppression hearing by detention facility training sergeants that, although there was no written procedure regarding searching personal items such as wallets or cigarette packs, the inventory procedure used at the facility required that all items in possession of an arrestee must be searched. In particular, Training Sergeant Patricia Ross testified that the procedure she taught jailers to use included "a thorough, complete search

conducted on every item that's in their possession." Additionally, Sergeant Ross testified that if an arrestee had an open pack of cigarettes, procedure required the jailer to "take each cigarette out and search the pack and the cigarettes." We believe this testimony corroborated the testimony provided by Officer Sellers.

Further, we note that written procedures are unnecessary as long as the inventory search is carried out in accordance with established inventory procedures. *See United States v. Kornegay,* 885 F.2d 713, 717 (10th Cir.1989), *cert. denied,* 495 U.S. 935, 110 S.Ct. 2179, 109 L.Ed.2d 508 (1990); *Spindler v. State,* 555 N.E.2d 1319, 1323 (Ind.Ct.App.1990); *State v. Weide,* 155 Wis.2d 537, 455 N.W.2d 899, 905 (1990). Thus, on the basis of the above mentioned testimony, and in light of the fact that written procedures are unnecessary, we believe there was substantial evidence to find that there was established police procedure to inspect all cigarette packs.

Our final area of review concerns whether the inventory search was reasonable. Courts generally uphold inventory searches as "reasonable" if they are made pursuant to an established procedure and in furtherance of any one of three purposes: (1) to protect the arrestee's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; or (3) to protect the police from potential danger. *South Dakota v. Opperman,* 428 U.S. 364, 369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976); *State v. Boswell,* 111 N.M. 240, 243, 804 P.2d 1059, 1062 (1991); *Ruffino,* 94 N.M. at 502, 612 P.2d at 1313.

Defendant continues to argue that Officer Sellers' search was not an inventory search at all, but rather an investigatory search prompted by his suspicion that the cigarette pack contained contraband. In this context, however, we note that the scope of a permissible inventory search is broad and may permit, without offending the Federal or State Constitution, that every item or container carried on or by an arrestee be opened and searched so long as such search is pursuant to a clearly established procedure requiring such extensive scrutiny. *Lafayette,* 462 U.S. at 648, 103 S.Ct. at 2610; *Boswell,* 111 N.M. at 242, 804 P.2d at 1061. Moreover, "the lawfulness of an inventory search operates independently from any suspicion by the police of contraband that may be concealed in a container." *Boswell,* 111 N.M. at 243, 804 P.2d at 1062.

Nonetheless, Defendant argues that, under the facts admitted at the hearing, the search of his cigarette pack did not further any of the three permissible purposes of inventory searches set out above. Because the monetary value of cigarettes is negligible, Defendant argues, a search of open cigarette packs is not necessary or reasonable in order to protect an arrestee's property, or to protect the police against claims or disputes about the number of cigarettes inventoried.

Defendant also argues that, because it was jail policy to confiscate any open cigarette packs in an arrestee's possession at the time of arrest and to store those cigarettes with the prisoner's other possessions during incarceration, there was no possibility of introducing dangerous instrumentalities into the detention facility through the opened cigarette pack. However, these arguments miss the essence of the law controlling inventory searches and we note again that a clearly established inventory procedure may properly require that jailers search all containers, including cigarette packs. *See Lafayette,* 462 U.S. at 648, 103 S.Ct. at 2610; *Boswell,* 111 N.M. at 242–43, 804 P.2d at 1061–62.

Further, we believe the recently decided *Boswell* decision noted above is illustrative of the broad scope of lawful inventory searches. In *Boswell,* our Supreme Court held that a police officer's search of a defendant's wallet, which had been inadvertently left in a grocery store following the defendant's arrest for shoplifting, was a valid inventory search. The wallet, which the defendant produced for identification at the time of the arrest, had been left at the grocery store after the defendant was taken into custody. After the arresting officer returned to the grocery store and retrieved the wallet, a search of the contents of the wallet revealed a blotter of LSD.

Our Supreme Court determined that "the government[al] interests that make an inventory search reasonable (to safeguard the property from loss or theft, to protect the police from liability and false claims, and to protect the police from hidden dangers), under the facts and circumstances of this case, justified the officer's return to retrieve the wallet." *Boswell,* 111 N.M. at 244, 804 P.2d at 1063. The *Boswell* Court then concluded that the "search properly fell within the inventory exception and was justified by appropriate police concerns that defendant's property be secured." *Id.* at 245, 804 P.2d at 1064.

Likewise, we believe there was substantial evidence to find that the inventory of Defendant's cigarette pack in the present case was reasonably made in furtherance of both the protection of the arrestee's property and to protect the police against false claims because items of value such as money, rings, and bracelets are often temporarily stored in open cigarette packs.

CONCLUSION

Because Officer Sellers testified that the purpose of searching the open cigarette container was to inventory the contents of the cigarette pack, and because the detention facility's inventory search procedure in this case did further a legitimate police interest under the law controlling inventory searches, we believe the search was reasonable and did not violate Defendant's right under the Fourth Amendment to be free from unreasonable searches. We affirm the trial court's denial of Defendant's motion to suppress the cocaine.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

848 P.2d 1105

Jason BAPTISTE, Plaintiff-Appellant,

v.

CITY OF LAS CRUCES and Elizabeth Carver, Defendants-Appellees.

No. 13206.

Court of Appeals of New Mexico.

Feb. 10, 1993.

Mario A. Esparza, Las Cruces, for plaintiff-appellant.

Robert Kelley, Wendell Mark Sims, Las Cruces, for defendants-appellees.

OPINION

HARTZ, Judge.

Pursuant to the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -4-29 (Repl.Pamp.1989), Plaintiff sued the City of Las Cruces and its animal control officer (ACO), Elizabeth Carver, for false imprisonment and false arrest allegedly resulting from the issuance of a citation by Carver. The Defendants sought dismissal of the charge on several grounds, including failure to state a claim upon which relief can be granted. *See* SCRA 1986, 1-012(B)(6). To establish this last ground, Defendants relied on a three-step analysis: (1) they are immune from suit under the Act unless immunity is waived by a provision of the Act, NMSA 1978, § 41-4-4(A); (2) the Act waives immunity for liability for false imprisonment and false arrest only if caused by law enforcement officers acting within the scope of their duties, NMSA 1978, § 41-4-12; and (3) a Las Cruces ACO is not a "law enforcement officer" as defined in the Act, NMSA 1978, § 41-4-3(D) (Cum. Supp.1992).

At the hearing on the motion to dismiss, the parties stipulated to the admission of Exhibit 1, a document setting forth the duties and qualifications of an ACO.[1] This consideration of evidence outside the pleadings converted the motion to dismiss into a motion for summary judgment pursuant to SCRA 1986, 1-056. *See Transamerica Ins. Co. v. Sydow,* 97 N.M. 51, 54, 636 P.2d 322, 325 (Ct.App.1981). Defendants were entitled to judgment only if there was no genuine issue as to a material fact. *See* SCRA 1-056(C). Finding that Carver was not a law enforcement officer, the district court dismissed the complaint with prejudice. Plaintiff appeals. We reverse because on the present record there is a genuine issue of fact regarding whether a Las Cruces ACO is a law enforcement officer under the Act.

Section 41-4-3(D) states:

> [L]aw enforcement officer means any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor[.]

We read this language in light of the traditional duties of law enforcement officers, *see Anchondo v. Corrections Dep't,* 100 N.M. 108, 110, 666 P.2d 1255, 1257 (1983); *Vigil v. Martinez,* 113 N.M. 714, 720, 832 P.2d 405, 411 (Ct.App.1992), and with regard to the legislative intent "to include within the definition of law enforcement officer * * * only those persons whose principal duties include those of a direct law enforcement nature." *Anchondo,* 100 N.M. at 111, 666 P.2d at 1258. "Principal duties" are "those duties to which employees devote the majority of their time." *Id.* at 110, 666 P.2d at 1257; *accord Vigil v. Martinez,* 113 N.M. at 720, 832 P.2d at 411.

We look to the duties of a Las Cruces ACO to determine whether an ACO comes within the statutory definition of "law en-

1. In their brief on appeal Defendants also rely on a Las Cruces municipal ordinance. But Defendants have not indicated where the ordinance appears in the record on appeal or, alternatively, how we can take judicial notice of the ordinance. Ordinarily such judicial notice would be improper. *See Coe v. City of Albuquerque,* 81 N.M. 361, 364, 467 P.2d 27, 30 (1970). We therefore disregard the ordinance.

forcement officer." Exhibit 1 contains the following pertinent information:

POSITION TITLE: Animal Control Officer

POSITION SUMMARY: Answers complaints regarding animals and insures compliance with City ordinances.

SPECIFIC CERTIFICATION AND/OR LICENSE REQUIREMENTS: Valid New Mexico Class V Operator's License; free of felony convictions; Radio Operator's License.

EDUCATION—MINIMUM REQUIREMENTS: High school diploma or equivalent.

EXPERIENCE—MINIMUM REQUIREMENTS: Two and one-half (2½) years experience in working with domestic animals on farm, in zoo, in veterinarian clinic, etc.

ABILITIES AND SKILLS—MINIMUM REQUIREMENTS: Must be able to write clear and accurate reports.

JOB DESCRIPTION: Answers complaints regarding animals. Picks up dead or injured animals or strays, including cats, dogs and other animals. Visits homes to inspect license, vaccination certificates and sick dogs or cats. Institutes quarantines in dog bite cases. Investigates complaints concerning treatment of animals or noncompliance with animal ordinances. Prepares cases and appears in court in legal action. Issues citations in cases or violations of ordinances. Maintains records and prepares periodic and special reports. May be required to destroy animals in the field. Performs other duties as assigned.

WORKING CONDITIONS—Works outside in all kinds of weather. May be exposed to the possibility of bruises, cuts and animal bites. Requires moderately light physical effort.

For an ACO to come within the statutory definition of "law enforcement officer," the ACO's principal duties under law must be "[(a)] to hold in custody any person accused of a criminal offense, [(b)] to maintain public order or [(c)] to make arrests for crimes[.]" Section 41-4-3(D). It suffices if an ACO's principal duties are either (a) or (b) or (c). We will not distort the plain language of the statute to adopt Defendants' contention that the statutory definition requires an ACO's principal duties to be either both (a) and (b) or both (a) and (c).[2] Plaintiff makes no claim that an ACO's principal duties include holding persons in custody or making arrests. Thus, the sole question is whether an ACO's principal duties under law are "to maintain public order."

The Tort Claims Act does not define the phrase "maintain public order." We note, however, that the statutory definition of law enforcement officer distinguishes between the duty "to maintain public order" and the duty "to make arrests for crimes." Section 41-4-3(D). This distinction clarifies that the task of maintaining public order can be accomplished without the power to arrest.

Some additional guidance is provided in decisions from other jurisdictions. The Georgia Supreme Court said, " 'Public order' means the tranquility and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords." *Board of Comm'rs of Peace Officers Annuity & Benefit Fund v. Clay,* 214 Ga. 70, 102 S.E.2d 575, 577 (1958). Another court has written, "A breach of the peace is described as 'a violation of public order; the offense of disturbing the public peace.' " *State v. Mancini,* 91 Vt. 507, 101 A. 581, 583 (1917). This statement suggests that the terms "public order" and "public peace" capture the same concept and a violation of either is a breach of the peace. We thus consider the following dictionary definition of "public peace": "The peace or tranquility of the community in general; the good order and repose of the people composing a state or municipality. That invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." *Black's Law Dictionary* 1130 (6th ed. 1990); *accord People v. Bissonette,* 327

2. Defendants find great significance in omission of the comma after "public order." But the New Mexico legislature typically omits the comma after the next-to-last item in a series.

Mich. 349, 42 N.W.2d 113, 116 (1950); *see Mancini,* 101 A. at 583 ("[P]ublic peace is that sense of security and tranquility, so necessary to one's comfort, which every person feels under the protection of the law."); *State v. Brooks,* 146 La. 325, 83 So. 637, 639 (1919) ("Public peace is public tranquility and quiet order and freedom from agitation or disturbance which is guaranteed by the law.").

[redacted] Although the guidance provided by these authorities is sparse and imprecise, it suggests that the "public order" is disturbed when dogs are barking, biting, knocking over garbage cans, etc. *Cf. Commonwealth v. Koch,* 288 Pa.Super. 290, 431 A.2d 1052, 1056–58 (1981) (continuous barking of dogs housed in kennel in rural community is not "of such a nature as to 'break the public peace' "). On the other hand, an ACO ordinarily is not maintaining public order when picking up dead or injured animals, inspecting licenses and vaccination certificates, or enforcing laws against mistreatment of animals.

Thus, Exhibit 1 by itself cannot tell us whether a Las Cruces ACO comes within the definition of "law enforcement officer" in the Tort Claims Act. Two questions remain. First, how much time does the ACO devote to the various duties? An ACO is a "law enforcement officer" only if the majority of the ACO's time is devoted to the duties of maintaining public order. *See Anchondo,* 100 N.M. at 110, 666 P.2d at 1257. Second, insofar as a duty of an ACO involves maintaining public order, is the duty one traditionally performed by law enforcement officers? If the duty is not a traditional duty of law enforcement officers, it does not come within the meaning of "maintaining public order" in the statutory definition of "law enforcement officer." *See id.* For example, responding to complaints of barking or biting dogs is not "maintaining public order" under the statute unless law enforcement officers traditionally have engaged in that activity. Although we assume that they have, we have found no definitive literature and the record in this case is silent on the matter.

In sum, on the record before us, we cannot determine whether duties with respect to the maintenance of public order constitute the principal duties of a Las Cruces ACO. Because the sole evidence on the issue (the stipulated exhibit) is inadequate to establish that a Las Cruces ACO is not a law enforcement officer within the meaning of the Tort Claims Act, we must reverse the district court's dismissal and remand for further proceedings. Our reversal does not foreclose the district court from granting summary judgment on the law-enforcement-officer issue after the parties submit additional evidence to that court.

IT IS SO ORDERED.

CHAVEZ and FLORES, JJ., concur.

[redacted]

848 P.2d 1108

Henry MARTINEZ, Claimant-Appellant,

v.

SOUTHWEST LANDFILLS, INC., and Mountain States Mutual Casualty Company, Inc., Respondents-Appellees.

No. 13590.

Court of Appeals of New Mexico.

Feb. 15, 1993.

[redacted]

[redacted]

Stephen E. McIlwain, Albuquerque, for claimant-appellant.

Robert Bruce Collins, Albuquerque, for respondents-appellees.

OPINION

BIVINS, Judge.

Worker appeals the Workers' Compensation Administration's Compensation Order awarding him 22% temporary partial disability as a result of an accidental injury on March 19, 1989. He raises four issues: (1) whether substantial evidence supports the award of 22% temporary partial disability; (2) whether the Workers' Compensation Judge (WCJ) erred in not awarding Worker reimbursement for charges incurred by him for examination by a health care provider of his choice; (3) whether the WCJ erred in not transferring Worker's health care to the health care provider chosen by Worker; and (4) whether the WCJ erred in concluding that all disputes over benefits due before August 19, 1990, had been fully resolved by the recommended resolution of Worker's first claim. We decline to address the first issue challenging the sufficiency of the evidence because Worker failed to comply with the appellate rule governing such a challenge, SCRA 1986, 12–213(A)(3) (Repl.1992), and we affirm on the remaining issues. We take this opportunity to spell out the requirements for a challenge to the sufficiency of the evidence under the whole record review standard, and to explain why compliance is necessary.

We summarize the portions of the WCJ's decision relevant to this appeal. Employed as a heavy equipment operator for Employer, Worker suffered an accidental injury within the scope of, and in the course of, his employment on March 19, 1989. Employer provided medical care as well as rehabilitation services with the goal of assisting Worker in re-entering the job market. Employer also paid Worker temporary total disability benefits from the date of the accident until February 1, 1990. After Worker filed his first claim for benefits, he and Employer attended a mediation conference and entered into a stipulation providing, among other things, that Worker suffered a disability to some percentage as a result of his accidental injury; that Worker would accept 10% partial disability benefits from February 1, 1990, to August 12, 1990, in full settlement of his claim prior to the mediation conference; that Worker would receive temporary total disability benefits from August 13, 1990, until October 13, 1990, or until further order of the Workers' Compensation Administration; and that the parties would attempt to resolve the issue of permanent disability by October 13, 1990, and, failing to do so, either party could pursue a resolution of that issue. Unable to resolve the issue, Worker filed his second claim and, after a second mediated recommended resolution was rejected by Employer, the matter went to hearing before the WCJ.

As a result of that hearing, the WCJ awarded Worker 22% temporary partial disability benefits from February 1, 1990, until further order. The WCJ rejected Worker's claim for reimbursement for charges incurred for an independent medical examination by Dr. Racca, and also rejected Worker's claim that his medical care should be transferred to Dr. Racca. This appeal followed. The WCJ concluded that the law in effect in 1987 applies and the parties do not disagree.

1. *Substantiality of the Evidence*

Worker challenges the sufficiency of the evidence to support the award of 22% temporary partial disability benefits, claiming that he should have been awarded 100% temporary disability benefits. We decline to review this question because Worker has failed to comply with SCRA 12–213(A)(3) and related case law.

SCRA 12–213(A)(3) provides in pertinent part:

> A contention that a ... finding of fact is not supported by substantial evidence *shall be deemed waived* unless the summary of proceedings includes the substance of the evidence bearing upon the proposition, and the argument has identified with particularity the fact or facts which are not supported by substantial evidence.... (Emphasis added.)

Worker has not complied with this rule. The summary of proceedings portion of his brief-in-chief, as well as the argument portion, selectively set forth evidence which would support a different result. Worker acknowledges that Employer presented evidence concerning Worker's rehabilitation, medical evidence from the treating physicians, and evidence concerning Worker's disability. However, he neither provides us with the substance of this evidence or other evidence which would support the WCJ's findings on disability, nor states the reasonable inferences that could be drawn from the evidence, nor acknowledges how Employer's evidence could be viewed together with the evidence offered by Worker to support Worker's claim on appeal. Instead, Worker's brief-in-chief concentrates on the evidence he presented through Dr. Racca, as to impairment, and Dr. Krieger, as to disability.

Predictably, it was left to the opposing party to provide the missing evidence. This missing evidence includes testimony by job placement specialists, cross-examination testimony of Worker's disability specialist, medical evidence unfavorable to Worker's position, and most importantly, evidence of Worker's lack of cooperation in seeking reemployment. This last evidence undoubtedly influenced the award made by the WCJ.

Equally predictable, Worker, in his reply brief, for the first time, acknowledges apparent conflicts in the testimony of the two disability specialists, as well as other evidence brought to our attention by Employer. He then seeks to explain away this countervailing evidence. This reluctant unfolding of all the evidence commonly occurs where the appellant fails to comply with SCRA 12–213. Because of the frequency with which this occurs, we now set forth the appellant's responsibilities in challenging the sufficiency of the evidence under the whole record review standard, as required by the appellate rules and related case law.

In *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988), we went to some length to set forth the requirements for whole record review in administrative proceedings. Taking the teachings of that case together with SCRA 12–213, we believe that a challenge to the sufficiency of the evidence under whole record review involves a two-step process.

Step one. The party challenging the sufficiency of the evidence supporting a proposition must set forth the substance of *all* evidence bearing upon the proposition. SCRA 12–213 requires this. *See also Tallman,* 108 N.M. at 128, 767 P.2d at 367.

Step two. Once the challenging party has set forth the substance of all the pertinent evidence, the party must then demonstrate why, on balance, the evidence fails to support the finding made.

In setting forth the substance of all the pertinent evidence, the appellant, in order to make a convincing argument, must present all supporting evidence in the light most favorable to the agency's decision. This includes stating all reasonable inferences that can be drawn from the facts, while acknowledging that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence." *Id.* at 129, 767 P.2d at 368. This kind of presentation takes into account and recognizes the considerable deference the reviewing court must give to the agency's findings. As we stated in *Tallman,* "[t]he reviewing court starts out with the perception that all evidence, favorable and unfavorable, will be viewed in the light most favorable to the agency's decision." *Id.* This does not mean, however, that the party challenging the substantiality of the evidence is prohibited from pointing out deficiencies in the evidence that the decision maker below might have considered favorable.

Indeed, our second step contemplates that the appellant point out evidence that fairly detracts from the evidence relied upon by the decision maker in support of the challenged proposition. *See id.* The whole record review standard, unlike the traditional standard of appellate review, requires the reviewing court, in determining the substantiality of the evidence, to " 'take into account whatever in the record fairly detracts from its weight.' " *Id.* (quoting *Universal Camera Corp. v. National Labor Relations Bd.,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951)). This permits the appellant, for example, to demonstrate why one expert's opinion should have been given more weight than another. Failure of an expert to have available all underlying facts needed to form a reasonable opinion is but one example of evidence lessening the weight of expert testimony. The bottom line, however, is that the appellant must persuade the reviewing court that "it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the *whole* record furnishes." *Tallman,* 108 N.M. at 129, 767 P.2d at 368 (emphasis added).

If there is compliance with the steps listed above, then the reviewing court should be able to rely entirely on the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or a decision, favorable or unfavorable, and in deciding whether there is substantial evidence to support the result, using the approach we outlined in *Tallman.* SCRA 12–213 contemplates that the canvass and determination be made on the basis of appellant's presentation in the brief-in-chief. The appellee should likewise be able to rely on the brief-in-chief in arguing why, on balance, the finding or decision is supported by substantial evidence. Neither the appellee nor the reviewing court should have to supplement the appellant's presentation of the evidence.

The above procedure not only requires adroitness on the part of the challenging party, but also a high degree of forthrightness. The party must abandon the role of advocate for facts that were argued below and rejected, and assume the role of advocate for the law. After all, whether a finding is supported by substantial evidence is a question of law, not of fact. *Pickens–Bond Constr. Co. v. Case,* 266 Ark. 323, 584 S.W.2d 21, 25 (1979) (en banc), *cited in Neel v. State Distribs., Inc.,* 105 N.M. 359, 365, 732 P.2d 1382, 1388 (Ct.App.1986) (Donnelly, J., dissenting), *cert. quashed,* 105 N.M. 358, 732 P.2d 1381 (1987); *Ferreira v. Workmen's Compensation Appeals Bd.,* 38 Cal.App.3d 120, 112 Cal.Rptr. 232, 235 (1974). Once that role is assumed, it becomes easier for the appellant to more realistically evaluate the chances of success on appeal. This saves not only the time and resources of the party, but also the court's time and resources. This brings us to the purposes of SCRA 12–213.

The primary purposes of SCRA 12–213's requirements are to fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and to help the court decide the issues on appeal. *See, e.g., Stanton v. Bokum,* 66

N.M. 256, 259, 346 P.2d 1039, 1041 (1959) (explaining purpose of former appellate rules requiring a statement of facts in appellate briefs). In this regard, it is not the responsibility of the reviewing court to search through the record to determine whether substantial evidence exists to support a finding. *See Zengerle v. City of Socorro,* 105 N.M. 797, 802, 737 P.2d 1174, 1179 (Ct.App.1986), *cert. quashed,* 105 N.M. 781, 737 P.2d 893 (1987), *overruled on other grounds by Whittenberg v. Graves Oil & Butane Co.,* 113 N.M. 450, 454, 827 P.2d 838, 842 (Ct.App.1991). That is the obligation of the appellant.

In fairness to Worker, when all three briefs are considered, there is some compliance with SCRA 12–213, however, as previously noted, neither the appellee nor the appellate court should have to search the record to determine the relevant facts bearing upon Worker's claim that the decision of the WCJ was not supported by substantial evidence. In addition, Worker's brief appears to rely on factual recitations made earlier during the calendaring process. Such reliance is to no avail because attempts to incorporate by reference arguments and authority contained in memoranda submitted in opposition to calendaring notices do not preserve matters not specifically argued in the briefs. *State v. Aragon,* 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct.App.), *cert. denied,* 109 N.M. 563, 787 P.2d 1246 (1990). Moreover, based on the manner in which the evidence unfolded, in order to conduct a proper review, this Court would be required to examine substantially all of the record to determine which side's view of the proof is accurate. Judicial resources simply do not permit us to do this, and we believe that SCRA 12–213 is designed to avoid that endeavor and to place the responsibility with the appellant.

SCRA 12–213 has another purpose just as salutary as those already discussed. It obliges an appellant to carefully review all the evidence as a reviewing court would and then decide whether to pursue or discard a sufficiency challenge. SCRA 12–213 demands this winnowing process. Only after a party challenging the sufficiency of the evidence goes through the steps outlined above in a careful and candid manner can that party truly decide whether the issue is worth pursuing. As already noted, this process saves time and money when issues found to be without merit are discarded.

We recently had occasion to refuse to consider a challenge to the sufficiency of the evidence where the appellant failed to include the substance of all the evidence bearing upon a proposition. *See Maloof v. San Juan County Valuation Protests Bd.,* 114 N.M. 755, 845 P.2d 849 (Ct.App. 1992). Although *Maloof* was decided under the traditional standard of review, the same principles enunciated there apply to whole record review. In *Maloof,* we said that an appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and that the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings. *Id.,* 114 N.M. at 759–760, 845 P.2d at 853–54; *see also In re Estate of McKim,* 111 N.M. 517, 521, 807 P.2d 215, 219 (1991); *Henderson v. Henderson,* 93 N.M. 405, 407, 600 P.2d 1195, 1197 (1979); *Galvan v. Miller,* 79 N.M. 540, 545–46, 549, 445 P.2d 961, 966–67, 970 (1968); *Giovannini v. Turrietta,* 76 N.M. 344, 346–47, 414 P.2d 855, 856–57 (1966); *State ex rel. State Highway Comm'n v. Pelletier,* 76 N.M. 555, 559, 417 P.2d 46, 48 (1966).

Therefore, deciding that Worker has waived his right of review on this issue, we affirm the WCJ's finding as to temporary partial disability.

2. *Reimbursement for Medical Costs*

NMSA 1978, Section 52–1–51(E) (Repl.Pamp.1991), allows for reimbursement of Worker for the cost of an examination by a physician or other health care provider of his choice provided "the *final determination* of the worker's claim is that the worker's claim of impairment is correct and differed from the employer's physician's opinion of percentage of impairment by more than twenty percent." (Emphasis added.) Worker argues that because the WCJ found that "Worker has a

temporary physical impairment as determined by Dr. Racca," and because Dr. Racca opined an impairment rating of 50%, which was more than 20% greater than the impairment rating given by Employer's physicians, the WCJ was required to order reimbursement for the cost of Dr. Racca's examination, including the discogram. We disagree.

Employer's physicians rated Worker's impairment at 7%. Worker arrives at a percentage difference greater than 20% by relying on Dr. Racca's opinion that Worker's impairment rating was 50%, and on the WCJ's finding accepting Dr. Racca's determination that Worker had a temporary physical impairment. Worker reasons that because the WCJ accepted Dr. Racca's determination of physical impairment, he necessarily accepted Dr. Racca's determination of the *percentage* of impairment.

Worker's reasoning, however, is contrary to the rule that findings are to be construed in support of the judgment, *see Sheraden v. Black*, 107 N.M. 76, 80, 752 P.2d 791, 795 (Ct.App.1988), and also contrary to the evidence. While Dr. Racca did use a 50% figure, he testified that the figure was speculative, and also used a 15% figure. Under this state of the evidence, and considering that the WCJ did not award Worker the cost of Dr. Racca's examination, we cannot say that the WCJ necessarily found the Worker's claim of 50% impairment to be correct.

The WCJ did not err in refusing at the time of the hearing to award Worker his independent medical examination costs.

3. *Transfer of Health Care*

Worker claims that he requested the WCJ to order his health care transferred from AIMS (Albuquerque Industrial Medicine Specialists) to Dr. Racca, indicating that he was dissatisfied with the AIMS treatment. He notes that Dr. Racca testified that the treating physicians provided by Employer had made the wrong diagnosis and had not treated Worker for his herniated disc. He claims that this misdiagnosis is buttressed by AIMS' referral to Dr. Stern after Dr. Racca's examination.

Relying on *Sedillo v. Levi-Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), Worker argues that failure to properly diagnose and treat is tantamount to a failure to provide adequate medical care as required under NMSA 1978, Section 52-1-49 (Repl.Pamp.1991). *Sedillo* is distinguishable. In that case, the employer entirely failed to offer or provide medical services, and this Court held that it was error to deny a claim for payment of services rendered by the worker's personal physician. *Sedillo*, 98 N.M. at 54-56, 644 P.2d at 1043-45.

In this case, Employer did not fail to provide medical care. In fact, the WCJ found that Employer did provide medical care; that the care provided by Employer was adequate and satisfactory; and that, although a positive result was not obtained from the care provided by Employer, such failure was not due to the nature, quality, or type of care provided by Employer. Worker does not directly challenge these findings. *See Gutierrez v. Amity Leather Prods. Co.*, 107 N.M. 26, 30-31, 751 P.2d 710, 714-15 (Ct.App.1988) (unchallenged findings binding on appeal).

In *Bowles v. Los Lunas Schools*, 109 N.M. 100, 781 P.2d 1178 (Ct.App.), *cert. denied*, 109 N.M. 131, 782 P.2d 384 (1989), a case which Employer cites but Worker overlooks, this Court held that for a worker to recover for medical services obtained from sources not provided by the employer, the worker must prove that the employer-provided services did not produce positive results, that this failure was due to the care provided, that the worker obtained other medical care which was successful, that this care was related to the worker's work-related injury, and that the care was reasonable and necessary. *Bowles*, 109 N.M. at 108, 781 P.2d at 1186. *See generally City of Albuquerque v. Sanchez*, 113 N.M. 721, 727, 832 P.2d 412, 418 (Ct.App. 1992) (We note that the *Bowles* interpretation of Section 52-1-49 has been superseded by an amendment to that statute. However, the version of Section 52-1-49 interpreted in *Bowles* also is applicable to the instant appeal.). Based on the WCJ's find-

ings, which are not directly attacked, Worker has not met the *Bowles* standard.

4. *WCJ's Conclusion that Disputes over Previous Benefits Were Resolved*

[redacted] While conceding he can cite no authority specifically on point, *see In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (issues raised which are unsupported by cited authority will not be reviewed on appeal), Worker argues that it was unfair for the WCJ to hold him bound by the first recommended resolution regarding Worker's previous acceptance of partial disability benefits while not holding Employer bound to the same resolution, when both parties accepted the recommended resolution. Specifically, Worker claims that he should not have been put to the test of proving medical causation. This argument is easily answered.

Worker has not shown how he was harmed by the WCJ's ruling. *See Nunez v. Smith's Management Corp.,* 108 N.M. 186, 188, 769 P.2d 99, 101 (Ct.App.1988) (illustrating two types of harmless error). Worker was able to establish causation, and he does not argue on appeal that he would have been entitled to more or different benefits had the WCJ not held him bound by the first recommended resolution. Nor does his brief show where this issue was preserved below. *See State v. Martin,* 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct. App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977) (court will not address issues when the brief does not indicate, with appropriate record references, where the issue was preserved).

We affirm.

IT IS SO ORDERED.

DONNELLY and PICKARD, JJ., concur.

[redacted]

848 P.2d 1115

STATE of New Mexico, Plaintiff–Appellee,

v.

Roy Lee POWELL, Defendant–Appellant.

No. 13756.

Court of Appeals of New Mexico.

Feb. 15, 1993.

[redacted]

Tom Udall, Atty. Gen., Elizabeth Blaisdell, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

C. Barry Crutchfield, Templeman and Crutchfield, Lovington, for defendant-appellant.

OPINION

HARTZ, Judge.

Defendant was convicted at a non-jury trial of a violation of NMSA 1978, Section 30–7–3(A) (Repl.Pamp.1984), which prohibits the "[u]nlawful carrying of a firearm in

an establishment licensed to dispense alcoholic beverages." On appeal he contends that the State was required to prove his conscious wrongdoing and that there was insufficient evidence of that element of the offense. He does not dispute that the trial judge properly found that he intentionally carried a firearm in a bar licensed to dispense alcoholic beverages. We affirm.

On February 5, 1991, Defendant was released from jail on charges arising from a stabbing at the Greystoke Lounge three days earlier. He and a friend then went to the home of the Greystoke bartender, Karla Coffer, and told her they planned to go to the bar that night. She warned them not to bring any weapons. When Defendant arrived at the Greystoke, he laid a knife on the bar and told Ms. Coffer that he was checking his weapon so that there would not be any problems. A couple of hours later he handed her a loaded pistol, again saying that he wanted to avoid problems. At trial Defendant testified that the pistol originally had been in his car outside the bar, but when he went to his car for cigarettes, he found that the window had been forced open, so he brought the pistol to the bartender to prevent it from being stolen. The arresting officer, however, testified that the car windows appeared to be intact at the time of the arrest. The State contended that Defendant brought the weapon into the bar to show the other patrons that he was armed.

Section 30–7–3(A) states:

> Unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages consists of carrying a loaded or unloaded firearm on any premises licensed by the department of alcoholic beverage control for the dispensing of alcoholic beverages except:
>
> (1) by a law enforcement officer in the lawful discharge of his duties;
>
> (2) by the owner, lessee, tenant or operator of the licensed premises or their agents, including privately employed security personnel during the performance of their duties;
>
> (3) by a person in that area of the licensed premises usually and primarily rented on a daily or short-term basis for sleeping or residential occupancy, including hotel or motel rooms; or
>
> (4) by a person on that area of a licensed premises primarily utilized for vehicular traffic or parking.

The statute does not define the state of mind necessary for commission of the crime.

To support his contention regarding the scienter element of the crime, Defendant relies on *State v. Austin,* 80 N.M. 748, 461 P.2d 230 (Ct.App.1969). Rejecting an argument that the statute defining the crime of unlawful taking of a vehicle was unconstitutionally vague and uncertain, *Austin* held that criminal intent was an element of the crime, even though it was not expressly included in the statutory definition. Defendant does not rely so much on the holding of *Austin* as on certain language in the opinion. *Austin* quoted the following proposition, which originally appeared in *State v. Shedoudy,* 45 N.M. 516, 524, 118 P.2d 280, 285–86 (1941):

> Generally speaking, when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, although the terms of the statute do not require it. But the legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the Act (from its language or clear inference) that such was the legislative intent.

Austin, 80 N.M. at 750, 461 P.2d at 232 (citations omitted). *Austin* then added:

> What is criminal intent? It is more than "intentional" taking. It is a mental state. This mental state is a conscious wrongdoing. Concerning this conscious wrongdoing, *Morissette v. United States,* 342 U.S. 246, [252, 72 S.Ct. 240, 244, 96 L.Ed. 288] (1952) states: "* * * courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,'

'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, * * *."

Id. (citation omitted). From this language Defendant concludes that the State was required to prove his "conscious wrongdoing" in this case. Although Defendant does not attempt to define the requisite mental state, he apparently construes the "conscious wrongdoing" requirement to mean that he must have possessed an evil intent in carrying the firearm in the Greystoke Lounge.

We disagree. One must be careful not to take the language of *Austin* and *Morissette* out of context. Both opinions dealt with larceny-type offenses. Morissette had been convicted of the offense of converting government property. He contended that he thought the property (which was rusting bomb casings dumped in heaps on a bombing range) had been abandoned. The trial judge refused to submit to the jury whether Morissette acted with innocent intention. The Supreme Court reversed, holding that the offense required more than just the intent to take the casings. The offense also required "knowledge of the facts, though not necessarily the law, that made the taking a conversion." *Morissette,* 342 U.S. at 271, 72 S.Ct. at 254. The Court presumed that Congress had adopted the common-law tradition of requiring such a mental state in larceny-type offenses.

The mental state required in larceny-type offenses—intent to take, coupled with knowledge of the facts making the taking unlawful—can be viewed as an "evil" intent. But we should not infer too much from *Austin's* description of this intent as "conscious wrongdoing." In particular, we should not read *Austin* to say that evil intent is presumed to be an element of every crime. Only a few months before the decision in *Austin* the same panel of this Court decided *State v. Davis,* 80 N.M. 347, 455 P.2d 851 (Ct.App.), *cert. denied,* 80 N.M. 316, 454 P.2d 973 (1969), which was cited with approval in *Austin.* The defendant in that case was charged with unlawful possession of mercury. Although the language of the statute prohibiting possession of mercury did not include an intent element, *Davis* held that, in accordance with *Shedoudy,* "criminal intent—that is, an intent to possess the mercury—is required for violation of [the statute]." *Davis,* 80 N.M. at 351, 455 P.2d at 855. *Davis* did not require an evil intent.

Moreover, later cases have used the words "conscious wrongdoing" to describe a mental state that could not properly be termed an evil intent. In *State v. Sheets,* 94 N.M. 356, 610 P.2d 760 (Ct.App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980), the defendant was convicted of the sale of unregistered securities. He complained that the jury was not instructed that he must have acted with a sense of conscious wrongdoing. We responded that the instruction given on general criminal intent "sufficiently covers conscious wrongdoing in the words 'purposely does an act which the law declares to be a crime.' " *Id.* 94 N.M. at 366, 610 P.2d at 770. Our Supreme Court has agreed that a defendant possesses the mental state of conscious wrongdoing when he or she purposefully does an act that the law declares to be a crime. *E.g., State v. Omar-Muhammad,* 105 N.M. 788, 791, 737 P.2d 1165, 1168 (1987).

The lesson we draw is that a determination of the state-of-mind element of an offense must be made on a statute-by-statute basis. In the absence of express statutory language to the contrary, we presume an intent requirement. *See State v. Shedoudy.* But the presumption can be overcome. *See State v. Harrison,* 115 N.M. 73, 846 P.2d 1082 (Ct.App.1992) (intent not an element of offense of driving while intoxicated). Furthermore, the intent that is ordinarily presumed is not an "evil" intent. In many contexts it may even be somewhat misleading to speak of the presumed intent as "conscious wrongdoing," because that phrase may easily be misread as connoting evil intent, despite the gloss put on the phrase by *Sheets* and its successors. To determine the presumed intent, we should not be trapped by a verbal formula but should, as in *Morissette,* simply look at the particular mental state ordinarily required for crimes of the same nature.

The crime of which Defendant was convicted is a possession-type crime. As in *Davis,* New Mexico courts have generally presumed that the mental element for such crimes is just that the possession be intentional—in other words, that the offender have knowledge of the possession. *E.g., State v. Pedro,* 83 N.M. 212, 490 P.2d 470 (Ct.App.1971) (possession of peyote); *State v. Giddings,* 67 N.M. 87, 96, 352 P.2d 1003, 1009 (1960) (possession of marijuana; defendant must have "knowledge of the presence and narcotic [sic] character of the object possessed"); *State v. Maes,* 81 N.M. 550, 554, 469 P.2d 529, 533 (Ct.App.1970) (heroin). *See* SCRA 1986, 14–130 (uniform jury instruction defining "possession" states that person is in possession of an object when the person knows what the object is and knows that it is on his or her person).

In particular, the intent element in firearm-possession offenses is typically no more than knowledge of possession. We have held that the crime of possession of a firearm by a convicted felon requires only knowledge by the felon that the object possessed is a firearm. *State v. Haddenham,* 110 N.M. 149, 155–56, 793 P.2d 279, 285–86 (Ct.App.), *cert. denied,* 110 N.M. 72, 792 P.2d 49, *and* 110 N.M. 183, 793 P.2d 865 (1990); *see State v. Castrillo,* 112 N.M. 766, 771, 819 P.2d 1324, 1329 (1991). Other jurisdictions have similarly interpreted statutes barring possession of firearms in various circumstances. *See United States v. Freed,* 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971) (consciousness of wrongdoing is not element of offense of possession of unregistered firearm); *United States v. Dishman,* 486 F.2d 727 (9th Cir.1973) (intent to use the weapon is not element of offense of attempting to board an aircraft while carrying a concealed dangerous weapon); *Wright v. Municipality of Anchorage,* 590 P.2d 425 (Alaska 1979) (possession of concealed weapon); *People v. Wilson,* 29 Ill.App.3d 1033, 332 N.E.2d 6 (1975) (same); *Uribe v. State,* 573 S.W.2d 819 (Tex.Crim.App.1978) (possession of firearm in licensed bar); *see also* Wash. Rev.Code Ann. § 9.41.300 (West 1988) (knowing possession of firearm in specified places).

Such a limited intent requirement conforms to the evident purpose of a statute barring the possession of firearms in taverns. That purpose is a prophylactic one. The mixture of firearms and alcohol is volatile. The danger does not necessarily arise from any evil intent on the part of the person possessing the firearm. The state's interest in keeping firearms out of establishments dispensing liquor is independent of any designs by the possessor of the weapon. *Cf. State v. Soto,* 95 N.M. 81, 82, 619 P.2d 185, 186 (1980) (purpose of § 30–7–3 is to protect innocent patrons); *United States v. Margraf,* 483 F.2d 708, 710 (3d Cir.1973) ("[M]ere presence of a weapon on board a plane creates a hazard because it may be seized and used by a potential hijacker."), *vacated,* 414 U.S. 1106, 94 S.Ct. 833, 38 L.Ed.2d 734 (1973).

Our rejection of Defendant's argument finds support in the uniform jury instructions promulgated by our Supreme Court with respect to the offense of which Defendant was convicted. The elements instruction requires the jury to find: (1) that the establishment was licensed to dispense alcoholic beverages; (2) that while in the establishment, the defendant was carrying a firearm; and (3) if applicable, that the defendant did not have legal authority to have the firearm in his possession in the establishment. SCRA 1986, 14–702. The general-criminal-intent instruction then requires the jury to find that the defendant acted intentionally in that he or she purposely did an act which the law declares to be a crime, whether or not the defendant knew the act to be unlawful. SCRA 1986, 14–141. Nothing in the uniform jury instructions suggests that an evil intent is necessary for a violation of Section 30–7–3(A).

Finally, we disagree with Defendant's contention that *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991), supports his position. *Osborne* held that unlawfulness is an element of the offense of criminal sexual contact of a minor and the jury must be instructed accordingly. That element, however, appears expressly in the statutory definition of the offense. NMSA 1978, Section 30–9–13 states, "Criminal sexual con-

tact of a minor is unlawfully and intentionally touching or applying force to the intimate parts of a minor * * *." *Osborne* was not a case in which a court implied an element of the offense that was not stated in the statutory definition. The statute at issue here, Section 30–7–3, in contrast to Section 30–9–13, does not include the words "unlawful" or "unlawfully" as part of the definition of the offense. The word "unlawful" appears in Section 30–7–3 only as part of the name of the offense and refers to the provision in the statute exempting four types of lawful carrying of firearms. No evidence at Defendant's trial supported any of the exemptions, and the trial court expressly so found. The district court here did not ignore an explicitly defined element of the offense of unlawful carrying of a firearm. *Osborne* does not help Defendant.

Thus, we conclude that Defendant's conviction did not require proof of an evil purpose. Defendant's conviction is affirmed.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

848 P.2d 1119

Kollette E. DEEDS, Petitioner–Appellant,

v.

Clyde H. DEEDS, Respondent–Appellee.

No. 13678.

Court of Appeals of New Mexico.

Feb. 17, 1993.

Juanita S. Roibal, Albuquerque, for petitioner-appellant.

Laurence J. Brock, Albuquerque, for respondent-appellee.

OPINION

BIVINS, Judge.

Wife appeals the dismissal of her motion to modify alimony awarded for a fixed, limited term. The district court determined that it did not have jurisdiction to modify its 1988 order granting rehabilitative alimony through May 1991. The sole issue on appeal is whether the district court had jurisdiction to modify alimony. Because of the wording of the 1988 order, and the clear legislative authority provided in NMSA 1978, Section 40-4-7(B)(2) (Repl.Pamp.1989), we hold that the court did have jurisdiction and reverse and remand for a hearing on the merits of Wife's motion.

The parties legally separated in 1980 and, pursuant to a final decree of separation, their property was divided and Husband was ordered to pay child support and alimony in the amount of $800 per month. The parties were divorced in 1986. The final decree of divorce continued the payment of child support and alimony, with the district court expressly retaining jurisdiction over those two matters.

In 1988, Wife filed a motion to increase alimony and child support and to establish distinct amounts for each. With regard to alimony, Wife's motion asked the court "to require Respondent [Husband] to pay all educational debts that Petitioner [Wife] has incurred in the course of gaining an education to become self-sufficient. These educational debts must be considered rehabilitative alimony."

The district court entered an order granting the motion, increasing alimony, and distinguishing the amounts to be paid for alimony and child support. The order required Husband to "pay ... $400.00 per month alimony through May, 1991. Alimony payments will cease as of June, 1991." Neither party appealed from that order.

On April 9, 1991, shortly before the expiration date, Wife filed a motion to set aside the above language, terminating alimony as of June 1991, and to increase and continue alimony. In a supplemental motion, Wife asked that Paragraph 5 of the 1988 order be modified to read as follows:

> Respondent will pay Petitioner Four Hundred dollars ($400.00) per month alimony until October, 1991, at which time child support payments will cease under Paragraph 1. Beginning November, 1991 Respondent will pay Petitioner One Thousand Five Hundred dollars ($1,500.00) per month if and until such time as Petitioner is able to work and able to earn that amount, or until the Petitioner's death. This amount of support to be guaranteed by a life insurance policy on the life of the Respondent.

As grounds for this modification, Wife alleged that she is now permanently disabled.

Husband moved to dismiss the motion for modification on the basis that the court did not have jurisdiction to reopen the issue of alimony once it had terminated. Husband also argued that the motion was, in effect, a Rule 1-060 motion and had been untimely filed. *See* SCRA 1986, 1-060 (Repl.1992). After a hearing on Husband's motion to dismiss, the special master determined that the court had jurisdiction to consider the motion for modification. The district court adopted that decision and remanded to the special master for a hearing on the merits. Upon reconsideration, the special master determined that the award of alimony provided a lump sum of alimony, which was not modifiable, and granted Husband's motion to dismiss. The district court considered the special master's report and entered its own findings and conclusions on the matter.

The district court determined that the 1988 order granting alimony until June 1991 was a final order that could have been appealed, but was not. The court also determined that no motions under SCRA 1-060 had been filed within one year and there was no claim that the 1988 order was void for lack of jurisdiction. The court determined that Wife's April 9 motion was a motion to modify alimony and was filed prior to the termination of the alimony payments required by the 1988 order. The

court found that there was nothing in the 1988 order that could be construed as an exception to the June 1991 termination of alimony. Finally, the court concluded that the award of alimony in this case was *not* a lump-sum alimony award. Nevertheless, the court concluded it had no jurisdiction to modify an alimony award that specifically stated, without exception, that alimony payments "shall cease" on a date certain. Thus, the motion for modification was dismissed. Wife appeals.

The question of the court's power to modify alimony awards for a fixed, limited term by extending the term or making the award permanent has been the source of considerable confusion and has given rise to differing results in other jurisdictions. *See generally* Russell G. Donaldson, Annotation, *Power to Modify Spousal Support Award for a Limited Term, Issued in Conjunction with Divorce, so as to Extend the Term or Make the Award Permanent,* 62 A.L.R.4th 180 (1988); 2 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.6 (2d ed.1987); 24 Am.Jur.2d *Divorce and Separation* § 705 (1983). Where alimony is awarded as periodic payments to be made for a fixed, limited time, some courts have held there is no power to modify the award by requiring payments for an additional period of time, relying on the theory that the alimony awarded is actually alimony in gross (i.e., lump-sum alimony). *See, e.g., Edgar v. Edgar,* 366 Mich. 580, 115 N.W.2d 286, 289–90 (1962) (en banc). Thus, even if the payments may be characterized as alimony, rather than part of the property settlement, a number of courts have held that they may not be modified where the award is a lump sum payable in installments. *See, e.g., Cummings v. Lockwood,* 84 Ariz. 335, 337–40, 327 P.2d 1012, 1014–16 (1958), *modified, Schroeder v. Schroeder,* 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989) (en banc) (a fixed-term award of spousal support must be delineated as non-modifiable in the support award to be considered a non-modifiable lump sum); *Whitney v. Whitney,* 15 Ill.App.2d 425, 146 N.E.2d 800, 804–05 (1957); *cf. Ball v. Ball,* 183 Neb. 216, 159 N.W.2d 297, 299–301 (1968) (periodic payments lacked several features of alimony in gross, and trial court's reduction of alimony payments upheld); *Kishner v. Kishner,* 93 Nev. 220, 562 P.2d 493, 494–96 (1977) (award of alimony, payable in installments, found to be lump-sum alimony and not terminable at death or remarriage of recipient spouse).

Relying on out-of-state authority, Husband argues that the award in this case under the 1988 order has all the characteristics of a lump-sum award and, therefore, is not modifiable. Although a sum certain can be calculated from the face of the 1988 order by multiplying the monthly payments by the length, in months, of the time period involved, we agree with the district court's finding that the alimony award was not a lump-sum award payable in installments. Lump-sum alimony has been defined as "the award of a definite sum of money; and if the sum is payable in installments[,] the payments run for a definite length of time." *Divorce and Separation, supra,* § 635, at 632. The sum must be paid in full, regardless of future events. *Id.* Lump-sum alimony becomes a vested property right from the day of judgment. *See Michaluk v. Burke,* 105 N.M. 670, 675, 735 P.2d 1176, 1181 (Ct.App.1987). In this case, there is no indication that the district court, in the 1988 order, intended for the full amount to be paid regardless of future events, such as the death of Husband. Thus, we affirm the district court's finding that the alimony is not a lump-sum award. *See Banks v. Banks,* 336 So.2d 1365, 1367 (Ala.Civ.App.1976) (court found that an 18-month award of alimony was not "in gross," in part because there was no intent expressed in the order granting the award that the award bind the paying spouse's estate if the paying spouse died prematurely).

Having determined that the 1988 order award was not for a lump sum, we need only to refer Section 40–4–7 for the authority to modify the award. Subsection (B)(2) provides that "[o]n final hearing, the court ... may modify and change any order in respect to alimony allowed either spouse, whenever the circumstances render such change proper." The legislature hav-

ing expressly provided this authority, and the award of alimony in this case not being a lump sum, we believe the award was subject to modification. Because of this statutory authority, we find it unnecessary to rely on out-of-state authority.

Rehabilitative alimony has been defined as alimony that is awarded for a fixed period of time, usually short, based on evidence that the recipient spouse will, at the end of the period, be able, through reasonable effort, to support himself or herself. Clark, *supra,* § 17.5, at 265; *see Kulakowski v. Kulakowski,* 191 N.J.Super. 609, 468 A.2d 733, 733 (Ch.Div.1982); *Turner v. Turner,* 158 N.J.Super. 313, 385 A.2d 1280, 1280 (Ch.Div.1978), *overruled on other grounds by Petersen v. Petersen,* 85 N.J. 638, 428 A.2d 1301, 1303 (1981). The purposes of rehabilitative alimony are to give the paying spouse some predictability concerning financial obligations; to prevent possible further court appearances by permitting the court to take into consideration reasonably foreseeable changes in the recipient spouse's circumstances; and to encourage the recipient spouse to find employment or complete education or training leading to employment. Clark, *supra,* § 17.5, at 265; *see Turner,* 385 A.2d at 1280–81; *see also Foutz v. Foutz,* 110 N.M. 642, 643–44, 798 P.2d 592, 593–94 (Ct.App. 1990) (expressing preference for encouraging financial independence of spouses, one from the other). *But cf. Arnold v. Arnold,* 167 N.J.Super. 478, 401 A.2d 261, 262–63 (App.Div.1979) (disagreeing with *Turner,* stating that rehabilitative alimony is not a viable way of encouraging recipient spouse to seek employment, and that the purpose of encouraging self-sufficiency of the recipient spouse does not justify arbitrary future cut-off date for alimony payments).

While the purposes of rehabilitative alimony are laudable, Section 40–4–7(B)(2) reflects a recognition that alimony awards can be both a burden to the paying spouse and a crucial factor in the welfare of the recipient spouse, and that changes in either spouse's circumstances can make modification of the decree necessary to avoid undue hardship. *See* Clark, *supra,* § 17.6, at 273. In light of the clear statutory language contained in Section 40–4–7(B)(2), we think it is clear that the district court erred in finding that it lacked jurisdiction to hear Wife's motion to modify the award of rehabilitative alimony.

We do not wish to be understood that alimony for a fixed period may be modified at any time. When the obligation to pay alimony expires, there is no longer any provision for alimony remaining. Under those circumstances, the district court would have no power to alter or amend alimony. *See Benavidez v. Benavidez,* 99 N.M. 535, 538, 660 P.2d 1017, 1020 (1983). In this case, Wife filed a motion before alimony expired; therefore, the court has jurisdiction to modify the award under the restrictions set forth above.

We therefore affirm the district court's finding that the 1988 order for alimony was not a lump-sum award. We reverse the district court's determination that it had no jurisdiction to modify the award. The dismissal of the motion for modification is reversed and the matter is remanded to the district court for consideration of the merits of the motion.

We reject Husband's request to recover attorney fees on appeal. He did not prevail. *See* SCRA 1986, 12–403 (Repl.1992).

IT IS SO ORDERED.

MINZNER, C.J., and DONNELLY, J., concur.

848 P.2d 1123

STATE ex rel. EDUCATIONAL ASSESSMENTS SYSTEMS, INC., Plaintiff–Appellant,

v.

COOPERATIVE EDUCATIONAL SERVICES OF NEW MEXICO, INC., Defendant–Appellee.

EDUCATIONAL ASSESSMENTS SYSTEMS, INC., a New Mexico corporation, Plaintiff–Appellant,

v.

Max LUFT, individually and Cooperative Educational Services of New Mexico, Inc., a New Mexico non-profit corporation, Defendants–Appellees.

No. 11143.

Court of Appeals of New Mexico.

Feb. 17, 1993.

Martin E. Threet, Robert G. Kavanagh, Kevin H. Kartchner, Threet & King, Albuquerque, for plaintiff-appellant.

Marshall G. Martin, Hinkle, Cox, Eaton, Coffield & Hensley, Albuquerque, for defendant-appellee Max Luft.

Dan A. McKinnon, III, Marron, McKinnon & Ewing, Albuquerque, for defendant-appellee Co-op. Educational Services.

OPINION

FLORES, Judge.

Educational Assessments Systems, Inc. (EASI) appeals from a decision by the district court dismissing with prejudice its petition for a writ of quo warranto, as well as its related complaint for damages, both of which raise questions under the Procure-

ment Code, NMSA 1978, §§ 13-1-28 to -199 (Supp.1984). On appeal, EASI contends that the district court erred (1) in determining that the Procurement Code contained applicable exemptions, (2) that, in any event, the Code contains an adequate legal remedy but does not authorize a private cause of action, and (3) on these facts neither Cooperative Educational Services of New Mexico, Inc. (CES) nor Max Luft (Luft), Chief Executive Director of CES, were liable to EASI for actions in restraint of trade or civil rights violations.

BACKGROUND

In 1979, CES was formed as a New Mexico nonprofit corporation by several public school districts for the primary purpose of procuring and delivering educational services to the school district members at a reduced cost. In 1984, approximately thirty school districts joined forces and entered into a joint powers agreement (JPA) pursuant to the provisions of the Joint Powers Agreements Act, NMSA 1978, Sections 11-1-1 to -7 (Repl.Pamp.1983). The objective was to establish an educational cooperative which would pool their efforts and resources in order to procure services for the respective school districts at an affordable cost. The member school districts comprising the cooperative designated CES as the administering agency of the cooperative. Each superintendent of the various member school districts served on the board of directors of CES. The JPA provided that all purchases by the cooperative would be upon the direction of the board of directors of CES and had to be in accordance with the requirements of the Procurement Code.

Subsequent to its formation, one of CES's primary activities was the delivery of ancillary or special education services to member school districts. In 1985, CES, an administering agency of the cooperative, issued a request for proposal (RFP) for ancillary services. EASI protested, claiming that (1) the RFP was too burdensome because the requested background information concerning the personnel who were to provide the services was difficult to obtain, and (2) automobile insurance naming CES as a co-insured could not be obtained. CES denied EASI's protest. Following a hearing before the cooperative's board of directors, EASI's appeal was also denied. EASI was advised at that time of its right to seek judicial review of that decision, pursuant to Section 13-1-183. EASI failed to seek such judicial review under Section 13-1-183, but rather initiated the present action.

This case initially began as two separate, but related, lawsuits. In the first suit, EASI petitioned the district court for a writ of quo warranto, for temporary restraint, and for injunctive relief. EASI requested the district court to direct CES to show cause regarding CES's authority to act as the administering agency of a JPA and further requested the court to: (1) issue a temporary restraining order to prevent the officers and directors of CES from issuing a response to the RFP issued by the school districts that form the JPA, who, in turn, sought submission of proposals to provide the JPA with management services; (2) permanently enjoin the officers and directors of CES from issuing a proposal at any time in response to the RFP; and (3) enjoin the directors of CES from causing the JPA to approve any proposal submitted by CES until the provisions of the Procurement Code had been met and until a meaningful competitive atmosphere could be achieved. The district court denied EASI's request for a temporary or preliminary injunction for the reason that EASI had failed to show that irreparable harm would result.

In the second suit, EASI filed a complaint for damages based on restraint of trade and deprivation of civil rights against Luft, individually, and against CES.

Upon EASI's motion, the district court ordered consolidation of the two cases. However, prior to consolidation, CES moved for summary judgment in the first lawsuit, arguing (1) that the issues were moot since CES had been dissolved and no longer acted as the administering agency under the JPA; and (2) that an adequate remedy at law existed under Section 13-1-172, therefore negating EASI's need for injunctive relief or a writ of quo warranto. The district court granted CES's motion for summary judgment, in part, stating that

the Joint Powers Agreements Act does not prohibit a private corporation from serving as an administering agency. Thereafter, EASI's motion for partial summary judgment on the issue of the liability of CES and Luft, based on restraint of trade and deprivation of civil rights, was denied.

Following a trial on the merits, and after filing amended findings of fact and conclusions of law, the district court entered a judgment dismissing both complaints with prejudice. EASI appeals from this judgment and raises several issues which we have consolidated into the following: (1) whether the district court erred in concluding that the Procurement Code contains relevant exemptions, and thus was not violated as EASI claims; (2) whether the district court erred in concluding that the Procurement Code provides the sole remedy for violations thereof; and (3) and (4) whether the district court erred in concluding that CES and Luft were not liable to EASI for restraint of trade or civil rights violations. We affirm.

DISCUSSION

I. *Applicability of the Procurement Code*

On appeal, EASI argues that the district court erred in concluding that CES and Luft did not violate the Procurement Code. Specifically, the district court concluded that a cooperative formed pursuant to the provisions of the Joint Powers Agreements Act is not required to comply with the provisions of the Procurement Code. The district court also concluded that the Procurement Code exempts cooperative procurement and that, as the administering agency of the cooperative, CES was likewise immunized from the requirements of the Procurement Code. Finally, the court concluded that "CES did not act in violation of the Procurement Code, or it at least substantially complied with its provisions." EASI contends that the district court erred in concluding that a cooperative procurement agreement among local public bodies exempts those bodies from the competitive proposal procedure mandated by the Procurement Code. EASI also contends that the district court erred in concluding that CES did not act in violation of the Procurement Code.

The Procurement Code, which became effective on November 1, 1984, applies to all expenditures by state agencies and local public bodies for the procurement of items of tangible personal property, services, and construction, unless the Procurement Code provides otherwise. Section 13–1–30. An educational institution is included within the definition of a state agency. Section 13–1–90. Local public bodies encompass "every political subdivision of the state and the agencies, instrumentalities and institutions thereof." Section 13–1–67. Both EASI and CES agree that the parties to the joint powers agreement are local public bodies. Thus, as local public bodies, school districts are generally subject to the provisions of the Procurement Code. Under the Joint Powers Agreements Act, a joint agency can exercise the powers of any of its member agencies "subject to any of the restrictions imposed upon the manner of exercising such power of one of the contracting public agencies." Section 11–1–5(C). Here, since the member school districts are subject to the Procurement Code, CES, as the joint agency, must also comply with the Procurement Code.

Next, we address CES's contention that pursuant to Section 13–1–98(A), cooperative procurement by CES was specifically exempt from the requirements of the Procurement Code. Because this Court determines there was a typographical error in the language of Section 13–1–98(A), we review this section as enacted, codified, and amended.

As published in 1984, Section 13–1–98(A) stated that the procurement of personal property or services by a state agency or a local public body from a state agency, a local public body or external procurement unit is specifically exempted from the Procurement Code, "except as otherwise provided in Sections 106 through 108 [13–1–133 to 13–1–135 NMSA 1978] of the Procurement Code." Both parties, at the request of this Court, filed supplemental briefs following oral argument addressing whether the exception provided in Section 13–1–98(A), correctly pertained to Sections 13–1–133 to –135, as stated in the Procure-

ment Code when published in 1984, or whether the exception should have originally referred to Sections 13–1–135 to –137.

In its supplemental brief, CES states that, other than session laws and compiler's notes, there is no legislative history in New Mexico and no indication why the legislature amended Section 13–1–98(A) in 1987, when the phrase "Sections 13–1–135 through 13–1–137 NMSA 1978" was substituted for the phrase "Sections 106 through 108 [13–1–133 to 13–1–135 NMSA 1978] of the Procurement Code." However, CES contends Section 13–1–98(A) can be reasonably construed to exempt purchases from a local public body, such as CES, created by an approved JPA. Additionally, CES notes the lack of statutory authority which would make the Joint Powers Agreements Act subject to the Procurement Code. In conclusion, CES states that it was exempt from the operation of the Procurement Code when it made purchases for the cooperative and that in spite of this, CES did comply with the Procurement Code by issuing a RFP.

EASI, on the other hand, contends that Section 13–1–98(A) contained an error as it was originally published in 1984. EASI submits that the error occurred as a result of the renumbering of sections which took place between the time the house bill was passed in 1984 as House Bill 237 and the time when the section was published as part of the Procurement Code in the 1984 supplemental pamphlet. The enumerated exceptions to the Procurement Code were originally drafted by the legislature in Section 72 of House Bill 237. With only minor changes, not relevant to this discussion, Section 72 of House Bill 237 was formally enacted as 1984 N.M. Laws, chapter 65, Section 71. When initially drafted, Section 72(A) of House Bill 237 exempted the procurement of "personal property or services by a state agency or a local public body from a state agency, a local public body or external procurement unit *except as otherwise provided in Sections 108 through 110 of the Procurement Code.*" N.M. House Bill 237, § 72(A) (emphasis added). At the time the house bill was passed, Sections 108 through 110 were, in all relevant parts, identical to Sections 13–1–135 through –137. However, when Section 72(A) of House Bill 237 was included in the session laws (1984 N.M. Laws, ch. 65, Section 71), Section 72 was renumbered as Section 71 and it provided that the provisions of the Procurement Code did not apply "*except as otherwise provided in Sections 106 through 108 of the Procurement Code.*" 1984 N.M. Laws, ch. 65, § 71(A) (emphasis added). Likewise, when the session laws were codified in the 1984 supplement, the applicable section, namely, Section 13–1–98(A), also provided that the provisions of the Procurement Code did not apply "except as otherwise provided in Sections 106 through 108 [13–1–133 to 13–1–135 NMSA 1978] of the Procurement Code." Section 13–1–98(A). EASI contends that Section 13–1–98(A), as originally codified, must be erroneous because it makes no sense to group Sections 13–1–133 and 13–1–134 with Section 13–1–135, whereas Section 13–1–135 is naturally read in conjunction with Sections 13–1–136 and 13–1–137. Additionally, Section 13–1–98(A) was amended in 1987 and "Sections 13–1–135 through 13–1–137" was substituted for "Sections ... 13–1–133 to 13–1–135" of the Procurement Code. EASI argues that this tends to indicate that the legislature realized their error and corrected it. In conclusion, EASI urges this Court to construe the law in accordance with the obvious intent of the legislature.

We agree with EASI that in construing the meaning of the exception, we should determine and give effect to the intent of the legislature. *See Security Escrow Corp. v. State Taxation & Revenue Dep't,* 107 N.M. 540, 760 P.2d 1306 (Ct.App. 1988). Clearly, the language "Sections ... 13–1–133 to 13–1–135" found in Section 13–1–98(A) was a typographical error and should be read "Sections 13–1–135 to 13–1–137." *See New Mexico Glycerin Co. v. Gallegos,* 48 N.M. 65, 145 P.2d 995 (1944) (the court determined that the word "or" within the statute was patently a typographical error and should be read "of"). Section 13–1–135 provides that state agencies and local public bodies may enter into agreements pursuant to the Joint Powers Agreements Act for the procurement of

services, construction, or tangible personal property and also permits central purchasing offices to enter into cooperative agreements with the state purchasing agent. Section 13–1–136 requires reporting of cooperative procurement agreements entered into between state agencies and local public bodies or external procurement units. Section 13–1–137 permits agreements providing for a state agency or local public body to sell property to, acquire property from or cooperatively use tangible personal property or services belonging to another state agency, local public body, or external procurement unit. Thus, as we understand Section 13–1–98(A), it provides that a state agency or local public body may procure tangible personal property or services from a state agency, local public body, or external procurement unit without needing to comply with any of the provisions of the Procurement Code except the requirements of Sections 13–1–135, –136, and –137. As previously noted, the term "local public body" includes "the agencies, instrumentalities and institutions" of every political subdivision of the state. Section 13–1–67; *see* § 11–1–3 (joint agency may "exercise any power common to the contracting parties"). Thus, when a local public body acquires property or services from a joint agency, the acquisition is not subject to any provisions of the Procurement Code except those set forth in Sections 13–1–135, –136, and –137. On the other hand, Section 13–1–98(A) does not exempt the procurement of goods or services *by* the joint agency from an outsider. Thus, the acquisition of the services of CES by the joint agency was not exempt from the provisions of the Procurement Code. This interpretation makes sense in that the joint agency must comply with the provisions of the Code in acquiring goods and services, but the contracting parties in the Joint Powers Agreement may then acquire the goods and services from the joint agency without going through the bidding requirements, etc., of the Procurement Code. We now proceed to determine EASI's remedy under the Procurement Code.

II. *Remedy Under Procurement Code*

EASI argues that the district court erred in concluding that the Procurement Code provides the sole remedy for violations thereof. EASI maintains that the Procurement Code fails to expressly state that the remedies provided therein are exclusive and that such exclusivity should not be inferred. CES contends, and the district court concluded, that the Procurement Code does not expressly or impliedly authorize any private right of action for disappointed offerors such as EASI, since Section 13–1–183 provides an adequate legal remedy. Section 13–1–183 states, in pertinent part:

> A. All actions authorized by the Procurement Code ... for judicial review of a determination shall be based upon the records of the central purchasing office and all evidence submitted by the protestant and other interested parties. All actions for judicial review must be filed within thirty days of receipt of notice of the determination....
>
> B. All determinations under the Procurement Code made by a state agency or a local public body shall be sustained unless arbitrary, capricious, contrary to law, clearly erroneous or not based upon substantial evidence.

CES argues that its position, to the effect that there is no private right of action under the Procurement Code, is consistent with federal procurement cases which hold that no private right of action exists or will be implied under federal law. We agree.

Under federal law, remedies are provided for disappointed bidders. Pursuant to the Bid Protest Regulations, 4 C.F.R. §§ 21.0 to –.12 (1991), a disappointed bidder may seek administrative relief by filing a protest with the General Accounting Office (GAO). 4 C.F.R. § 21.1. Additionally, a disappointed bidder may request reconsideration of the GAO's decision. 4 C.F.R. § 21.12. Further, the Administrative Procedure Act, 5 U.S.C. § 701–06 (1989), provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant

statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Analogy can be made to the cases in which the federal courts have declined to recognize an express or implied private right of action by the disappointed bidder under federal statutes and regulations. In *Northland Equities, Inc. v. Gateway Center Corp.,* 441 F.Supp. 259 (E.D.Pa.1977), the unsuccessful bidder of a government lease sued the successful bidder on a federal cause of action for recovery of damages and lost profits for various violations of the federal procurement statutes. The appellate court held that neither federal statutes nor regulations, while providing several other remedies, provide a disappointed bidder a statutory cause of action to recover either damages or lost profits from the successful bidder. *Id.* at 261. The court stated that there was no implicit damage remedy in the federal procurement statutes and that the federal procurement statutes were not created for the primary benefit of bidders, but rather were created to protect the government's interest in economical procurement. *Id.* at 262; *see also Tectonics, Inc. v. Castle Constr. Co.,* 753 F.2d 957 (11th Cir.1985) (in discussing the Small Business Act, the court held that Congress did not intend to provide a civil private cause of action to disappointed bidders); *Savini Constr. Co. v. Crooks Bros. Constr. Co.,* 540 F.2d 1355 (9th Cir.1974) (in discussing the Small Business Act, the court held that it did not create an express cause of action by the disappointed bidder against a successful bidder); *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.,* 653 F.Supp. 1242 (E.D.Va.1987) (in discussing the Small Business Act, the court stated that it did not create either an express or implied right of action by the disappointed bidder against the successful bidder). At least one other court has interpreted a state procurement code to hold that the disappointed bidder cannot maintain a private cause of action against a successful bidder. *See Ohio River Conversions, Inc. v. City of Owensboro,* 663 S.W.2d 759 (Ky.Ct.App.1984).

Additionally, CES argues that the purpose of the Procurement Code is to benefit the citizens and that "benefitting the citizens" means having an efficient procurement system. In discussing the federal procurement statutes, the court in *Northland Equities* stated that "[t]he procurement statutes were not created for the 'especial' benefit of bidders" but rather for the governmental interest in an economical and efficient system of procurement. *Northland Equities,* 441 F.Supp. at 262–63; *see also Ohio River Conversions,* 663 S.W.2d at 760 ("Competitive bidding statutes are primarily intended for the benefit of the public rather than for the benefit or enrichment of bidders, and consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public" (quoting 72 C.J.S.Supp. *Public Contracts* § 8 (1975))). CES contends that the system is not efficient if a disappointed bidder can wait until after the performance to sue in order to recover lost profits. *See Northland Equities,* 441 F.Supp. at 263. Further, the creation of additional causes of action in addition to the prescribed remedies under the procurement statutes may discourage disappointed bidders from seeking prompt judicial and administrative review of contract awards, create litigation in government procurement, increase the cost of conducting business with the government, and deter potential bidders from participating in government procurement. *John C. Holland Enters.,* 653 F.Supp. at 1247.

CES submits that under Section 13–1–172, the Procurement Code adequately protects the bidders. Section 13–1–172 provides that "Any bidder, offeror or contractor who is aggrieved in connection with a procurement may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after the facts or occurrences giving rise thereto." EASI suggests the remedy under the Procurement Code is inadequate because no specific remedy exists for the problem that arose in this case, which it describes as CES's "direct economic interest in the outcome." We are not persuaded that the remedy provided by the legislature is inadequate or inapplicable. *See generally Patterson v. Globe Am. Casualty Co.,* 101

N.M. 541, 685 P.2d 396 (Ct.App.1984) (discussing New Mexico precedent regarding private cause of action under statute not expressly providing one).

The Procurement Code regulates all the stages of the public procurement process. The Code gives the disappointed bidder the right to protest pursuant to Section 13–1–172, and also creates a statutory remedy, namely, judicial review pursuant to Section 13–1–183. The Code does not specifically provide for a damage remedy. However, it does provide for protest and for an appealable determination of the protest. *See* §§ 13–1–172, –175, –176, –183. We determine that the Procurement Code provides an adequate legal remedy and that the writ of quo warranto was not the proper remedy herein. *Cf. State ex rel. Vigil v. Rodriguez,* 65 N.M. 80, 332 P.2d 1005 (1958). Accordingly, we affirm the district court on this issue.

III. *Antitrust Violation*

EASI argues that the district court erred in concluding that it failed to establish an antitrust violation. Under NMSA 1986, Section 57–1–1 (Repl.Pamp.1987), "Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." In order to establish an antitrust law violation, "the plaintiff must show a conspiracy or combination among two or more persons and an unreasonable restraint of trade due to this combination or conspiracy." *Clough v. Adventist Health Sys., Inc.,* 108 N.M. 801, 804, 780 P.2d 627, 630 (1989) (citation omitted). "Furthermore, the object of the conduct must be to restrain trade." *Id.* For purposes of the Antitrust Act, NMSA 1986, Sections 57–1–1 to –15 (Repl.Pamp.1987), "person" is defined as "an individual, corporation, business trust, partnership, association or any governmental or other legal entity with the exception of the state ... and the United States." Section 57–1–1.2.

Here, EASI's brief in chief concedes "that a conspiracy could not exist between CES ... and its [e]xecutive [d]irector, Dr. Luft." Rather, EASI contends on appeal that a conspiracy existed among the various school superintendents who acted in a dual capacity as directors of CES. However, EASI failed to try the case on this theory; the theory was not raised in the complaint, the pre-trial order, or any motion to amend the complaint. "Where the record fails to indicate that an argument was presented to the court below, unless it is jurisdictional in nature, it will not be considered on appeal." *Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987). To preserve an issue for appellate review, it must appear that the appellant fairly invoked a ruling of the district court on the same grounds argued in the appellate court. *Id.* at 496, 745 P.2d at 721; *see* SCRA 1986, 1–046; 12–213(A)(3); 12–216(A). Based on EASI's failure to preserve its theory that a conspiracy existed among the various school superintendents, we do not address this issue.

IV. *Violation of Civil Rights*

EASI argues that the actions of CES and Luft in attempting to circumvent the competitive-proposal process of the Procurement Code deprived EASI of property rights, including the right to submit a meaningful bid to provide services, in violation of the United States Constitution, and as such were actionable under 42 U.S.C. Section 1983 (1989). EASI maintains that the Procurement Code creates a valuable property interest in all prospective bidders vying to provide services for governmental entities and that such prospective bidders have a sufficient economic interest at stake to enable them to challenge, on constitutional grounds, actions by such public entities which deprive them of their ability to compete.

The district court concluded, inter alia, that (1) no private right of action for disappointed offerors such as EASI was either expressly or impliedly provided under the Procurement Code since Section 13–1–183 provides an adequate legal remedy; (2) EASI was not denied due process nor was it deprived of any property interest; (3) EASI waived any rights it had under the Procurement Code when it failed to seek timely judicial review of the cooperative's action under Section 13–1–183; (4) CES as the alter ego of the member school districts

was immune from the claims for damages on account of alleged civil rights; and (5) there was no evidence that EASI suffered any damages as a result of its failure to obtain either the ancillary services contract or the administering agency contract, nor did EASI prove a loss of profits or any other damages.

This claim, which is based on a statute creating liability for action under color of state law, requires that the plaintiff establish (1) that the defendants acted under color of state law, and (2) that the actions of the defendants caused the plaintiffs to be deprived of a right secured by the Federal Constitution or the laws of the United States. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

42 U.S.C. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CES argues that EASI has failed to prove that CES has acted under color of state law. In support of their argument, CES relies on *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), in which the Supreme Court held that private corporations may not be liable under 42 U.S.C. Section 1983 unless the State is responsible for the acts complained of. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004, 102 S.Ct. at 2786.

EASI argues that although CES and Luft maintained their identities as a private entity and a private individual, respectively, they intentionally invoked their relationship with member school districts thereby indicating that their actions were directed by such districts. CES responds that the State was not responsible for, nor did it dictate the complained-of activities conducted by the board of directors of CES.

We note that the activities of CES were conducted by the members of the board of directors, all of whom were superintendents of school districts. In fact, each of the members of the board of directors of CES held that position solely as a result of being employed in a public position.

Alternatively, CES argues that even if state action was involved, EASI was not denied due process because the Procurement Code sets forth provisions to deal with aggrieved bidders or offerors. As previously noted, Section 13-1-172 states that "[a]ny bidder, offeror or contractor who is aggrieved in connection with a procurement may protest to the state purchasing agent or a central purchasing office ... in writing within fifteen calendar days after the facts or occurrences giving rise thereto." Additionally, Section 13-1-183(A) provides for judicial review of all actions authorized by the Procurement Code filed within thirty days of receipt of notice of the determination.

Assuming without deciding that there was action under color of state law and that EASI had a protected property interest, we agree with CES's alternate argument that there was no violation of due process because EASI was given a reasonable opportunity to participate in the protest process afforded pursuant to the Procurement Code. *See Atencio v. Board of Educ.*, 658 F.2d 774 (10th Cir.1981). Accordingly, we affirm the district court on this issue.

CONCLUSION

For the foregoing reasons, we affirm.

IT IS SO ORDERED.

PAMELA B. MINZNER, C.J., and HARTZ, J., concur.

848 P.2d 1131

The HOME INDEMNITY COMPANY, Plaintiff-Appellant,

v.

ARAPAHOE DRILLING COMPANY, INC., Defendant-Appellee.

Nos. 13173 and 13188.

Court of Appeals of New Mexico.

Feb. 18, 1993.

Gregory L. Biehler, Beall & Biehler, P.A., Albuquerque, for plaintiff-appellant.

Judy A. Fry, Janet R. Braziel, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for defendant-appellee.

OPINION

PICKARD, Judge.

This appeal involves the time limitation for taking certain appeals from the corporation commission (sitting as the insurance board) to the district court. Home Indemnity Company was aggrieved by a decision of the corporation commission entered on November 9, 1990, in favor of Arapahoe Drilling Company. Home Indemnity filed its appeal on December 19, 1990. Upon motion of Arapahoe, the district court dismissed Home Indemnity's appeal. By separate order, the district court confirmed the judgment of the corporation commission, apparently because there was no reason not to confirm the judgment once the appeal was dismissed. Home Indemnity filed separate appeals from each order, and we consolidated the appeals on motion of the parties. Neither party separately briefed the order confirming the judgment; both parties agree that at this stage of the proceedings, the propriety of the order confirming the judgment turns on whether or not the appeal was properly dismissed. We hold that the appeal was properly dismissed and therefore affirm both orders.

BACKGROUND

The Insurance Code is contained in NMSA 1978, Sections 59A–1–1 to 59A–55–26 (Repl.Pamp.1992) and consists of all those sections except Articles 16A, 23A, 23B, and 24A, and Section 59A–33–14. Section 59A–1–1. We cite the 1992 replacement pamphlet because none of the provisions specifically applicable to this case has materially changed since this case was filed. Article 4 of the Insurance Code, §§ 59A–4–1 to –20, is entitled "Examinations, Hearings and Appeals" and contains Subsections 59A–4–20(A) and (B), which provide that "A party may appeal from an order of the superintendent," and "The appeal shall be taken within sixty days after receipt, by the party appealing, of a copy of the decision from the review of the superintendent's order by the corporation commission or insurance board."

If this provision applies, Home Indemnity's appeal was timely and the court below erred in dismissing it. However, Subsection 59A–4–20(F) provides that "This section shall not apply to matters arising under Chapter 59A, Article 17 NMSA 1978."

Article 17 of the Insurance Code, §§ 59A–17–1 to –36, is entitled "Insurance Rates and Rating" and contains Subsection 59A–17–35(A), which provides that "Any order made by the insurance board pursuant to Section 59A–17–34 NMSA 1978 shall be subject to review by the district court of Santa Fe county in the same manner as provided for taking of appeals in other civil actions." Thus, the three issues raised by this case are: (1) whether the proceedings in this case were under Article 17, culminating in a decision pursuant to Section 59A–17–34; (2) whether the time for "taking of appeals in other civil actions" expired by the time Home Indemnity's appeal was filed; and (3) whether other reasons would allow the appeal to be heard.

FACTS

The nature of the proceeding before the corporation commission was a dispute between the parties about the proper workers' compensation premiums that Arapahoe should have been paying. Home Indemnity claimed that Arapahoe owed it some $90,000 in premiums and invoked the jurisdiction of the federal court to collect. Arapahoe claimed that it did not owe the $90,000 and, in addition, claimed that it had overpaid some $140,000 in premiums; Arapahoe made its claims in a counterclaim in the federal action. Pursuant to stipulation, the parties agreed that all issues in the federal court action would be submitted to the jurisdiction of the New Mexico Department of Insurance.

The nature of the dispute concerned whether a class of employees known as "tool pushers" would be classified for rating purposes as oil field workers or supervisory personnel. If they were classified as the former, the rate was $35.71 per $100 of payroll; if the latter, the rate was $4.87 per $100 of payroll. The superintendent of insurance held that tool pushers were supervisory personnel and that Home Indem-

nity had improperly classified them. The corporation commission affirmed.

DISCUSSION

1. Article 17 versus Article 4

Home Indemnity contends that the issues presented to the superintendent did not involve insurance rating, rate experience, calculation of the rate of the premium, or rate determination, and that therefore Article 17 cannot apply. It further contends that this matter involves the appropriate rate classification and therefore Article 4 applies. We disagree.

The word "classification" appears nowhere in Article 4. On the other hand, it appears several places in Article 17. For example, there is Section 59A–17–4(C), which defines "supplementary rate information" as "any manual or plan of ... classification," and there is Section 59A–17–8, which permits risks to be grouped by classification, provides that classification systems be updated periodically, and outlines how classifications are assigned.

Section 59A–17–30(B) permits the superintendent to hear appeals relating to an insurance company's rating system. In this case, the decision of the superintendent of insurance recited that jurisdiction was invoked pursuant to the parties' stipulation and Section 59A–17–30. In both Home Indemnity's docketing statement and its brief in chief, it recited that the issues were presented to the superintendent pursuant to Section 59A–17–30 for resolution. In other words, it appears Home Indemnity concedes that Article 17 applied to the proceedings before the corporation commission.

It argues, however, that the proceedings were nonetheless conducted by the corporation commission pursuant to certain sections of Article 4. This argument is not convincing. While both the stipulation and the decision of the superintendent recited that the proceedings in this case were conducted pursuant to Sections 59A–4–15 and –17, this does not mean that the proceedings were not Article 17 proceedings. Section 59A–17–34 expressly provides that Article 17 hearings are to be conducted pursuant to certain of the procedural provisions of Article 4, notably Sections 59A–4–15, –16, and –17. Moreover, it bears repeating that Subsection 59A–4–20(F) expressly provides that Section 59A–4–20 does not apply to matters arising under Article 17.

For these reasons, the appeal had to be taken within the time limits provided by Article 17.

2. Time for "taking of appeals in other civil actions"

Section 59A–17–35 provides that appeals to the district court from Article 17 proceedings are to be taken "in the same manner as provided for taking of appeals in other civil actions." What does this language mean in the context of an appeal to district court?

Several possibilities come to mind. Before discussing them, we note that the Supreme Court has not addressed this matter by rule of procedure. *See James v. New Mexico Human Servs. Dep't, Income Support Div.*, 106 N.M. 318, 742 P.2d 530 (Ct. App.) (when Supreme Court has set time limit for taking administrative appeal, that time limit governs over inconsistent statutory time limit), *cert. quashed,* 106 N.M. 353, 742 P.2d 1058 (1987); *see also State v. Alvarez,* 113 N.M. 82, 823 P.2d 324 (Ct. App.) (when Supreme Court-adopted time limit was different from statutory time limit but rule was not clearly intended to take precedence over statute, Court of Appeals would not assume that Supreme Court intended to enact an inconsistent rule), *cert. denied,* 113 N.M. 23, 821 P.2d 1060 (1991). Thus, we address this issue as a matter of legislative intent.

First, the language concerning "appeals in other civil actions" may mean that the legislature intended appeals pursuant to Section 59A–17–35 to be governed by the time limit established by the legislature for appeals in civil cases, NMSA 1978, § 39–3–2 (Repl.Pamp.1991). Second, the language may mean that the time limit is that limit contained in the Rules of Appellate Procedure, SCRA 1986, 12–201 (Repl.1992). Both of these limits are thirty days from the date of filing of the appealable order. However, both limits apply by their terms

to appeals from the district court to the Court of Appeals, not to appeals to a district court.

Various types of administrative cases are appealed to district court. In fact, there are over forty different statutes creating a right of appeal from a lower tribunal to the district court and setting procedure therefor, including the two statutes at issue here. A list of most, if not all, of them is contained in an appendix to this opinion. Because of the variety of the provisions in these statutes and the fact that they are administrative and not ordinary civil proceedings, we doubt the legislature intended any of them to be considered "other civil actions."

Finally, the most common types of "civil actions" appealed to district court are cases appealed from lower courts, the magistrate and metropolitan courts. Both by statute and by rule, appeals from these courts to the district court are to be taken within fifteen days of the appealable order. NMSA 1978, § 34-8A-6(D) (Repl.Pamp.1990); NMSA 1978, § 35-13-1 (Repl.Supp.1988); SCRA 1986, 3-706(A) (Repl.1990); SCRA 1986, 2-705(A) (Repl.1990).

Apart from the administrative appeals, whose procedures we have already rejected as being those contemplated by the words "other civil actions," we need not decide in this case what "other civil actions" the legislature had in mind in enacting Section 59A-17-35. The time limit for all of them is either fifteen or thirty days, and Home Indemnity's appeal, filed forty days after entry of the order from which appeal was taken, was untimely in any event.

3. Other reasons to hear the appeal

Home Indemnity contends that the rules requiring liberal construction of appellate provisions so that appeals are determined on their merits should apply to this case. *See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 103 N.M. 707, 708, 712 P.2d 1369, 1370 (1986). We have no quarrel with the general principle and, indeed, are committed to the rule of liberal construction. *See State v. Manes,* 112 N.M. 161, 163, 812 P.2d 1309, 1311 (Ct.App.), *cert. denied,* 112 N.M. 77, 811 P.2d 575, *and cert. denied,* — U.S. —, 112 S.Ct. 381, 116 L.Ed.2d 332 (1991). However, in this case there is nothing to construe. As indicated in our discussion of the first issue, no amount of construction will turn what is fundamentally an Article 17 proceeding into a different type of proceeding. As indicated in our discussion of the second issue, no matter what time limit we chose from those reasonably available to us, the appeal was still out of time.

Home Indemnity contends that it should have thirty days from receipt of the corporation commission's order in which to file its appeal. Because service was not made on the parties until November 20, according to Home Indemnity's brief, Home Indemnity contends that its notice of appeal, filed on December 19, was timely. In fact, Home Indemnity contends that a violation of due process would be present if the time were run from entry of the order if Home Indemnity had no notice of the entry of the order.

We agree that it would be a violation of due process if Home Indemnity would have been required to take an appeal from an order of which it had no notice. *Cf. Montano v. Encinias,* 103 N.M. 515, 709 P.2d 1024 (1985). However, that is not the case here. We also may have some discretion to excuse an untimely notice of appeal and assume that the district court might have similar discretion. *See In re Estate of Newalla,* 114 N.M. 290, 296, 837 P.2d 1373, 1379 (Ct.App.1992). However, this is not a case which should motivate a court to exercise its discretion. *See Trujillo v. Hilton of Santa Fe,* 115 N.M. 398, 851 P.2d 1065 (Ct.App.1993).

Home Indemnity, by its own admission, knew of the entry of the November 9 order on November 20. At that time, there were still almost twenty days left in which to appeal. Home Indemnity's failure to file a timely notice of appeal was not due to any lack of notice, and nothing but Home Indemnity's own actions caused it to file its notice in an untimely fashion.

Home Indemnity's argument in this regard appears to be superficially supported by *Rutherford v. City of Albuquerque,* 113 N.M. 573, 829 P.2d 652 (1992). However, *Rutherford* is distinguishable. In that case, the Supreme Court construed the applicable statute, which was silent on the matter, to provide for commencing the time in which to appeal on the date of mailing the decision. In this case, the statute's reference to other civil actions, which all commence the time on the date of entry of the decision, precludes this court from construing the statute to commence the appeal time on a different date. *See State ex rel. Barela v. New Mexico State Bd. of Educ.,* 80 N.M. 220, 222, 453 P.2d 583, 585 (1969) (courts will not add words to statutes, particularly if they make sense as written).

Home Indemnity finally contends that equitable considerations require us to hear its appeal. Those equitable considerations are that Home Indemnity seeks to raise an important issue that affects insurance rating organizations in general. No authority is cited for the proposition that the importance or effect of the issue sought to be raised will excuse an untimely notice of appeal. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Nor are we aware of any such authority.

CONCLUSION

As demonstrated by this case and the authorities cited in it, the timely taking of an appeal, especially from lower tribunals to the district court, can still present many traps for the unwary. We commend to the Supreme Court that it expressly address these matters by rule. In the meantime, while we sympathize with practitioners, we are bound to uphold the applicable procedural rules when it appears to us that appellants could have complied with them but simply did not.

To hold otherwise would thwart the salutary purpose of providing a definite time in which to appeal. That purpose is that "it is necessary to provide a precisely ascertainable point of time at which litigation ends." 9 James W. Moore et al., *Moore's Federal Practice* ¶ 204.02[1], at 4–13 (2d ed. 1992); *see also Brainerd v. Beal,* 498 F.2d 901, 903 (7th Cir.) (purpose of requiring compliance with rule on timely notice of appeal is to avoid uncertainty), *cert. denied,* 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 664 (1974).

Accordingly, the order dismissing the appeal and the following order confirming the judgment of the corporation commission are affirmed.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

APPENDIX

1. NMSA 1978, § 3–19–8 (Repl.1985). Appeals from planning commission. No time limit stated.

2. NMSA 1978, § 3–33–22(D) (Repl.Pamp.1991). Appeals from municipal improvement district assessments. Time limit: 15 days after publication of title and summary or posting of ordinance.

3. NMSA 1978, § 3–33–35(A) (Repl.Pamp.1991). Appeals from municipal improvement district individual reassessments. Time limit: 10 days after reassessment roll is ratified by ordinance.

4. NMSA 1978, § 4–55A–18(D) (Repl.Pamp.1992). Appeals from county improvement district assessments. Time limit: 15 days after publication of title and summary or posting of ordinance.

5. NMSA 1978, § 4–55A–31(A) (Repl.Pamp.1992). Appeals from county improvement district individual reassessments. Time limit: 10 days after reassessment roll is ratified by ordinance.

6. NMSA 1978, § 7–1–26(A) (Repl.Pamp.1990). Appeals from denials of claims for tax refunds. Time limits: 30 days from mailing of denial if claim is not granted in full or 120 days from mailing of claim which is neither allowed nor denied.

7. NMSA 1978, § 10–5–7(A) (Repl.Pamp.1992). Appeals from secretary of finance and administration. Time limit: 30 days after entry of public official suspension order.

8. NMSA 1978, § 10–9–18(A) (Repl.Pamp.1992). Appeals from personnel

board. Time limit: 30 days after dismissal, demotion, or suspension.

9. NMSA 1978, § 10–11–120(B) (Repl.Pamp.1992). Appeals from PERA. Time limit: 30 days after retirement board has filed its final decision.

10. NMSA 1978, § 13–1–183(A) (Repl.Pamp.1992). Appeals from Procurement Code determinations. Time limit: 30 days from receipt of determination notice.

11. NMSA 1978, § 13–4–15(D) (Repl.Pamp.1992). Appeals from labor and industrial commission. Time limit: 30 days from mailing of final notice of appeals board.

12. NMSA 1978, § 17–3–34 (Repl.Pamp.1988). Appeals from game and fish license revocation hearings. No time limit stated.

13. NSMA 1978, § 19–7–67 (Repl.1985). Appeals from commissioner of public lands. Time limit: 60 days after decision.

14. NMSA 1978, § 21–24–8 (Repl.Pamp.1992). Appeals from determinations of board of educational finance regarding issuance, denial, or revocation of permits. No time limit stated.

15. NMSA 1978, § 25–3–12 (Repl.Pamp.1987). Appeals from slaughtering establishment condemnations. Time limit: 10 days from environmental improvement board decision.

16. NMSA 1978, § 25–3–19(C) (Repl.Pamp.1987). Appeals from suspension or revocation of meat inspection service or establishment numbers. Time limit: 10 days from decision of environmental improvement board.

17. NMSA 1978, § 28–1–13(A) (Repl.Pamp.1991). Appeals from human rights commission. Time limit: 30 days from service of commission's order.

18. NMSA 1978, § 42–3–14(B)(2) (Cum. Supp.1992). Appeals from relocation payment decisions. Time limit: 30 days from date of mailing or delivery of written decision and order of the displacing agency.

19. NMSA 1978, § 58–1–45(A) (Repl.Pamp.1991). Appeals from the financial institutions division of the regulation and licensing department. Time limit: 30 days after issuance of order.

20. NMSA 1978, § 58–10–13(B) (Repl.Pamp.1991). Appeals from the chief of the savings and loan bureau. Time limit: 30 days after service of decision.

21. NMSA 1978, § 58–10–84 (Repl.Pamp.1991). Appeals from decisions on orders to discontinue violations and to remove directors, officers, and employees pursuant to the Savings and Loan Act. See § 58–10–92 for time limit.

22. NMSA 1978, § 58–10–92(A) (Repl.Pamp.1991). Appeals from decisions by supervisor of financial institutions division of the regulation and licensing department (for savings and loan associations). Time limits: either 30 days after issuance of order or 30 days after order becomes reviewable.

23. NMSA 1978, § 58–21–16(A) (Repl.Pamp.1991). Appeals from final orders by director of financial institutions division of the regulation and licensing department (for mortgage loan companies and loan brokers). Time limit: 30 days after entry of order.

24. NMSA 1978, § 58–22–29(A) (Repl. Pamp.1991). Appeals from final orders by director of financial institutions division of the regulation and licensing department (for hospital equipment loans). Time limit: 30 days after entry of order.

25. NMSA 1978, § 59A–29–6 (Repl.Pamp.1992). Appeals from orders of superintendent of the insurance department. No time limit stated.

26. NMSA 1978, § 59A–32–12 (Repl.Pamp.1992). Appeals from the superintendent of the insurance department pursuant to Motor Vehicle Assigned Risks Law. Time limit (cross-reference to NMSA 1978, Section 59A–4–20(B) (Repl.Pamp.1992)): 60 days after receipt of a copy of the superintendent's order.

27. NMSA 1978, § 59A–42–12(B) (Repl.Pamp.1992). Appeals from superintendent of insurance department (property and casualty insurance guaranty fund). Time limit: 30 days after superintendent's order on appeal.

28. NMSA 1978, § 59A-46-20(B). Appeals from determinations superintendent of insurance department (certificates of authority for health maintenance organizations). No time limit stated.

29. NMSA 1978, § 59A-52-22 (Repl.Pamp.1992). Appeals from the fire board. Time limit: 30 days after filing of decision.

30. NMSA 1978, § 60-6B-2(M) (Repl.Pamp.1992). Appeals from the superintendent of regulation and licensing. Time limit: 30 days from the director's decision.

31. NMSA 1978, § 60-6C-6(A) (Repl. Pamp.1992). Appeals from orders of business license revocations, suspensions, or fines. Time limit: within 30 days of entry of order.

32. NMSA 1978, § 61-1-17 (Repl.Pamp.1989). Appeals from licensing boards. Time limit: 20 days after service of the decision.

33. NMSA 1978, § 66-5-36 (Repl.Pamp.1989). Appeals from cancellation, suspension, or revocation of drivers licenses. Time limit: 30 days thereafter.

34. NMSA 1978, § 66-5-204 (Repl.Pamp.1989). Appeals from decisions by the director of the motor vehicle division of the taxation and revenue department regarding the Mandatory Financial Responsibility Act. Time limit: 20 days after hearing officer's decision.

35. NMSA 1978, § 66-8-112(G) (Cum. Supp.1992). Appeals from driver's license revocation. Time limit: 30 days from order.

36. NMSA 1978, §§ 69-6-2, 69-8-14(A) (Repl.Pamp.1989). Appeals from mining penalties and injunctions. No time limit stated ("Such actions ... shall be governed by the rules and laws applicable to equity proceedings in such court. Either party to such action shall have a right of appeal from any judgment or order therein, as provided by law.").

37. NMSA 1978, § 69-25A-30(A) (Repl.Pamp.1979). Appeals from bureau of mines and mineral resources. Time limit: 30 days after decision is rendered.

38. NMSA 1978, §§ 70-2-25(B), -26 (Repl.Pamp.1987). Appeals from oil conservation commission. Time limit: 20 days after order following rehearing or denial of rehearing.

39. NMSA 1978, § 70-3-8 (Repl.Pamp.1987). Appeals from rejection of applications for use of highway for pipeline. No time limit stated ("in the same manner as provided for appeals from orders of the board of county commissioners by Sections 4-45-5 and 4-45-6 NMSA 1978").

40. NMSA 1978, § 71-5-18(B) (Repl.Pamp.1981). Appeals from the oil conservation division of the energy, minerals, and natural resources department. Time limit: 20 days after the entry of the order following rehearing or after refusal of rehearing.

41. NMSA 1978, §§ 72-7-1(B), 72-12A-10 (Repl.1985). Appeals from the state engineer's office. Time limit: 30 days after receipt by certified mail of notice of decision.

42. NMSA 1978, § 73-1-26. Appeals from appropriation decisions by the state engineer made by artesian conservancy districts. No time limit stated ("within the time and manner provided by law for appeals from such decisions").

848 P.2d 1137

Pamela D. FITZGERALD, Claimant-Appellee,

v.

OPEN HANDS, Employer, and United States Fidelity & Guaranty Company, Insurer, Respondents-Appellants.

No. 13741.

Court of Appeals of New Mexico.

Feb. 18, 1993.

Timothy R. Briggs, Thomas R. Mack, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for respondents-appellants.

Linda Martinez-Palmer, Daniel J. O'Friel, Law Offices of Daniel J. O'Friel, Ltd., Santa Fe, for claimant-appellee.

OPINION

PICKARD, Judge.

This workers' compensation case involves the proper legal interpretation and application to the facts of the statutes defining "impairment" and "disability" and limiting the amount of compensation benefits payable. The accidental injury took place on November 28, 1988, and the governing law is that in effect from 1987 to 1991. The specific provisions at issue are NMSA 1978, Sections 52-1-24, 52-1-25, and 52-1-41 (Repl.Pamp.1987).

Worker was a psychiatric nurse at the New Mexico State Penitentiary in Santa Fe when she was brutally beaten by a psychotic prisoner. Worker's main physical injuries were to her face and head. These injuries were treated by doctors and dentists, including a plastic surgeon, on an intermittent basis from the date of the accident until December 1989. In addition to her physical injuries, worker sustained post-traumatic stress disorder from which she was still suffering at the time of the hearing.

The workers' compensation judge found that worker was totally temporarily disabled from the date of the accident until March 15, 1991. The judge also found that worker was totally permanently disabled solely from her secondary mental impairment from March 15, 1991, on. The compensation order awarded worker 119 weeks and 4 days of total disability benefits for the secondary mental impairment commencing on March 15, 1991, based on a finding that worker's disability produced by the physical impairment lasted 119 weeks and 4 days from November 28, 1988, to March 15, 1991. The judge also awarded $9000 in attorney fees.

Employer appeals, raising four issues: (1) whether the judge misinterpreted the law limiting compensation benefits for sec-

ondary mental impairment and lacked evidence on which to base her interpretation of the law; (2) whether there was sufficient evidence of total disability; (3) whether medical records were properly admitted into evidence when they were not disclosed in a timely fashion; and (4) whether the attorney fees were excessive. We address the second and third issues summarily, holding that there was substantial evidence of total disability and that employer has shown no error in the admission of medical records. We do not address the fourth issue in light of our disposition of the first issue. We reverse on the first issue and remand for a corrected award of compensation benefits and redetermination of attorney fees in light of the new award.

While conceding that worker is totally disabled as a psychiatric nurse, employer contends that worker is not totally disabled because she could perform as a nurse in other fields and was in fact working in client development and as a group leader in an Outward Bound-type of program at the time of the hearing. The evidence, however, was that, due to her psychological state, worker lacked confidence in her nursing abilities, could not care for others, and did not maintain continuing education in nursing. The fact that worker was able to work at the program does not, under the facts of this case, establish that worker was not totally disabled. In the year prior to the hearing, this job was extremely part-time, and worker earned only $600 from it. While there was evidence that the reason worker did not work more for this particular program was a lack of clients, the judge could have inferred that worker would not have been able to handle a full client base due to her psychological state. On the whole record, therefore, *see Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct.App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988), there was substantial evidence that worker was totally disabled. *See Smith v. City of Albuquerque*, 105 N.M. 125, 130–32, 729 P.2d 1379, 1384–86 (Ct.App.1986); *cf. Dodrill v. Albuquerque Utilities Corp.*, 103 N.M. 737, 713 P.2d 7 (Ct.App.1985) (recognizing "odd-lot" doctrine).

Employer alleges error in the judge's admission of worker's medical records. However, employer's brief does not cite any reference to the transcript or record where this issue was raised below. Under these circumstances, no error is shown. *See State v. Martin*, 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct.App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977).

This brings us to the major issue on appeal, whether the judge erred in her determination of the duration of worker's benefits. In order to evaluate this issue, we set out the pertinent statutory provisions in relevant part. Section 52–1–24 states:

> As used in the Workers' Compensation Act ...:
>
> A. "impairment" includes physical impairment, primary mental impairment and secondary mental impairment;
>
> B. "primary mental impairment" means a mental illness arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury ...; and
>
> C. "secondary mental impairment" means a mental illness resulting from a physical impairment caused by an accidental injury arising out of and in the course of employment.

Section 52–1–25(A) states:

> As used in the Workers' Compensation Act ..., "total disability" means an impairment to a worker resulting by reason of an accidental injury arising out of and in the course of employment 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.

Section 52–1–41(A) states:

> For total disability, the worker shall receive, during the period of that disability, ... [a specified calculation of benefits] a week but in no event to exceed a period of seven hundred weeks, except for total disability resulting from:
>
> (1) primary mental impairment in which case the maximum period is one hundred weeks; or

(2) secondary mental impairment in which case the maximum period is the maximum period allowable for the disability produced by the physical impairment or one hundred weeks, whichever is greater.

Although worker has not cross-appealed, the parties' arguments and the judge's findings show three different ways of construing these statutes. Worker's construction appears to be that it is the disability that governs, and as long as there is a disability (as opposed to an impairment), worker is entitled to full disability payments. Employer's construction is that Section 52–1–41(A)(2) allows compensation payments for as long as the physical disability is present; if the physical disability lasts less than 100 weeks, then a person who is totally disabled by secondary mental impairment can receive compensation payments for the balance of the 100 weeks and no more. The judge's construction is that Section 52–1–41(A)(2) requires a determination of when the physical disability ends; then for the period during which the worker is disabled solely by the secondary mental impairment, that worker is entitled to the greater of 100 weeks of compensation payments or the number of weeks of physical disability. According to the judge, both of these would be payable only after the payments for the disability which included physical disability ended. Thus, in this case, because the judge found that worker's physical disability ended on March 15, 1991, and because the period from the accident on November 28, 1988, to March 15, 1991, was 119 weeks and 4 days, worker was entitled to another 119 weeks and 4 days of compensation benefits beginning on March 15, 1991.

We find that worker's construction of the applicable statutes ignores much of the statutory language. Worker's construction would read the word "impairment" out of the definition of disability in Section 52–1–25. According to that section, disabilities are based on impairments that prevent work. *See also Douglass v. State Regulation & Licensing Dep't,* 112 N.M. 183, 185, 812 P.2d 1331, 1333 (Ct.App.), *cert. denied,* 112 N.M. 77, 811 P.2d 575 (1991). Impairments, then, are defined in Section 52–1–24. These include physical impairments, primary mental impairments, and secondary mental impairments. At the time of the hearing, it was conceded that worker no longer suffered any physical impairment. Worker never suffered a primary mental impairment because that, by definition, is a mental impairment without physical injury, and it was undisputed that worker's beating resulted in physical injury. Thus, at the time of the hearing, worker was disabled by a secondary mental impairment and, accordingly, was subject to the limitation of Section 52–1–41(A)(2).

As between employer's construction and the judge's construction, we understand how the judge could have found both to be plausible on a first reading of Section 52–1–41 alone. One way she could have decided which construction to adopt would be to adopt the one pursuant to which this concededly disabled worker would get benefits. However, NMSA 1978, Section 52–5–1 (Repl.Pamp.1987) counsels that the rule of "liberal" construction of the "remedial" workers' compensation statute is not to be used. *See also Jensen v. New Mexico State Police,* 109 N.M. 626, 629, 788 P.2d 382, 385 (Ct.App.), *cert. denied,* 109 N.M. 563, 787 P.2d 1246 (1990). Thus, to the extent the judge may have applied a rule of liberal construction to arrive at the result she did, she erred in doing so.

Section 52–5–1 also counsels that all benefit claims are to be decided on their merits with the interests of both the employee and the employer to be equally favored. What are those merits? First, we recognize that by enacting the "new" workers' compensation act, under which this case must be decided, the legislature clearly intended to restrict coverage for mental injuries. *Douglass,* 112 N.M. at 185, 812 P.2d at 1333. This is evidenced both by the restrictive circumstances under which mental injuries are compensated at all, *see Douglass v. State Regulation & Licensing Dep't; Jensen v. New Mexico State Police,* and by the limitations contained in Section 52–1–41 on the duration of compensation.

Second, carrying the judge's reading of Section 52–1–41 to its logical conclusion will show that her construction could not

have been what the legislature had in mind because it would allow workers disabled by mental impairments a longer period of compensation benefits than other disabled workers. According to the judge's construction, a worker who has a secondary mental impairment and is disabled by the physical impairment for 700 weeks but who remains mentally impaired thereafter could collect 1400 weeks of compensation benefits. Because we are confident that the legislature did not intend this result, we find employer's reading of the applicable statute to be the most reasonable. *See Gutierrez v. City of Albuquerque,* 96 N.M. 398, 400, 631 P.2d 304, 306 (1981) (when statute is susceptible to two constructions, court will not adopt one that will render statute's application absurd or unreasonable).

Thus, in cases of this nature, workers' compensation judges must first determine the maximum period allowable for a worker's disability produced by the physical impairment. In this case, the judge appeared to find that that was 119 weeks and 4 days. However, there was no evidence that worker's physical impairment, much less any disability based on it, lasted that long. It was undisputed that worker's last visit to a doctor for physical problems was in December 1989, less than fifty-seven weeks after her accidental injury.

We therefore reverse and remand to the Workers' Compensation Administration for the judge to make a finding concerning the maximum period allowable for any disability suffered by worker produced by the physical impairment. The judge shall then allow worker compensation from November 28, 1988, for that period or 100 weeks, whichever is greater. Because the amount of compensation worker will receive will necessarily be less in light of our disposition, the judge shall also recalculate appropriate attorney fees.

IT IS SO ORDERED.

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

849 P.2d 358

Vincent SANTILLANES, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 20638.

Supreme Court of New Mexico.

March 1, 1993.

Sammy J. Quintana, Chief Public Defender and Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for petitioner.

Tom Udall, Atty. Gen. and Bill Primm, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

FROST, Justice.

We granted the defendant Vincent Santillanes' writ of certiorari to review the Court of Appeals decision affirming his conviction of child abuse under NMSA 1978, Section 30-6-1(C) (Repl.Pamp.1984). Santillanes' primary argument is that the provision in the statute under which he was convicted is unconstitutional because it improperly criminalizes ordinary civil negligence. He raises due process and fundamental fairness issues as well as equal protection and cruel and unusual punishment arguments. Santillanes also contests his conviction on the grounds of insufficiency of evidence, improper venue, prosecution under the wrong statute, and prosecutorial misconduct. Finding that all of his assigned errors are without merit except for his argument regarding the proper interpretation of the statute under which he was convicted, we address only that issue.

I. *FACTS*

Santillanes cut his 7-year-old nephew's neck with a knife during an altercation. The jury convicted him of child abuse involving no death or great bodily injury under Section 30-6-1(C) on February 1, 1991.[1] Section 30-6-1(C) reads as follows:

> Abuse of a child consists of a person knowingly, intentionally or *negligently*, and without justifiable cause, causing or permitting a child to be:
>
> (1) placed in a situation that may endanger the child's life or health;
>
> (2) tortured, cruelly confined or cruelly punished; or
>
> (3) exposed to the inclemency of the weather.

NMSA 1978, § 30-6-1(C) (Cum.Supp.1992) (emphasis added).

1. When Santillanes was convicted, the offense was a fourth-degree felony; it is now a third-degree felony. *See* NMSA 1978, § 30-6-1 (Cum. Supp.1992).

After the close of all evidence, defense counsel submitted a requested jury instruction to the court setting forth a criminal negligence standard rather than a civil negligence standard to define the negligence element under the statute. Defendant's Requested Instruction No. 3 stated:

> An act, to be "negligence" or to be done "negligently," must be one which a reasonably prudent person would foresee as creating a substantial and unjustifiable risk of injury to Paul Santillanes. The risk created must be of such a nature and degree that the reasonably prudent person's failure to perceive it involves a gross deviation from the standard of care that a reasonably prudent person would observe in the same situation.

The requested instruction was patterned after the definition of criminal negligence in Model Penal Code Section 2.02(2)(d) (1985). The trial court refused Santillanes' instruction and instead instructed the jury on a civil negligence standard. That instruction, Instruction No. 7, read:

> The term "negligence" may relate either to an act or a failure to act.
>
> An act, to be "negligence," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such a person, in the exercise of ordinary care, would not do.
>
> A failure to act, to be "negligence," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to himself or to another.

The trial court apparently did not instruct the jury on the definition of "intentionally."

II. *COURT OF APPEALS DECISION*

On appeal to the Court of Appeals, Santillanes claimed that the trial court erred in refusing his requested instruction that delineated a criminal negligence standard. He claimed that the term "negligently" in Section 30–6–1(C) either should be read to mean criminal negligence or that it should be deemed unconstitutionally vague or overbroad in violation of due process of law. While it was not clear whether the jury convicted Santillanes of intentional or negligent child abuse, he argued that the court instructed the jury on both theories and that the jury could have convicted him on either theory. Because the trial court instructed the jury on the wrong standard of negligence, Santillanes argued, his conviction by general verdict must be overturned.

The Court of Appeals, however, held that Santillanes did not preserve for appeal the issue regarding the contested instruction because he failed to tender a proper instruction on the criminal negligence standard. The Court stated that the instruction which Santillanes requested was confusing because it did not permit the jury to evaluate the defendant's conduct by any meaningful standard. The Court also stated that his requested instruction incorrectly defined criminal negligence. Concluding that he failed to preserve this issue for appeal, the Court of Appeals held that Santillanes had no standing to complain of any violation of the due process clause.

Nevertheless, the Court of Appeals analyzed the record for fundamental error. The Court reasoned that because the evidence unmistakably established criminal negligence anyway, no justiciable issue existed in this case regarding any distinction between civil and criminal negligence in the statute.

III. *ISSUES*

In this Court, Santillanes maintains that felony punishment should attach only to criminal behavior, in this case criminal negligence, not to ordinary civil negligence. Santillanes asserts that according felony status to acts of civil negligence violates substantive due process because the civil negligence standard is not tailored to meet the statutory goal of protecting children from abuse. Finally, Santillanes claims that as the Court of Appeals interpreted the statute, the civil negligence standard overreaches its mark and incorporates conduct that is not criminal, but rather simply negligent. Thus, he claims that the term

"negligently," as interpreted, is overbroad in violation of due process of law.

The State counters that the statute, as applied, only pertains to child abuse that goes beyond merely normal action or inaction. *See State v. Coe,* 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct.App.), *cert. denied,* 92 N.M. 353, 588 P.2d 554 (1978). According to the State, the Court in *Coe* limited the scope of the ordinary negligence standard because it interpreted the term "abuse" to require a showing of something more than just simple negligence or inadvertence even if it fell short of requiring a showing of criminal negligence. Thus, the State argues that the term "negligently," as interpreted in *Coe* and as applied in numerous other cases, is not constitutionally overbroad or vague. In addition, the State emphasizes that our courts have long interpreted the statute as requiring only a civil negligence standard and that there is no reason to change it now.

A. *Preservation of Issue*

First, we must address the issue of whether Santillanes preserved the assigned error for appeal. The relevant rule states:

> for 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.

SCRA 1986, 5–608(D) (Repl.Pamp.1992). The Court of Appeals did not find that Santillanes failed to make a proper objection to the negligence instruction that the trial court gave to the jury. Rather, the Court ruled that Santillanes had no standing to raise his constitutional attack because he failed to preserve the issue when he submitted an incorrect instruction on criminal negligence. The Court of Appeals erred in its interpretation of Rule 5–608. *See Gallegos v. State,* 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992).

Under Rule 5–608, counsel must submit a proper instruction to preserve error only if no instruction is given on the issue in question on appeal. Here, the trial court gave an instruction on the issue in question on appeal, albeit a civil negligence instruction, and it is that issue which forms the basis of Santillanes' constitutional attack. Moreover, because there is no uniform jury instruction on criminal negligence in New Mexico, defense counsel relied on the Model Penal Code. While his proffered instruction was not a precise restatement of the Model Penal Code's definition of criminal negligence, defense counsel captured the essence of that definition and thus informed the trial judge of the claimed vice in the charge given to the jury. *See id.* We hold that Santillanes preserved his issue for appeal.

B. *Requirement of Criminal Negligence*

At common law, the conviction of a crime required satisfaction of the element of intent. *See Perez v. State,* 111 N.M. 160, 161, 803 P.2d 249, 250 (1990). The legislature, however, may define certain conduct as criminal without the element of intent. *State v. Barber,* 91 N.M. 764, 766, 581 P.2d 27, 28 (Ct.App.1978). When a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the legislature intended to enact a no-fault or strict liability crime. Instead, it is well settled that we presume criminal intent as an essential element of the crime unless it is clear from the statute that the legislature intended to omit the *mens rea* element. *See Reese v. State,* 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987) (Ransom, J., specially concurring). This determination is one of statutory construction in light of what the common law required. *Id.*

It is also well settled that the legislature has the authority to make negligent conduct a crime. *See State v. Lucero,* 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct. App.), *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975). The issue in this case, then, is not whether we must read the *mens rea* element into a criminal statute because the child abuse statute contains a *mens rea* element. Rather, the question is when the legislature has included but not defined the *mens rea* element in a criminal statute,

here the term "negligently," what degree of negligence is required.[2]

The State asserts that the legislature's "decision to criminalize the conduct described by [Section 30–6–1(C)] reflects a compelling public interest in protecting defenseless children" and thus was a proper exercise of the legislature's police power. *State v. Lujan,* 103 N.M. 667, 671, 712 P.2d 13, 17 (Ct.App.1985), *cert. denied,* 103 N.M. 740, 713 P.2d 556 (1986). The State also points out that the statute has withstood many constitutional attacks.[3] While it is undisputed that the statute's purpose is both legitimate and laudable, our interpretation of this criminal statute requires that the term "negligently" be interpreted to require a showing of criminal negligence instead of ordinary civil negligence.

1. *Prior Case Law*

In addressing the issue of whether a civil or criminal negligence standard must be applied under the child abuse statute, the courts of this state consistently have applied a civil negligence standard. In *State v. Coe,* 92 N.M. 320, 587 P.2d 973 (Ct.App.), *cert. denied,* 92 N.M. 353, 588 P.2d 554 (1978), however, the Court of Appeals stated that the term "negligently" in the child abuse statute did not apply to ordinary situations in which a child was injured, but only when someone committed an abusive act against a child. *Id.* at 321, 587 P.2d at 974. The defendant in *Coe* argued that "negligently," in the ordinary civil sense, encompassed any and all harm to a child, thereby making the child abuse statute unconstitutionally vague so as to violate due process. *Id.* Rejecting that argument, the *Coe* court reasoned that the statute required "abuse" and not mere normal action or inaction. The Court concluded, therefore, that the statute was not void for vagueness because the statute gave fair notice of the proscribed conduct to any reasonable person. *Id.* Clearly, *Coe* called for a showing of something more than civil negligence, yet the bulk of our case law continually has countenanced an instruction requiring only ordinary tort negligence.

For example, in *State v. Williams,* 100 N.M. 322, 670 P.2d 122 (Ct.App.), *cert. denied,* 100 N.M. 259, 669 P.2d 735 (1983), the Court of Appeals rejected the defendant's argument based upon the due process clause that the child abuse statute allowed for arbitrary and discriminatory enforcement because it employed a civil negligence standard. *See id.* at 325, 670 P.2d at 125 (citing *State v. Coe, supra*). Relying on the traditional civil negligence analysis adopted in dictum in *State v. Adams,* the Court in *Williams* concluded that there was sufficient evidence to uphold the conviction of child abuse. *See Williams,* 100 N.M. at 324, 670 P.2d at 124; *see also State v. Adams,* 89 N.M. 737, 738, 557 P.2d 586, 587 (Ct.App.), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976) (determining that substantial evidence supported conviction of child abuse on civil negligence standard).

In *State v. Robinson,* 93 N.M. 340, 600 P.2d 286 (Ct.App.), *cert. denied,* 92 N.M. 532, 591 P.2d 286 (1979), the Court of Appeals, relying on *State v. Grubbs* and again in dictum, approved of the application of a civil negligence standard in the child abuse statute. *See id.* at 345, 600 P.2d at 291. The Court in *Robinson* declined to consider

2. It appears from our research that New Mexico's child abuse statute is unique in defining the proscribed conduct in terms of negligence rather than in terms of criminal or culpable negligence.

3. *See, e.g., State v. Lucero,* 98 N.M. 204, 647 P.2d 406 (1982); *State v. Crislip,* 110 N.M. 412, 796 P.2d 1108 (Ct.App.), *cert. denied,* 110 N.M. 260, 794 P.2d 734 (1990); *State v. Williams,* 100 N.M. 322, 670 P.2d 122 (Ct.App.), *cert. denied,* 100 N.M. 259, 669 P.2d 735 (1983); *State v. Fulton,* 99 N.M. 348, 657 P.2d 1197, (Ct.App.1983); *State v. Robinson,* 93 N.M. 340, 600 P.2d 286 (Ct. App.), *cert. denied,* 92 N.M. 532, 591 P.2d 286 (1979); *State v. Coe,* 92 N.M. 320, 587 P.2d 973 (Ct.App.), *cert. denied,* 92 N.M. 353, 588 P.2d 554 (1978); *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App.), *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975).

The only recorded dissent against the constitutionality of Section 30–6–1 is found in *Lucero,* 87 N.M. at 245, 531 P.2d at 1219 (Sutin, J., dissenting) (concluding that definition of "negligently" is inconsistent with definitions of "tortured," "cruelly confined," and "cruelly punished").

the merits of the defendant's claim that the ordinary tort negligence standard was unconstitutional because he raised that argument for the first time on appeal. *Id.*

The opinion in *State v. Grubbs,* 85 N.M. 365, 512 P.2d 693 (Ct.App.1973), seems to be the foundation for the application of the civil negligence standard in the child abuse statute. In *Grubbs,* the Court of Appeals upheld the defendant's conviction of involuntary manslaughter by unlawful act. *Id.* at 366, 512 P.2d at 694. The unlawful act of which the defendant was found guilty was negligent use of a weapon under what is now Section 30–7–4(A)(3). The defendant claimed that "negligence" should be interpreted as criminal negligence, but the *Grubbs* court disagreed and held that ordinary negligence was all that was required. *Id.* Noting that the statute failed to define "negligent," the Court applied its ordinary meaning because the legislature failed to indicate that it intended a different construction of the terms. *Id.* at 368, 512 P.2d at 696.

Most recently in *State v. Crislip,* 110 N.M. 412, 796 P.2d 1108 (Ct.App.), *cert. denied,* 110 N.M. 260, 794 P.2d 734 (1990), the Court of Appeals again tacitly approved the civil negligence standard for prosecution of child abuse. *Id.* at 419, 796 P.2d at 1115. The Court upheld the trial court's rejection of the defendant's tendered instruction on negligence, which was patterned after *Coe,* because it determined that the refused instruction was incorporated into the instruction setting forth an ordinary negligence standard. *Id.* at 418, 796 P.2d at 1114.

We have stated, however, in the context of a reckless driving conviction, that mere civil negligence "not amounting to wilful or wanton disregard of consequences cannot be made the basis of a criminal action." *See Raton v. Rice,* 52 N.M. 363, 365, 199 P.2d 986, 987 (1948). In *Raton v. Rice,* we went on to say broadly:

> [m]ere negligence is not sufficient. It may be sufficient to compel the driver to respond in damages. However, when it comes to responding to an accusation of involuntary manslaughter, *with the possibility of a penitentiary sentence,* a different rule is called into play.

Id. (quoting *State v. Sisneros,* 42 N.M. 500, 513, 82 P.2d 274, 281 (1938) (Zinn, J., concurring)) (emphasis added). We can find no clearly articulated basis for the rationale in *Raton v. Rice* except for the intuitive notion that a higher standard than tort negligence should be applied when the crime is punishable as a felony.

Indeed, most commentators urge the application of criminal negligence for felonies instead of the civil negligence standard. Typically, the commentators explain their preference for criminal negligence over civil negligence as a standard in criminal law by relying on common-sense justifications based upon the traditional application of heightened standards of culpability to crimes punishable with jail sentences.[4]

2. *Case Law from Other Jurisdictions*

Courts from other jurisdictions have wrestled with the issue of whether a civil negligence standard could apply in a criminal action. No other court has addressed the precise issue before us today, but the opinion in *State v. DeBerry,* 185 W.Va. 512, 408 S.E.2d 91, *cert. denied,* —— U.S. ——,

4. Noted scholars LaFave and Scott stated for example:

> It came to be the general feeling of the judges when defining common law crimes (not always so strongly shared later by the legislatures when defining statutory crimes) that something more was required for criminal liability than the ordinary negligence which is sufficient for tort liability. The thought was this: When it comes to compensating an injured person for damages suffered, the one who has negligently injured an innocent victim ought to pay for it; but when the problem is one of whether to impose criminal punishment on the one who caused the injury, then something extra—beyond ordinary negligence—should be required.

1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.7, at 326 (1986); *see also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 842 (3d ed. 1982) ("Common sense compels the conclusion that there may be a grade or degree of fault sufficient to call for the payment of damages in a civil suit, but quite insufficient to authorize criminal punishment, and this is exactly the result reached by the common law.").

112 S.Ct. 592, 116 L.Ed.2d 616 (1991), comes closest. In that case, the Supreme Court of Appeals of West Virginia held that its child abuse statute, in which the operative element was "neglect," did not require a showing either of intent or civil negligence. The court rejected the defendant's claim that the statute was void for vagueness, holding instead that the legislature may define a crime without requiring a showing of intent. *See id.* at 516, 408 S.E.2d at 95 (citing *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App.), *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975)). The court in *DeBerry* also rejected the State's equating of "neglect" with ordinary negligence, ruling instead that a higher degree of negligence was required. *See DeBerry,* 408 S.E.2d at 95 n. 6. Accordingly, the court held that the term "neglect" was not unconstitutionally vague in violation of due process of law. *Id.* at 96. No rationale was given, however, for the ruling that criminal negligence was required.

3. *Vagueness and Overbreadth*

We do not perceive the problem here as one in which persons of common intelligence must guess at the meaning of an element in a criminal statute and thereby differ as to its application, thus violating the vagueness doctrine under the due process clause of our Constitution. *See State v. Benny E.,* 110 N.M. 237, 243, 794 P.2d 380, 386 (Ct.App.1990).[5] Persons of common intelligence certainly could apply either the civil negligence standard or the criminal negligence standard without having to guess as to what conduct was proscribed under each standard.

Instead, we believe that the issue is more one of overbreadth than vagueness. In the ordinary sense of the word "overbroad," the term "negligently" in the child abuse statute has cast its net too far and encompasses conduct that the statute cannot be interpreted to proscribe. The constitutional doctrine of overbreadth,[6] however, serves to invalidate a statute only when it sweeps so broadly to impinge unnecessarily on conduct protected by the First and Fourteenth Amendments. *See State v. Silva,* 86 N.M. 543, 547, 525 P.2d 903, 907 (Ct. App.), *cert. denied,* 86 N.M. 528, 525 P.2d 888 (1974); *see also State v. Pierce,* 110 N.M. 76, 81, 792 P.2d 408, 413 (1990). No such constitutionally protected conduct is involved here.

4. *Statutory Construction*

As discussed above, there is no basis for declaring the child abuse statute unconstitutional under the void for vagueness or overbreadth doctrines, both of which find their genesis in the due process clause. We believe that the real problem here is not one of legislative enactment, but instead one of judicial interpretation.

It is well-settled in our state that a statute defining criminal conduct must be strictly construed. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n,* 93 N.M. 546, 549, 603 P.2d 285, 288 (1979). Any doubts about the construction of penal statutes must be resolved in favor of lenity. *State v. Leiding,* 112 N.M. 143, 145, 812 P.2d 797, 799 (Ct. App.), *cert. denied,* 112 N.M. 77, 811 P.2d 575 (1991). A criminal statute may not be applied beyond its intended scope, and it is a fundamental rule of constitutional law that crimes must be defined with appropriate definiteness. *State v. Bybee,* 109 N.M. 44, 46, 781 P.2d 316, 318 (Ct.App.1989).

We find guidance from an analogous situation in which courts have addressed whether a criminal statute that completely omits the mental state element required a showing of *mens rea* or whether it was a statute defining a strict liability crime. Generally, a regulatory measure arising

5. The vagueness doctrine is based on the principle of fair notice in that no one may be held criminally responsible and subject to criminal sanctions for conduct without fair warning as to the nature of the proscribed activity. *See State v. Najera,* 89 N.M. 522, 522, 554 P.2d 983, 983 (Ct.App.1976).

6. The legal doctrine of overbreadth applies when the statute in question has been interpreted as sweeping unnecessarily broadly, thus impinging on constitutionally protected conduct. *See* 16C C.J.S. *Constitutional Law* § 974, at 284 (1985).

from the exercise of the legislature's police power is aimed at the achievement of some societal good rather than at the punishment of a crime that is *malum in se*, or in other words, exhibiting an "evil mind." *See United States v. Balint*, 258 U.S. 250, 252, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922); *State v. Barber*, 91 N.M. at 766, 581 P.2d at 29. Serious nonregulatory crimes, on the other hand, generally proscribe conduct manifesting moral culpability. *See State v. Ortega*, 112 N.M. 554, 562, 817 P.2d 1196, 1204 (1991).

Penalties for regulatory or public welfare crimes having no element of *mens rea*, that is, strict liability crimes, have traditionally been relatively slight *Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240, 246, 96 L.Ed. 288 (1952). To analogize, for example, each of the other criminal statutes in New Mexico in which "negligence" is an element also fail to define that term, but each of them is punishable as a petty misdemeanor, which is consistent with the view that only a showing of ordinary civil negligence is required. *See* NMSA 1978, § 30–7–4 (Repl.Pamp. 1984) (negligent use of deadly weapon); NMSA 1978, § 30–7–6 (Repl.Pamp.1984) (negligent use of explosives); NMSA 1978, § 30–8–13 (Repl.Pamp.1984) (negligently permitting livestock upon public highways). Conversely, when scienter is an element of the crime, the penalty generally is higher because "the infamy is that of a felony, which ... is 'as bad a word as you can give to man or thing.'" *Morissette*, 342 U.S. at 260, 72 S.Ct. at 248; *see, e.g.*, NMSA 1978, § 30–17–5(B) (Repl.Pamp.1984) (requiring recklessness as element of negligent arson, which is a felony). In other words, when moral condemnation and social opprobrium attach to the conviction of a crime, the crime should typically reflect a mental state warranting such contempt.

We believe that there is a reasonable doubt as to the intended scope of proscribed conduct under the child abuse statute. Strictly construing the statutory language in favor of lenity, and in the absence of a clear legislative intention that ordinary civil negligence is a sufficient predicate for a felony, we conclude that the civil negligence standard, as applied to the child abuse statute, improperly goes beyond its intended scope and criminalizes conduct that is not morally contemptible. *See State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989) (interpreting element of negligence in criminal statute as requiring criminal negligence, absent clear legislative declaration that civil negligence is sufficient standard for crime). Although not constitutionally protected, such conduct nevertheless lies beyond the intended scope of the statute. We construe the intended scope of the statute as aiming to punish conduct that is morally culpable, not merely inadvertent.

We interpret the *mens rea* element of negligence in the child abuse statute, therefore, to require a showing of criminal negligence instead of ordinary civil negligence. That is, to satisfy the element of negligence in Section 30–6–1(C), we require proof that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.

We do not find the absence of a definition of negligence in the statute indicative of legislative intent, and we are not persuaded by the State's contention that when the legislature has meant to apply a criminal negligence standard, it has specifically done so as in the case of negligent arson. *See* NMSA 1978, § 30–17–5(B) (Repl.Pamp.1984) (requiring recklessness as element of negligent arson). We also reject the State's contention that the legislature tacitly approved of the civil negligence standard as interpreted by our courts when it upgraded the violation of the child abuse statute from a fourth-degree felony to a third-degree felony in 1989. Instead, we find this concept firmly rooted in our jurisprudence: When a crime is punishable as a felony, civil negligence ordinarily is an inappropriate predicate by which to define such criminal conduct. *See Raton v. Rice*, 52 N.M. at 365, 199 P.2d at 987.

Because the child abuse statute contains no indication that the legislature intended felony punishment to attach to ordinary negligent conduct under Section 30–6–1(C), we do not address the constitutionality of that provision. *See Grover,* 437 N.W.2d at 63. We simply construe the statute as requiring at least a showing of criminal negligence in the absence of some contrary indication from the legislature that "the public interest in the matter is so compelling or that the potential for harm is so great that the interests of the public must override the interests of the individual" so as to justify civil negligence as a predicate for a felony. *See State v. Barber,* 91 N.M. 764, 765, 581 P.2d 27, 28 (Ct.App.1978) (setting out rationale for making act criminal without requiring element of intent).

C. *Reversible Error*

Having determined that the trial court committed error in failing to instruct the jury on a criminal negligence standard, we must now consider whether the error was harmless or whether it so undermined the reliability of the conviction or prejudiced the defendant's rights as to warrant reversal of his conviction. *State v. Orosco,* 113 N.M. 780, 783, 833 P.2d 1146, 1149 (1992). Failure to instruct the jury on an essential element of the charged offense has been held to be reversible error. *See Ortiz v. State,* 106 N.M. 695, 697, 749 P.2d 80, 82 (1988); *Reese v. State,* 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987); *State v. Mascarenas,* 86 N.M. 692, 694, 526 P.2d 1285, 1287 (Ct.App.1974). When there can be no dispute that the essential element was established, however, failure to instruct on that element does not require reversal of the conviction. *Orosco,* 113 N.M. at 784, 833 P.2d at 1150.

Santillanes' defense was that his nephew injured himself when he jumped into a fishing line strung between two trees. He did not argue that he inadvertently caused the boy's throat to be cut. In addition, evidence in the record shows that his nephew's throat was cut from just below his right ear across to the left side of his neck below his jaw.

The jury found that Santillanes cut his nephew's throat with a knife during a scuffle. We believe that no rational jury could have concluded that Santillanes cut his nephew's throat, resulting in the injury described above, without satisfying the standard of criminal negligence that we have adopted today. Concluding that there could be no dispute that the element of criminal negligence was established by the evidence in the case, we hold that the error in instructing the jury on a civil negligence standard instead of a criminal negligence standard was not reversible error. *See id.* at 786, 833 P.2d at 1152.

D. *Prospective Application*

The question will arise as to whether our new interpretation of "negligently" under the child abuse statute is to be given retrospective or prospective application. *See State v. Jones,* 44 N.M. 623, 630–31, 107 P.2d 324, 329 (1940) (reliance on prior law is critical issue when considering retroactive application). The issue of retroactive effect arises only when a court's decision overturns prior case law or makes new law when law enforcement officials have relied on the prior state of the law. *State v. Kaiser,* 91 N.M. 611, 615, 577 P.2d 1257, 1261 (Ct.App.), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978). Many times in the past, the courts of this state have given prospective effect to new principles that changed existing law. *See, e.g., State v. Gonzales,* 111 N.M. 590, 598, 808 P.2d 40, 48 (Ct.App.), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991) (proscription of prosecutor's systematic use of peremptory challenges to eliminate persons from jury on basis of race held to apply to all cases then pending on direct review, provided issue was raised and preserved below); *Washington v. Rodriguez,* 82 N.M. 428, 431, 483 P.2d 309, 312 (Ct.App.1971) (United States Supreme Court decisions in *Miranda* and *Escobedo* not applied retroactively).

It is within the inherent power of this Court to give its decision prospective or retroactive application without offending constitutional principles. *Lopez v. Maez,* 98 N.M. 625, 632, 651 P.2d 1269, 1276

(1982). The United States Supreme Court in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), provided the framework for determining whether a judicial decision shall apply prospectively or retroactively. In *Linkletter*, Supreme Court considered whether to give retroactive application to the exclusionary rule that it announced in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The Court held that the United States Constitution neither prohibits nor requires retroactive application of judicial decisions. *Linkletter*, 381 U.S. at 629, 85 S.Ct. at 1737–38. The Court then stated that retrospective or prospective application must be determined on a case by case basis by looking at three issues: the purpose of the new rule, the reliance placed upon the old rule, and the effect upon the administration of justice that retroactive application would have. *Id.* at 636, 85 S.Ct. at 1737, 1738; *see Whenry v. Whenry*, 98 N.M. 737, 739–40, 652 P.2d 1188, 1190–91 (1982) (applying criteria set out in *Linkletter*).

Law enforcement officials in this State have relied on the civil negligence standard in the child abuse statute for at least fifteen years. Our appellate courts on several occasions have upheld such convictions and approved of the application of the tort negligence standard. " 'The past cannot always be erased by a new judicial declaration,' " and we cannot remove every trace of the convictions predicated upon the civil negligence standard from our jurisprudence. *See Linkletter*, 381 U.S. at 636, 85 S.Ct. at 1737, 1738.

The purpose of the criminal negligence standard is to deter behavior that is culpable or, in other words, conduct that entails greater risk or fault than mere inadvertence or simple negligence. Applying this rule retroactively would not further its purpose because all such conduct was proscribed under the civil negligence standard, nor could it deter past conduct.

Finally, equal administration of justice and the integrity of the judicial process requires prospective application of the criminal negligence standard in the child abuse statute. To give our holding today retroactive effect would unduly burden the criminal justice system. It could reopen old wounds and create new scars for child abuse victims and their families, wounds that they may not have forgotten, but from which they may have healed and recovered.

Having weighed the considerations enunciated in *Linkletter*, we conclude that the inequities and injustices of retroactively applying the criminal negligence standard in the child abuse statute mandate the prospective application of our holding today.

IV. *CONCLUSION*

The legislature is the proper branch of government to determine what behavior should be proscribed under its police power and thus to define criminal behavior and provide for its punishment. *State v. Dennis*, 80 N.M. 262, 264, 454 P.2d 276, 278 (Ct.App.1969). There are limits, however, to the power of the legislature. The legislature may properly exercise its police power only if the statute is reasonably necessary to prevent manifest or anticipated evil or if it is reasonably necessary to preserve the general welfare or the public health, safety, and morals. *Id.* As in the past, this Court disclaims any intention of even suggesting to the legislature how it might conduct its affairs. *See Dillon v. King*, 87 N.M. 79, 85, 529 P.2d 745, 751 (1974) (citing *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 2 L.Ed. 60 (1803)). Nevertheless, it is "our function and duty to say what the law is...." *Id.*

We emphasize that we are not defining the crime of negligent child abuse, thus usurping the police power of the legislature. Rather, we are interpreting the statute in light of traditional concerns regarding the intended scope of criminal statutes. We believe that the application of the civil negligence standard in the prosecution of child abuse under Section 30–6–1(C) goes beyond the statute's intended scope and impermissibly criminalizes innocent conduct. Converting a tort case into a criminal matter punishable as a felony is not what the statute intended.

In summary, because Section 30–6–1(C) has been interpreted to criminalize innocent conduct, although negligent in the civil sense, that interpretation is erroneous. All opinions of this Court and of the Court of Appeals, therefore, that are inconsistent in any way with the analysis contained herein regarding criminal negligence are expressly overruled.[7] The conviction of Santillanes, however, is affirmed in the absence of reversible error. The standard of criminal negligence that we have adopted today shall govern all cases which are now pending on direct review, provided the issue was raised and preserved below, and all cases presently pending but in which a verdict has not been reached.

IT IS SO ORDERED.

RANSOM, C.J., and BACA, MONTGOMERY, and FRANCHINI, JJ., concur.

849 P.2d 368

Leodegaria TARANGO, et Vir., Hilario Tarango, Plaintiffs,

v.

FARMERS INSURANCE COMPANY OF ARIZONA, Defendant–Appellee,

v.

ALLSTATE INSURANCE COMPANY, Defendant–Appellant.

No. 20321.

Supreme Court of New Mexico.

March 3, 1993.

The Farlow Law Firm, LeRoi Farlow, Albuquerque, for appellant.

Reeves, Chavez, Greenfield, Acosta & Walker, P.A., Daniel G. Acosta, Las Cruces, for appellee.

OPINION

FROST, Justice.

The sole issue on appeal is whether the Class II insurer Allstate Insurance Company (Allstate) is responsible for paying the entire $15,000 of underinsured benefits due to the injured insured Leodegaria Tarango, or whether the Class I insurer Farmers Insurance Company of Arizona (Farmers) and Allstate each must pay a prorated portion of the underinsured benefits. By declaratory judgment, the trial court found

7. Those opinions specifically overruled insofar as they employed a civil negligence standard in the prosecution of child abuse are: *State v. Crislip,* 110 N.M. 412, 796 P.2d 1108 (Ct.App.), *cert. denied,* 110 N.M. 260, 794 P.2d 734 (1990); *State v. Williams,* 100 N.M. 322, 670 P.2d 122 (Ct.App.), *cert. denied,* 100 N.M. 259, 669 P.2d 735 (1983); *State v. Robinson,* 93 N.M. 340, 600 P.2d 286 (Ct.App.), *cert. denied,* 92 N.M. 532, 591 P.2d 286 (1979); *State v. Coe,* 92 N.M. 320, 587 P.2d 973 (Ct.App.), *cert. denied,* 92 N.M. 353, 588 P.2d 554 (1978); and *State v. Adams,* 89 N.M. 737, 557 P.2d 586 (Ct.App.), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976).

that Allstate was responsible for paying the entire $15,000 in underinsured benefits. Allstate appeals the decision of the trial court. We affirm.

Tarango was a passenger in an automobile driven and owned by Socorro Alarcon. Alarcon pulled over and stopped her car on the side of the road. Tarango and Alarcon were standing by the trunk of Alarcon's vehicle when a car driven by Zack Martin struck the car from behind. Tarango was seriously injured.

Tarango received $25,000 in liability benefits from Martin's liability insurance carrier. She then made claims against Alarcon's Allstate underinsured motorist coverage under which she was a Class II passenger insured and against her own underinsured motorist coverage on two policies with Farmers under which she was a Class I insured. Tarango's Class II coverage under the Allstate policy was $25,000. Her two Farmers policies contained coverage of $25,000 each. Class I insureds are the named insured, the spouse, and those relatives that reside in the household while Class II insureds are insured by virtue of their passenger status in an insured vehicle.

Pursuant to arbitration clauses in all policies, the issue of Tarango's damages was arbitrated. The arbitrators determined that her total damages were $40,000. After deducting the $25,000 in liability benefits already received, the arbitrators entered a total underinsured benefits award of $15,000 to Tarango. *See generally Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985) (an insured is entitled to underinsurance benefits to the extent his underinsured coverage exceeds the tortfeasor's liability insurance). Tarango is not a party to this appeal; the sole dispute is between Farmers and Allstate.

Farmers contends that the trial court's decision holding Allstate totally responsible for the $15,000 award is supported by *Branchal v. Safeco Insurance Co.*, 106 N.M. 70, 738 P.2d 1315 (1987). In *Branchal*, we required the Class II insurer of the vehicle in which the injured party was a passenger to pay uninsured benefits up to its policy limits before the injured party's own Class I insurer was required to pay on its uninsured motorist coverage. *Id.* "The policy covering the vehicle involved in the accident is closer to the risk than the policy insuring the non-owner driver or passenger." *Id.* at 71, 738 P.2d at 1316.

Allstate contends, however, that *Branchal* is not dispositive because *Morro v. Farmers Insurance Group*, 106 N.M. 669, 748 P.2d 512 (1988), dictates a different result. In *Morro*, this Court held that Morro, an injured passenger, could stack a $25,000 Class II underinsured motorist policy with her two $25,000 Class I underinsured policies which she had purchased for autos not involved in the accident. *Id.* at 672, 748 P.2d at 515. Thus, Morro had $75,000 in underinsured coverage from three policies. Her damages exceeded the $75,000 coverage. The tortfeasor's liability carrier settled with Morro for its policy limits of $25,000, thereby leaving her with an excess $50,000 underinsured entitlement. The trial court required each underinsured carrier to pay its pro-rata share. *Id.* at 673, 748 P.2d at 516. It is Allstate's position that *Morro* requires that the coverage under Farmers' two policies be stacked with its underinsured coverage and that all three policies should pay the $15,000 amount on a pro-rata basis.

In *Morro*, the Class II carrier wanted to set off the full liability payment against the Class II coverage, or at least to set off one-half of the liability (based on the number of insurers) rather than to set off one-third (based on the number of policies). The Class I carrier did not object to the pro rata credit of one-third that was given by the trial court to the Class II insured. In *Morro*, the Class II policy was treated by the trial court as concurrent coverage with the Class I policies. Neither party raised an issue of primary as opposed to secondary coverage. We continue to agree with the view stated in *Branchal:*

> [I]t is the better and more reasonable rule to require the insurer of the vehicle in which the injured party was riding as a passenger, rather than as an owner or

> driver, to first pay uninsured motorist benefits before the injured party's insurer may be required to pay under its uninsured motorist coverage.

Branchal, 106 N.M. at 70, 738 P.2d at 1315. We fail to perceive any valid reason why the rationale of *Branchal* should not be applied to both uninsured and underinsured circumstances. Allstate's policy was written to cover passengers in its insured's vehicle, and premiums were paid specifically for that coverage. The trial court was correct when it concluded that there was no need to stack the Tarango underinsurance policies issued by Farmers.

Under the facts of this case, Allstate had primary coverage. The underinsured liability must first be assessed against Allstate to the limits of its policy before demand can be made upon Farmers under its secondary policies. To allow proration as urged by Allstate would require Farmers to pay twice as much under its policies even though its insured's vehicle was not involved in the collision.

For these reasons, we conclude that the trial court was correct in issuing its declaratory judgment requiring Allstate to pay the entire amount of the underinsurance entitlement to Tarango. The judgment is affirmed.

IT IS SO ORDERED.

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

[redacted]

849 P.2d 372

ELEPHANT BUTTE IRRIGATION DISTRICT, Plaintiff–Appellee,

v.

The REGENTS OF NEW MEXICO STATE UNIVERSITY, Intervenors–Defendants–Appellants,

v.

UNITED STATES of America, Defendant–Appellant,

v.

Eluid L. MARTINEZ, New Mexico State Engineer, The City of El Paso, and All Claimants, Known and Unknown, to Water of the Rio Grande Stream System Between Elephant Butte Reservoir and the Texas State Line, Defendants.

ELEPHANT BUTTE IRRIGATION DISTRICT, Plaintiff–Appellant,

v.

Eluid L. MARTINEZ, New Mexico State Engineer, Defendant–Appellee,

v.

UNITED STATES of America, et al., Defendants.

Nos. 13364, 13371 and 13450.

Court of Appeals of New Mexico.

Jan. 14, 1993.

Certiorari Denied March 17, 1993.

Beverly J. Singleman, Hubert & Hernandez, P.A., Las Cruces, for plaintiff-appellee and plaintiff-appellant Elephant Butte Irr. Dist.

Luis G. Stelzner, Charles T. DuMars, Judith D. Schrandt, Sheehan, Sheehan & Stelzner, P.A., Albuquerque, for defendants-appellants Regents of NM State University.

Don J. Svet, U.S. Atty., Herbert A. Becker, Asst. U.S. Atty., Albuquerque, for defendant-appellant U.S.

Tom Udall, Atty. Gen., Eric Richard Biggs, Martha Clark Franks, Sp. Asst. Attys. Gen., Santa Fe, for defendant-appellee Eluid L. Martinez, NM State Engineer, and amicus curiae for State of NM ex rel. State Engineer.

OPINION

FLORES, Judge.

The opinion filed December 14, 1992, is withdrawn and the following is substituted therefor.

These three appeals arise out of an attempted water rights adjudication of the Rio Grande between Elephant Butte Dam and the New Mexico/Texas state line. The suit was initiated by Elephant Butte Irrigation District (EBID), who named as defendants the state engineer, the United States, the City of El Paso, and all known and unknown claimants to the disputed water. In Court of Appeals No. 13,371, appellant United States contends that the district court should have granted its motion to dismiss because the federal statute waiving sovereign immunity for state water adjudications, 43 U.S.C.S. § 666 (1980) (McCarran Amendment) does not permit joinder unless the entire main stem of the Rio Grande in New Mexico is adjudicated. The United States further argues that, even if joinder is permissible, the New Mexico stream adjudication statute, NMSA 1978, Section 72–4–17 (Repl.1985), and SCRA 1986, 1–019 (Repl.1992), require dismissal. In Court of Appeals No. 13,450, an interlocutory appeal, appellant EBID argues that the dismissal of the state engineer as a party was improper because the district court misinterpreted applicable venue statutes. Finally, in Court of Appeals No. 13,364, an interlocutory appeal, appellant Regents of New Mexico State University (NMSU) contends that the district court should have granted its motion to dismiss for lack of an indispensable party as a result of the dismissal of the state engineer.

We hereby consolidate the three appeals, affirm the denial of the United States' motion to dismiss, and reverse the district court's dismissal of the state engineer. As a result of our disposition, it is not necessary to reach NMSU's appeal.

FACTS

On September 12, 1986, EBID filed a complaint in the District Court of Dona Ana County for stream adjudication and injunctive relief. The complaint named as defendants the state engineer, the United States, the City of El Paso, and all known and unknown claimants to the surface or ground water of the Rio Grande between Elephant Butte Reservoir and the Texas state line. A first amended complaint was filed on October 14, 1986. Each of the three named defendants filed motions to dismiss. All four district judges in Dona Ana County recused themselves. Thereafter, Judge William Deaton of the Bernalillo County District Court was designated to hear the case. Judge Deaton granted the state engineer's motion to dismiss for lack of venue, but denied the other defendants' motions. No interlocutory appeal was taken.

On November 25, 1987, defendant City of El Paso filed a petition to remove the case to federal district court. The state district court thereafter dismissed the complaint without prejudice on December 8, 1987. On March 22, 1989, the federal district court granted EBID'S motion to remand or abstain, finding that the case was not removable because the action which ostensibly made the case removable was not brought by the voluntary act of EBID. After remand to the Dona Ana County district court, the case was reassigned to Otero County District Court Judge Robert M. Doughty. On February 15, 1990, Judge Doughty, sua sponte, issued an order granting EBID leave to amend the complaint to once again join the state engineer as a defendant, provided that EBID make no new allegations against existing parties in its amended complaint.

On March 12, 1990, the United States filed a motion to be dismissed as a party. The grounds for the motion were identical to those raised in the United States' earlier motion to dismiss: failure of the complaint to satisfy the requirements of the McCarran Amendment, failure to comply with Section 72–4–17, and failure to join an indispensable party. EBID's second amended complaint for stream adjudication was filed on March 14, 1990. The complaint sought (1) a general adjudication of rights to the water hydrologically connected to, and including, the Rio Grande between Elephant Butte Dam and the New Mexico/Texas line; (2) a hydrographic survey; and (3) to enjoin the state engineer from numerous acts, including any further appropriation of surface or ground water in the disputed area. The state engineer filed a motion to dismiss on April 20, 1990. Among other reasons for dismissal, the state engineer's motion asserted that the venue statute in effect when the original complaint was filed limited venue to the first judicial district in Santa Fe County, even though the venue statute had since been amended. NMSU filed a motion to dismiss the complaint on September 18, 1990, alleging that the state engineer is an indispensable party.

On May 17, 1991, the Dona Ana County district court entered an order which, among other things, dismissed portions of the complaint which sought to enjoin El Paso from appropriating certain ground water, but which left El Paso as a party for purposes of the adjudication of water rights. On August 16, 1991, the court denied the United States' motion to dismiss. Judge Doughty concluded that Judge Deaton's earlier ruling denying a similar motion would not be reconsidered because it was the "law of the case." Alternatively, Judge Doughty ruled against the United States on the merits of the motion. Judge Doughty concluded that the water users above Elephant Butte Dam were irrelevant to an adjudication of downstream users; as such, the purposes underlying the McCarran Amendment were satisfied under these facts and neither Rule 1–019 nor Section 72–4–17 mandated dismissal.

On August 16, 1991, the district court dismissed, without prejudice, the state engineer as a defendant. In the order of dismissal, the court concluded that the venue statute in effect at the time of the original complaint was applicable. Under the newer statute, in effect when the second amended complaint was filed, venue in Dona Ana County would have been permis-

sible. *Compare* NMSA 1978, § 38–3–1(G) (Cum.Supp.1986) *with* NMSA 1978, § 38–3–1(G) (Repl.Pamp.1990). The court certified this issue for interlocutory appeal.

On August 16, 1991, the district court denied NMSU's motion to dismiss for failure to join an indispensable party, i.e. the state and/or the state ex rel. the state engineer. The court adopted all of EBID's requested findings of fact and conclusions of law. The court concluded that the state engineer was not an indispensable party because he performs the role of a regulator rather than a holder of water rights in the disputed area. This issue was also certified for interlocutory appeal.

DISCUSSION

I. JOINDER OF THE UNITED STATES

We first consider the United States' contention that it should be dismissed as a party because: (A) the McCarran Amendment does not permit joinder of the United States in an adjudication of less than the entire stretch of the Rio Grande in New Mexico; (B) state court precedent (in another jurisdiction) has interpreted the McCarran Amendment to require full stream adjudication; and (C) failure to include water users above Elephant Butte Dam requires dismissal of the complaint under New Mexico's stream adjudication statute, Section 72–4–17, and Rule 1–019. While this appeal was pending, we granted the State of New Mexico's motion for leave to file an amicus curiae brief.

Initially, we address EBID's contention that the district court correctly ruled that the "law of the case" bars reconsideration of the merits of the motion to dismiss and, in any event, the United States waived its challenge to the court's ruling because it failed to submit requested findings and conclusions. Since EBID believes that the United States was required to appeal from the first order denying its motion to dismiss, it has moved to dismiss the appeal for failure to comply with the time requirements of SCRA 1986, 12–201(A).

We deny EBID's motion for three reasons. First, the United States was not required to appeal the earlier ruling since it was not a final order. *See B.L. Goldberg & Assocs. v. Uptown, Inc.,* 103 N.M. 277, 705 P.2d 683 (1985). Second, the law of the case doctrine applies to issues raised on remand that were addressed and decided at the appellate level. *See Reese v. State,* 106 N.M. 505, 745 P.2d 1153 (1987); *see also Black's Law Dictionary* 886–87 (6th ed. 1990). The law of the case doctrine has also been applied where jury instructions were not objected to below, although this is probably more accurately characterized as a preservation problem. *See Gerety v. Demers,* 86 N.M. 141, 520 P.2d 869 (1974). Even if the law of the case applied to the district court's previous ruling under the facts of this case, the doctrine is discretionary and thus should not be used to permit joinder of the United States in possible contravention of federal law. *See Reese,* 106 N.M. at 506–07, 745 P.2d at 1154–55; *see also Stroh Brewery v. Alcoholic Beverage Control,* 112 N.M. 468, 816 P.2d 1090 (1991), *cert. denied,* — U.S. —, 112 S.Ct. 1166, 117 L.Ed.2d 413 (1992). Third, with respect to EBID's waiver argument, a party is not required to submit requested findings and conclusions when a motion to dismiss is based on any of the defenses enumerated in SCRA 1986, 1–012 (Repl.1992). *See* SCRA 1986, 1–052(B)(1)(a) (Repl.1992).

Before discussing the merits of the United States' appeal, we deem it necessary to review the McCarran Amendment in the context of the evolution of western water law.

A. *Legal Background*

New Mexico, like most Western states, follows the prior appropriation doctrine. N.M. Const. art. XVI, § 2 (Repl.Pamp.1992); *see also* NMSA 1978, § 72–1–1 (Repl.1985). This doctrine may be characterized as a "first in time, first in right" system, under which "[b]eneficial use [is] the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3 (Repl.Pamp.1992); *see also* NMSA 1978, § 72–1–2 (Repl.1985). All rights vested prior to March 19, 1907, relate back to the initiation of the claim, i.e., the point at which the water was put to beneficial use. Section 72–1–2. Generally,

individuals seeking to appropriate water after that date are required to seek a permit from the state engineer. *Id.* Since 1931, the state engineer has declared individual groundwater basins throughout most of the state and has regulated appropriation of their waters. *See* NMSA 1978, § 72–12–18; *see generally* Charles T. DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues,* 22 Nat. Resources J. 1045 (1982). All rights existing prior to the declaration of groundwater basins are recognized. Section 72–12–18.

Under New Mexico's adjudication statute, "any suit for the determination of a right to use the waters of any stream system" requires joinder of all claimants to the water source who may be ascertained through reasonable diligence. Section 72–4–17. This statute has been held to be all-embracing because it requires adjudication of all surface and groundwater hydrologically connected to the stream system. *State ex rel. Reynolds v. Sharp,* 66 N.M. 192, 344 P.2d 943 (1959). In order to determine the geographical scope of the stream system and the amount of water available, the district court directs, by its order, the state engineer to conduct a hydrographic survey. Section 72–4–17.

■ In states that have adopted a prior appropriation regulatory scheme, water adjudications are intended to create a detailed hierarchy of users for times of shortage. *See* DuMars, *supra,* at 1045–46. Adjudication also facilitates conveyance of water rights, which are recognized property interests. *See New Mexico Prods. Co. v. New Mexico Power Co.,* 42 N.M. 311, 77 P.2d 634 (1937). Because of the huge federal presence in prior appropriation states, attempts to fully adjudicate water rights require federal participation in state adjudications. *See* S.Rep. No. 755, 82d Cong., 1st Sess. 4–5 (1951); *see also United States v. City & County of Denver ex rel. Bd. of Water Comm'rs,* 656 P.2d 1, 8–9 (Colo. 1982). In 1952, Congress enacted the McCarran Amendment as Section 208 of the Department of Justice Appropriation Act, 1953, ch. 495, 66 Stat. 556. It reads, in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any rights to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances....

43 U.S.C.S. § 666(a).

■ This waiver of federal immunity from state procedures to quantify federal water rights was intended to avoid the "piecemeal adjudications of water rights in a river system," *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), that would otherwise result. In *Dugan v. Rank,* 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), the Court held that the United States could not be joined in a suit between private water users because the McCarran Amendment required a general stream adjudication. The more-difficult problem—and the issue in the present appeal—concerns the meaning of the phrase "river system or other source." In other words, what constitutes a general adjudication of a river system sufficient to effectuate the purposes underlying the McCarran Amendment? Although *United States v. District Court In & For County of Eagle,* 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), addressed the issue of whether or not federal reserved rights were subject to state quantification, the Court also discussed the United States' contention that the Eagle River, a tributary of the Colorado River, was not a "river system" within

the meaning of the McCarran Amendment. The Court stated, "No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction." *Id.* at 523, 91 S.Ct. at 1001. In a companion case, the Court considered whether or not proceedings under Colorado's systematic water adjudication statute were "general adjudications" sufficient to permit joinder of the United States. *United States v. District Court in & for Water Div. No. 5,* 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971). The Court noted that the Colorado scheme provided for monthly proceedings involving water rights applications on given stream systems. *Id.* at 529, 91 S.Ct. at 1004. The Court concluded that this systematic approach fulfilled the purposes of the McCarran Amendment because it "reaches all claims, perhaps month by month but inclusively in the totality." *Id.*

The New Mexico general water adjudication statute, Section 72–4–17, is sufficiently comprehensive to join the United States under the McCarran Amendment. *See United States v. Bluewater–Toltec Irrigation Dist.,* 580 F.Supp. 1434 (D.N.M.1984), *aff'd United States ex rel. Acoma & Laguna Indian Pueblos v. Bluewater–Toltec Irrigation Dist.,* 806 F.2d 986 (10th Cir. 1986). Thus, it can be said that the requirements of the McCarran Amendment and Section 72–4–17 are interchangeable as applied to the issue presented in this case, i.e., whether an adjudication of the water rights of the Rio Grande between Elephant Butte Dam and the Texas state line is sufficiently comprehensive to result in a meaningful decree.

The only New Mexico state court opinion discussing the McCarran Amendment is *State ex rel. Reynolds v. Lewis,* 88 N.M. 636, 545 P.2d 1014 (1976), which involved adjudication of the Rio Hondo. There, the issue was whether the McCarran Amendment granted jurisdiction to state courts over the United States in stream adjudications involving Indian reserved water rights. *Id.* at 637, 545 P.2d at 1015. The opinion considered the United States Supreme Court decisions noted above in the context of the purpose of the McCarran Amendment and stated:

> It is clear that the purpose of this statute is to facilitate state adjudication of a stream system. As the sponsor of the bill, Senator McCarran, stated:
>
> > [It is] to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

Id. at 637–38, 545 P.2d at 1015–16 (quoting S.Rep. No. 755, 82d Cong., 1st Sess. 9 (1951)).

There is one state court opinion that specifically addresses the scope of a main stem adjudication. In *In re Snake River Basin Water System,* 115 Idaho 1, 764 P.2d 78 (1988), *cert. denied,* 490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989), the supreme court of Idaho held that all tributaries of the Snake River must be included in that river's adjudication to satisfy the "river system" requirement of the McCarran Amendment. In dicta, the court, summarily and without citation to any authority, rejected an argument that exclusion of the tributaries was permissible because the main stem section could be considered an "other source" under the McCarran Amendment. *Id.,* 115 Idaho at 9, 764 P.2d at 86. The court stated: "It would destroy the intent of the McCarran Amendment to allow a river system to be fragmented into separate sources in order to obtain jurisdiction over the United States." *Id.*

B. *Analysis*

Turning to the merits of this appeal, there are two questions which must be addressed: (1) as a general proposition, whether adjudication of only a segment of a main stem of a river satisfies the requirements of the McCarran Act and Section 72–4–17, and (2) if not, whether the facts of

this case warrant an exception. For purposes of determining the geographical scope of the adjudication, if the adjudication satisfies the requirements of the McCarran Amendment, it will satisfy Section 72–4–17 because both statutes are intended to avoid piecemeal litigation by including all claimants to the water source. *See Colorado River Water Conservation Dist. v. United States; State ex rel. Reynolds v. Lewis.*

Based on the legislative history of the McCarran Amendment and the cases discussing it, we believe the answer to the first question is clearly that the lower Rio Grande is not a "river system." Under the McCarran Amendment, a state adjudication only has to include that portion of a river system within the state's jurisdiction. *County of Eagle,* 401 U.S. at 523, 91 S.Ct. at 1001. If the adjudication includes a portion of the main stem of the river, it should include all of the river system within the state's jurisdiction, including any tributaries, to qualify as an adjudication of the river system. *See In re Snake River Basin Water System.* Under certain circumstances, a particular adjudication might not include all the tributaries to the main stem of the river yet still qualify as an adjudication of the "river system" if the excluded tributary is being adjudicated separately. *See United States v. District Court in and for Water Div. No. 5.* However, that case involved Colorado's unique system of water rights adjudications; as a result, we do not believe it allows for a determination that an adjudication of only the portion of the Rio Grande between Elephant Butte Reservoir and the Texas state line is an adjudication of a river system.

The more-difficult question is whether or not there is something unique about this portion of the Rio Grande that would justify an exception to the general rule. The most-persuasive argument in favor of joinder is found in the state's amicus brief. It notes that the Rio Grande Compact requires New Mexico to deliver a specific amount of water to Elephant Butte Dam. *See* NMSA 1978, § 72–15–23 (Repl.1985). The quantity is calculated annually based on the amount of upstream flow near Cochiti Lake at Otowi Bridge. *Id.* at art. IV. Although the delivery obligation is set at Otowi Bridge, the amount of precipitation coming into the river between that point and Elephant Butte will obviously affect the amount of water actually delivered. This amount changes annually. *See* S.E. Reynolds and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 Nat. Resources J. 201 (1974). The Compact takes this into account by providing for accrual of annual credits and debits. Section 72–15–23, art. VI.

The Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line. As a result, the compact does not apportion a specific quantity of water between the two states. *See City of El Paso ex rel. Public Serv. Bd. v. Reynolds,* 563 F.Supp. 379 (D.N.M.1983). Texas apparently believed that delivery at the dam was preferable because the Rio Grande Project contracts independently apportioned water below the dam for both New Mexico and Texas users. *Id.* at 385–86; *see also* Raymond A. Hill, *Development of the Rio Grande Compact of 1938,* 14 Nat. Resources J. 163, 173–174 (1974).

The apportionment of water under state compacts is binding on private water claimants. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). Therefore, the delivery obligation of New Mexico is superior to the rights of the claimants along the Rio Grande upstream from Elephant Butte Dam. Because the Rio Grande Compact requires a specific amount of water to be delivered to the dam, but does not apportion the delivered water, there is a statutorily-mandated exception to the relationship that may otherwise exist between users upstream and downstream from the dam. Placed in the context of this appeal, the delivered but unapportioned water may be considered a separate "river system" for purposes of the McCarran Amendment and a separate "stream system" for purposes of Section

72–4–17. Adjudicating the inter se rights of the parties below the dam will therefore not result in a "piecemeal" decree because users above the dam may not use an amount of water in contravention of New Mexico's delivery obligations. *See id.* As a result, a general adjudication of the Rio Grande between Elephant Butte Reservoir and the Texas state line substantially complies with the requirements of the adjudication statutes. *See State ex rel. Reynolds v. Sharp.* Accordingly, we affirm the district court order denying the United States' motion to dismiss.

II. JOINDER OF THE STATE ENGINEER

Appellant EBID appeals from the district court's order dismissing without prejudice the state engineer as a defendant. The district court dismissed on the basis that the venue statute in effect at the time the original complaint was filed controlled and required the state engineer to be sued in Santa Fe County. *Compare* NMSA 1978, § 38–3–1(G) (Cum.Supp.1986) (state officials must be sued in Santa Fe County) *with* NMSA 1978, § 38–3–1(G) (Repl.Pamp.1990) (state officials may also be sued in county where plaintiff resides). The order was filed on August 16, 1991. EBID raises three arguments to support its contention that venue in Dona Ana County is proper to hear claims against the state engineer. First, EBID argues that the New Mexico Constitution, which prohibits the legislature from changing the rules of procedure applicable to any pending case, N.M. Const. art. IV, § 34 (Repl.Pamp.1992), does not prohibit application of the amended venue statute because, as a result of the case's removal from state district court to federal district court, the case was not "pending" when the venue statute was amended. Second, EBID argues that, even if the earlier venue statute controlled, the district court had pendent venue over the claims. Third, EBID contends that Section 72–4–17 contains a specific venue provision that controls over the more-general provisions of the earlier venue statute.

Consideration of this appeal involves two levels of analysis. First, it is necessary to determine whether or not this was a "pending case" under Section 34 of article IV of the New Mexico Constitution between the time it was removed to federal court and the time it was remanded to the district court. If the case was deemed pending while before the federal court, then it is necessary to determine the effect of the mandatory venue provisions of the former version of Section 38–3–1(G). Of course, EBID could take advantage of the amended venue statute if it voluntarily dismissed the action and thereafter refiled in Dona Ana County. Because it has chosen not to do so, it is necessary for us to reach the constitutional and statutory issues raised on appeal.

A. *Pending Case*

Section 34 of article IV of the New Mexico Constitution states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." Whether or not an action is pending for purposes of this section has been the subject of only a handful of cases. In *Stockard v. Hamilton,* 25 N.M. 240, 180 P. 294 (1919), which held that section 34 does not apply to cases that have reached a final judgment, the court reviewed the purpose behind the constitutional provision:

> We have been unable to find a constitutional provision like our own. The word "pending," according to Webster and Century Dictionary, means "depending," "remaining undecided," "not terminated," and this meaning of the word should be adopted in this connection. The evident intention of the Constitution is to prevent legislation [sic] interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state, and which have not been concluded, finished, or determined by a final judgment. This provision of the Constitution was inserted for the purpose of curing a well-known method, too often used in the days when New Mexico was under a territorial form of government, to win cases in the courts by legislation

which changed the rules of evidence and procedure in cases which were then being adjudicated by the various courts of the state.

Id. at 245, 180 P. at 299.

Based on *Stockard*'s summary of legislative intent, it may be reasonable to conclude that the present action was not pending for constitutional purposes from the time it was removed to federal court on November 30, 1987, until remand on March 22, 1989. The above-quoted language focuses on potential legislative tinkering with pending state court cases. Under the applicable federal removal statute, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.S. § 1446(d) (1989). The majority view is that a state court is divested of jurisdiction in a civil case upon removal. *See* Michael J. Kaplan, Annotation, *Effect, on Jurisdiction of State Court, of 28 U.S.C.S. § 1446(e), Relating to Removal of Civil Case to Federal Court,* 38 A.L.R. Fed. 824 (1978) (subsection "(e)" was redesignated as subsection "(d)" after the annotation was written). The state court lacks jurisdiction to act while the case is before the federal court even if it is subsequently deemed nonremovable. *Id.* at 845. Since the state court is unable to act, it follows that the legislature would not direct specific legislation at the case.

However, despite the state court's inability to act, we conclude that this case was "pending" from the time the original complaint was filed. Removal is analogous to a state court appeal, the filing of which divests the trial court of jurisdiction except for purposes of perfecting the appeal. *See State v. Garcia,* 99 N.M. 466, 659 P.2d 918 (Ct.App.1983). In the context of state court appeals, a case will be deemed "pending" even if a final judgment has been reached if subsequent district court proceedings can be traced to appellate remand instructions or an opinion that directs a party to a new cause of action. *See Brown v. Board of Educ.,* 81 N.M. 460, 468 P.2d 431 (Ct.App.1970). Here, the jurisdiction of the state court was suspended while the case was before the federal court, a situation analogous to the suspension of a trial court's jurisdiction when this court considers an appeal that is ultimately dismissed for lack of a final order. *See Garcia,* 99 N.M. at 472, 659 P.2d at 924. Accordingly, we agree with the district court that the earlier venue statute controls.

B. *Venue*

We next consider whether or not dismissal of the state engineer was required under the statutes in effect at the time the original complaint was filed. EBID contends that Section 72–4–17 is a venue statute that controls over the more-general provisions of Section 38–3–1(G). In the alternative, EBID argues that the claims against the state engineer could nonetheless be heard in Dona Ana County under a "pendent venue" theory.

It appears that the district court believed that the basis for venue in Dona Ana County was limited to NMSA 1978, Section 38–3–1(A) (Repl.Pamp.1987). Under this general venue statute, venue was proper in Dona Ana County because it is the place where plaintiff and the majority of defendants reside. However, Section 38–3–1(G) states that "suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capital and not elsewhere." This mandatory venue provision controls over the more-general provisions of Section 38–3–1(A). *See United Nuclear Corp. v. Fort,* 102 N.M. 756, 700 P.2d 1005 (Ct.App.1985). It therefore might appear that the district court properly dismissed the state engineer for lack of venue. However, *United Nuclear* does not control because, under the facts of this appeal, there is a second mandatory venue provision that conflicts with Section 38–3–1(G).

Section 72–4–17 states in part that "[t]he court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved." The dispositive language is the phrase "may be properly brought." A plain reading of this

section shows that it is intended to consolidate jurisdiction in a single court once the venue statute has been satisfied. However, it does not explicitly state where venue is proper.

Section 72-4-17 further states that "the attorney general may bring suit ... in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes." This language indicates that the legislature intended that jurisdiction be in a court having jurisdiction over the land through which the stream system flows. However, this language applies only to the attorney general and does not clearly answer the issue of proper venue when the water adjudication is brought by a private party. Nonetheless, we believe that the legislature intended to consolidate jurisdiction over all questions relating to a water adjudication in a court having jurisdiction over any part of the stream system and that venue was proper in Dona Ana County under NMSA 1978, Section 38-3-1(D)(1) (Repl.Pamp.1987).

Section 38-3-1(D)(1) states that "when lands or any interest in lands are the object of any suit in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situate." This is a mandatory venue provision. *See* NMSA 1978, § 12-2-2(I) (Repl.Pamp.1988) (word "shall" is mandatory). Water rights are real property rights that are generally tied to specific land. *See New Mexico Prods. Co.*, 42 N.M. at 321, 77 P.2d at 641; *see also State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 618 P.2d 359 (1980) (all water rights are appurtenant to specific acreage); *Posey v. Dove*, 57 N.M. 200, 257 P.2d 541 (1953) (water rights are real property rights); NMSA 1978, § 72-1-2 (Repl.1985) (waters appropriated for irrigation purposes are appurtenant to specified land unless severed from that land in the manner provided by law); *cf. Heath v. Gray*, 58 N.M. 665, 274 P.2d 620 (1954) (holding that petition that asserted interest in oil and gas lease was a suit in which an interest in lands was the object). We thus conclude that under Section 38-3-1(D)(1), suits involving water rights must be brought in a county through which the stream or any portion of the stream flows. All of the property rights involved in this suit are located in Dona Ana and Sierra counties. Venue is therefore proper in Dona Ana County.

What exists, then, is a conflict between two mandatory venue provisions: Section 38-3-1(D)(1), governing the adjudication of the water, and Section 38-3-1(G), governing suits brought against the state engineer. We recognize that the state engineer does not have a property interest in the water rights, but rather a regulatory interest that does not come within Section 38-3-1(D) because it cannot be construed as an interest in land. *See City of Albuquerque v. Village of Corrales*, 88 N.M. 185, 539 P.2d 205 (1975). Nonetheless, the causes of action relating to the state engineer affect the water rights involved in the adjudication. Because the Dona Ana County district court properly has venue over the water rights adjudication, Section 72-4-17 requires that that court have exclusive jurisdiction over all questions relating to the water rights involved, including those against the state engineer. *See Ulibarri v. Hagan*, 98 N.M. 676, 652 P.2d 226 (1982). Additionally, under Section 72-4-17 we do not believe that the district court in Santa Fe County would have jurisdiction to consider questions relating to water rights in Dona Ana and Sierra counties. *See generally Kalosha v. Novick*, 84 N.M. 502, 505 P.2d 845 (1973) (holding that venue means the place where a case is to be tried while jurisdiction refers to the power of a court to determine the case).

Because we conclude that venue is proper in Dona Ana County, we reverse the district court's order of dismissal.

III. NMSU'S APPEAL

NMSU appeals the district court's denial of NMSU's motion to dismiss based on the argument that the state or, alternatively, the state through the state engineer was an indispensable party to the litigation and that the action should be dismissed since the state engineer could not be joined as a party. In light of our conclusion that the

state engineer could properly be joined as a party and our reversal of the district court's order dismissing the state engineer from the litigation, we consider NMSU's appeal moot and thus do not address it.

CONCLUSION

For the reasons discussed above, we affirm the district court's order denying the United States' motion to dismiss and reverse the district court's order dismissing the state engineer as a party.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

849 P.2d 382

Elivorio ARIAS, Claimant–Appellant,

v.

AAA LANDSCAPING and Mountain States Mutual Casualty Company, Respondents–Appellees.

No. 14118.

Court of Appeals of New Mexico.

Feb. 10, 1993.

Certiorari Denied March 24, 1993.

Gerald A. Hanrahan, Chavez Law Offices, Albuquerque, for claimant-appellant.

Robert Bruce Collins, Albuquerque, for respondents-appellees.

Opinion

MINZNER, Chief Judge.

Worker appeals an order of summary judgment entered in favor of Employer. Worker challenges the workers' compensation judge's (WCJ) determination that the facts of his case do not fall within any recognized exceptions to the going and coming rule. Our first and second calendar notices proposed affirmance. Worker filed timely memoranda in opposition to both calendar notices. Not being persuaded by Worker's memoranda, we affirm.

Facts.

Employer owns a landscaping business in Albuquerque, and Worker was employed by the business. During the off-season, Employer asked Worker if he wanted a job assembling Christmas wreaths. The job involved travelling to Rociada, a small town outside of Las Vegas, New Mexico. Employer agreed to provide its employees with transportation to and from Rociada. Specifically, the employees were transported in Employer's truck to Rociada the beginning of each week, where they worked Monday through Friday. Employer paid for their lodging and living expenses during the week. On Fridays, the employees returned to Albuquerque in Employer's truck. The employees were usually paid an hourly wage for their travel time.

One Friday, Worker asked Employer if he could leave the job early and return to Albuquerque in a car owned by a coworker.

Employer allowed Worker to leave. During the trip home the car slid off the highway due to ice, and Worker was injured in the accident. It is undisputed that Worker had Employer's permission to leave the work place early. It is also undisputed that Worker was not paid his hourly wage for the return trip to Albuquerque on the day of the accident.

Worker sought workers' compensation benefits for his injuries. Employer filed a motion for summary judgment, arguing that Worker was not injured in the scope and course of his employment. The WCJ entered summary judgment in favor of Employer.

Discussion.

In effect, Worker relies on case law recognizing that a worker's journey to or from work in his or her employer's conveyance is within "the course of his [or her] employment." *See* NMSA 1978, § 52–1–28(A) (Repl.Pamp.1991). The rationale underlying such cases is that "the risks of the employment continue throughout the journey." 1 Arthur Larson, *Workmen's Compensation Law* § 17.00 at 4–209 (1992).

In his second memorandum in opposition, Worker argues that a New York decision supports his argument that he is entitled to compensation. 1 Larson, *supra,* § 17.13, at 4–222 to –224. In *Cornelius v. Brock,* 27 A.D.2d 604, 275 N.Y.S.2d 632 (1966), the worker, who was killed in a car accident, travelled 120 miles from his city of residence to the job site. The employer usually provided transportation, and the workers were paid hourly for their trip to the job site, but not for the return trip. At the time of the accident, the worker was returning from the job site with another employee who had been given permission by the employer to take his own car to and from the job site. The *Cornelius* court held that the worker's widow was entitled to compensation because the travel to and from the job site had become a substantial part of the service performed for the employer. The court stated it was immaterial that the workers were not compensated for the return trip home.

Cornelius is factually distinct from the present case. The employer in that case sanctioned the worker's riding with another employee; essentially, the employer provided alternate transportation for the worker by allowing him to ride with another employee during the regular commuting schedule. In contrast, Worker in the present case asked permission to leave early and travel with another employee, which Employer allowed. Worker chose not to use Employer's transportation, and left early from work for personal reasons. *See generally* 1 Larson, *supra,* § 17.13. "If there is nothing more in the facts than the bare availability of transportation in the employer's conveyance, which privilege the employee forgoes in favor of using his own car, motorcycle, or bicycle, compensation has been denied." *Id.* at 4–221 (footnotes omitted).

Insofar as Worker argues that the second calendar notice did not address the "special errand" rule, we believe the present case is distinguishable from special errand cases. In *Edens v. New Mexico Health & Social Services Department,* 89 N.M. 60, 547 P.2d 65 (1976), the worker was killed travelling from Santa Fe after attending training required by her employer. In *Avila v. Pleasuretime Soda, Inc.,* 90 N.M. 707, 568 P.2d 233 (Ct.App.1977), the worker was injured shortly after making a bank deposit that she made daily for her employer. Compensation was awarded in both cases because the employers required the workers to perform tasks outside the work place. Here, while Worker was required to travel a distance to the job site, the accident occurred during a trip home that was unrelated to any task requested by Employer.

The present case is analogous to *Martin v. Cumberland County Commissioners' Manpower Department,* 395 A.2d 1172 (Me.1979). In *Martin,* the worker was injured in a car accident when her employer gratuitously allowed her to leave work early because of a severe winter storm. Compensation was denied because the trip was purely personal. Worker in the present case left the job early for personal reasons; therefore, his injuries are not compensable under recognized exceptions to the going and coming rule.

In his second memorandum in opposition, Worker continues to argue that his case is similar to *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950). While Worker is correct that the *Wilson* Court did not require that hourly compensation be paid, as part of employment, for the time the worker travelled to the job, significantly, the deceased employee in *Wilson* had been required, as part of his employment, to transport a crew to and from the job site. According to *Wilson*, the exceptions to the going and coming rule apply when a worker (1) must travel to and from work using transportation supplied by an employer, or is paid in wages by the employer for travel time to and from work; or (2) is " 'charged with some duty or task in connection with his [or her] employment,' " on the way to or from work. *Id.* at 92, 227 P.2d at 372 (quoting *Gallman v. Spring Mills*, 201 S.C. 257, 22 S.E.2d 715, 717–18 (1942)). The worker in *Wilson* was charged with the duty of delivering a crew to the job site every day, and was killed in an accident while doing so. In contrast, in the present case, Worker was injured during a non-routine or unusual trip at a time when he was not being paid for travel time, and when he was not performing a job duty for Employer. Thus, *Wilson* is inapplicable in the present case.

Conclusion.

Based on the foregoing, we conclude that disposition of this appeal on the summary calendar is appropriate. *See Garrison v. Safeway Stores*, 102 N.M. 179, 179–80, 692 P.2d 1328, 1328–29 (Ct.App.) (disposition on summary calendar appropriate where there is no reason for filing a transcript and application of legal principles to facts is clear), *cert. denied*, 102 N.M. 225, 693 P.2d 591 (1984). The order granting summary judgment is affirmed.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

849 P.2d 384

William R. and Marcia K. ESPANDER, Plaintiffs–Appellants,

v.

CITY OF ALBUQUERQUE, Defendant–Appellee.

No. 13007.

Court of Appeals of New Mexico.

March 4, 1993.

William G. Gilstrap, William G. Gilstrap P.C., Albuquerque, for plaintiffs-appellants.

David S. Campbell, City Atty., Alfred Quintana, Asst. City Atty., Albuquerque, for defendant-appellee.

OPINION

HARTZ, Judge.

I. BACKGROUND

Plaintiffs, William R. and Marcia K. Espander (the Espanders), appeal from a summary judgment granted by the district court in favor of Defendant, City of Albuquerque (City). The Espanders filed a complaint alleging property damage and personal injury caused by flooding onto their property and into their residence by water that came from a City arroyo. The City moved for summary judgment on the ground that it was immune from liability under the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (Repl.Pamp.1989). The City predicated its motion on the complaint and an affidavit by Dan Hogan, a City supervisor who managed the hydrology division of the Albuquerque Public Works Department. His affidavit stated that "[t]he storm drainage system ... behind [the Espanders'] residence ... was a diversion channel for storm drainage [that had never] been designed or used for liquid waste and/or solid waste diversion or distribution [and was] not part of any water utility or solid or liquid waste connections or disposal system." Being bound by the authority of *City of Albuquerque v. Redding,* 93 N.M. 757, 605 P.2d 1156 (1980), we reverse.

II. DISCUSSION

The Tort Claims Act provides that "[a] governmental entity and any public employee while acting within the scope of

duty are granted immunity from liability for any tort except as waived by Sections 41–4–5 through 41–4–12 NMSA 1978." Section 41–4–4(A). The Espanders claim that immunity is waived in the circumstances of this case by Section 41–4–8, which states:

> A. The immunity granted pursuant to Subsection A of Section 4 of the Tort Claims Act 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 of the following public utilities and services: gas; electricity; water; solid or liquid waste collection or disposal; heating; and ground transportation.
>
> B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage:
>
> (1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or
>
> (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

The City denies that immunity has been waived pursuant to Section 41–4–8(A) and argues that even if that subsection does waive immunity, immunity is reinstated by Subsection B and also by the second sentence of Section 41–4–6. Section 41–4–6 states in full:

> 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.

We first discuss Section 41–4–6, then Section 41–4–8(B), and finally Section 41–4–8(A).

A. Applicability of Section 41–4–6.

Section 41–4–6 does not apply to this case. Section 41–4–6 waives immunity for causes of action relating to the operation or maintenance of "any building, public park, machinery, equipment or furnishings." The natural interpretation of the second sentence of that section is simply that it preserves immunity with respect to damages arising out of the operation and maintenance of works used for diversion or storage of water *in public parks and on the grounds of public buildings. See Castillo v. Santa Fe County,* 107 N.M. 204, 206, 755 P.2d 48, 50 (1988) (Section 41–4–6 applies to property surrounding a public building). For example, there would be immunity for liability arising from ponds and ditches in public parks. The immunity preserved by that sentence does not, however, extend to liability arising from the maintenance of diversion channels on public property in general. Although some language in decisions interpreting Section 41–4–6 may suggest that the section extends to all publicly owned premises, *see Bober v. New Mexico State Fair,* 111 N.M. 644, 652–53, 808 P.2d 614, 622–23 (1991) (State Fair liable for negligence in operation of coliseum's parking lot), no holding has gone so far. Because the City has not contended that the diversion channel by the Espanders' residence was on park land or on the grounds of a public building, we cannot say that the second sentence of Section 41–4–6 was intended to preserve immunity from liability in the circumstances of this case.

B. Applicability of Paragraph (B)(2) of Section 41–4–8.

The City contends that it was entitled to judgment because Paragraph (B)(2)

of Section 41–4–8 preserves immunity for liability for damages:

> arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

We may assume that the language "discharge, dispersal, release or escape ... into or upon land" is sufficiently broad to encompass flooding. The question is whether the substances listed in the paragraph include runoff water. We think not.

First, one could argue that runoff water is included in the word "liquids." Yet, the most reasonable construction of the paragraph is that "liquids" is modified by the word "toxic." In other words, the language "toxic chemicals, liquids or gases" is equivalent to "toxic chemicals, toxic liquids or toxic gases." Although one would expect the word "solids" rather than "chemicals" to be juxtaposed with "liquids" and "gases," it makes no sense to have inserted "or" rather than a comma between "liquids" and "gases" if *all* liquids and gases were to be included.

Second, one could argue that runoff water is "waste material." We have no doubt that the word "material" can include liquids. The question is whether runoff water is a "waste" material. "Waste" can mean "left over or superfluous." *See The Random House Dictionary of the English Language* 1611 (1971) (definitions 20 and 30 of "waste"). But in Paragraph (B)(2) the legislature used the word in a narrower sense. The statute speaks of "waste materials or other irritants, contaminants or pollutants." The language "or other" strongly implies that the only superfluous or unused material within the meaning of "waste" material is material that is an irritant, contaminant, or pollutant. Runoff water does not satisfy that requirement, at least if the words "irritant," "contaminant," and "pollutant" bear their common meanings. Our interpretation is buttressed by the observation that the language in Paragraph (B)(2) tracks the language of a "pollution exclusion" clause widely used in insurance contracts. *See New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267, 1271 (3d Cir.1992); *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 709 (8th Cir. 1992). (The precise question presented here—whether runoff water is "waste material" within the meaning of the exclusion—is, however, unlikely to arise in the insurance context because the exclusion also contains the additional language: "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.") We conclude that Paragraph (B)(2) of Section 41–4–8 does not help the City here.

C. The Meaning of Section 41–4–8(A) and *Redding.*

We now arrive at the issue that would ordinarily be the starting point of our discussion—whether Section 41–4–8(A) waives immunity for the liability alleged in this case. Our reason for taking the path we have is that our conclusions regarding Sections 41–4–6 and 41–4–8(B) inform our interpretation of Section 41–4–8(A).

The Espanders rely on the waiver of immunity in Section 41–4–8(A) for liability for damages arising from negligence "in the operation of the following public utilities and services: * * * liquid waste collection or disposal." Our prior analysis leads to the following observations.

First, if, as discussed above, the word "waste" as used in Section 41–4–8*(B)(2)* cannot be used to describe water runoff, then we would presume that the word "waste" as used in Section 41–4–8*(A)* also cannot be used to describe water runoff. Ordinarily, courts should interpret a word as having the same meaning throughout a statute, and certainly within the same section, particularly when the section was adopted as a whole at one time. *See Noriega v. Stahmann Farms,* 113 N.M. 441, 443, 827 P.2d 156, 158 (Ct.App.) ("maintenance" must have same meaning in both sentences of Section 41–4–6), *cert. denied,* 113 N.M. 449, 827 P.2d 837 (1992). This view is reinforced here by the observation that the

only statutory definition of "wastes" at the time of the enactment of Section 41–4–8 clearly did not include water runoff. The Water Quality Act defines "wastes" as "sewage, industrial wastes or any other liquid, gaseous or solid substance which will pollute any waters of the state[.]" NMSA 1978, § 74–6–2(C) (Repl.Pamp.1992). Thus, our analysis of Section 41–4–8(B)(2) raises a serious doubt that "liquid waste" in Section 41–4–8(A) was meant to encompass water runoff.

Pointing in the same direction is our understanding of Section 41–4–6. At first blush, Section 41–4–6 would seem irrelevant to the meaning of Section 41–4–8(A). Yet, we often look to the context created by an entire statute in order to interpret more accurately a particular section within the statute. The second sentence of Section 41–4–6 was enacted in 1977, one year after the enactment of Section 41–4–8 and the first sentence of Section 41–4–6. If the damages described in the second sentence of Section 41–4–6 are damages for which immunity from liability is waived by Section 41–4–8(A), then the legislature accomplished nothing by adding the sentence—any immunity preserved by the sentence is lost pursuant to Section 41–4–8(A). We should assume that when the legislature enacted the sentence, it was not acting irrationally. *See Southard v. Fox,* 113 N.M. 774, 776, 833 P.2d 251, 253 (Ct.App. 1992). As the Supreme Court has stated, it "construes each part of an act in connection with every other part so as to produce a harmonious whole." *Lopez v. Employment Sec. Div.,* 111 N.M. 104, 105, 802 P.2d 9, 10 (1990). Hence, we conclude that Section 41–4–8(A) does not waive immunity for the damages described in the second sentence of Section 41–4–6. Our interpretation of that sentence therefore can inform our interpretation of Section 41–4–8(A).

In our view, one purpose of amending Section 41–4–6 by adding the second sentence was to make clear that immunity was not being waived with respect to liability arising out of works for the diversion of water—such as drainage ditches—on the grounds of public buildings and in public parks. (We need not consider works for the "storage" of water.) Yet, one would expect all such diversion works to be part of a public system for the diversion of water runoff. The ditch in the park needs to lead somewhere. If that system is considered to be a public utility or service for liquid waste disposal, within the meaning of Section 41–4–8(A), then the damages described in the second sentence of Section 41–4–6 (at least with respect to "works used for diversion ... of water") are fully encompassed by the waiver of immunity in Section 41–4–8(A). Any diversion work immunized from liability by the second sentence of Section 41–4–6 would be subject to liability under Section 41–4–8. The inclusion of diversion works in the second sentence of Section 41–4–6 would be a legal nullity, a useless act by the legislature. One would then wonder why the law adding the second sentence to Section 41–4–6 did not add a similar provision to Section 41–4–8. The most reasonable explanation for this "oversight" is that the legislature that enacted the second sentence of Section 41–4–6 did not consider the system of works used for diversion of runoff water to constitute a public utility or service for "liquid waste disposal." Under that view no amendment to Section 41–4–8 would be necessary. In this regard, we note that our research has not found any authority (other than *Redding*) for the proposition that the term "liquid waste disposal" includes diversion of runoff water. *See Mechanical Contractors Ass'n v. State,* 255 N.J.Super. 488, 605 A.2d 743, 745 (Ct.App. Div.1992) (definition of "plumbing" speaks of "storm water" and "liquid waste" in the alternative).

Nevertheless, we cannot disregard our Supreme Court's opinion in *Redding.* Redding was riding her bicycle on an Albuquerque street when her front tire slipped through a drain grate located in the road and she was thrown from her bicycle. The Court stated that "[a] sewer grate can serve no other primary purpose than to afford disposal of waste water, silt and debris from the roadbed of the street." *Redding,* 93 N.M. at 759, 605 P.2d at 1158. Thus, the City's immunity was waived by

the language in Section 41–4–8(A) that authorizes suits for liability for damages "caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: ... *solid or liquid waste collection or disposal*[.]" *Id.* As we understand *Redding,* it held that water runoff is a form of "liquid waste" and that works for the collection and diversion of runoff water are part of a public utility or service. Although the Hogan affidavit submitted by the City states that the "storm drainage system ... behind [the Espanders'] residence [was not] designed or used for liquid waste ... diversion," the affidavit cannot change the meaning of statutory language. *Cf. Ledbetter v. Webb,* 103 N.M. 597, 602–03, 711 P.2d 874, 879–80 (1985) (appellate court not bound by trial court's erroneous conclusions of law). We conclude that Section 41–4–8(A) waives the City's immunity from liability for the damages alleged in this case.

Following *Redding,* we reverse and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DONNELLY, J., concurs.

APODACA, J., specially concurring.

APODACA, Judge, specially concurring.

I concur in the majority's conclusion that under *City of Albuquerque v. Redding,* 93 N.M. 757, 605 P.2d 1156 (1980), the district court's grant of summary judgment was improper. I therefore agree in the majority's reversal of the district court's decision and in remanding for further proceedings. However, I disagree with portions of the majority's analysis and therefore specially concur.

The majority contends that there is a conflict between the statutory language and the holding of *Redding* because the word "waste" is used in both NMSA 1978, Section 41–4–8(A) and (B)(2) (Repl.Pamp.1989). In the majority's view, "waste" should mean the same thing in both subsections, and thus if "runoff water" is included within the meaning of "waste" in Subsection (A) (as held in *Redding*), it must also be included within the scope of Subsection (B)(2). However, the majority has independently determined that runoff water is not included within the scope of Subsection (B)(2). Based on these determinations and an analysis of the additions of various sentences to the statutes, the majority concludes that the legislature must not have intended water diversion works to constitute a public utility or service for "liquid waste disposal" within the meaning of Section 41–4–8(A), a conclusion that the majority has further determined is inconsistent with *Redding.* I disagree and believe that the "conflict" or inconsistency seen by the majority is fully reconcilable.

I agree with the majority that, under *Redding,* a system to dispose of storm runoff water is a public utility or service for the collection or disposal of solid or liquid waste within the meaning of Section 41–4–8(A). *Redding,* 93 N.M. at 759, 605 P.2d at 1158. Thus, immunity for injuries resulting from the negligent maintenance of such a system would be waived.

I do not see a conflict between Section 41–4–8(A), *Redding*'s holding, and Section 41–4–8(B)(2) because, reading that subsection as a whole, I believe it clearly refers only to pollutants. The phrase "or other irritants, contaminants or pollutants" indicates that the term "waste materials" is intended to encompass toxic substances. *Id.* As the majority notes, the language from the subsection is that of standard pollution-exclusion clauses in insurance contracts. *See New Castle County v. Hartford Accident & Indem. Co.,* 970 F.2d 1267, 1271 (3d Cir.1992). I thus agree with the majority's conclusion that storm runoff water is not included within the scope of Section 41–4–8(B)(2).

I believe that a more-reasonable interpretation of Section 41–4–8(B)(2) is that it refers to accidental discharges of waste materials that are toxic, and not to dispersals of nontoxic substances that occur as the result of the regular operation of a public service. *See New Castle,* 970 F.2d at 1271 (standard insurance clause states that

clause does not apply if the discharge is "sudden and accidental"). Additionally, I believe that this subsection was intended to allow for the operation of solid waste disposal sites and similar facilities. My analysis therefore "explains away" the conflict seen by the majority. Simply stated, Subsection (B)(2) is "boiler plate" language for toxic wastes, thus excluding runoff water; Subsection (A), on the other hand, does not encompass such language. Additionally, *Redding* clearly held that Subsection (A) includes runoff water. The scope of Subsection (B)(2) was not addressed in *Redding.* Thus, in my view, Subsections (A) and (B) and the holding in *Redding* are reconcilable.

In connection with the majority's discussion of NMSA 1978, Section 41–4–6 (Repl.Pamp.1989), and the City's argument that the second sentence of that Section reinstates immunity, I observe that in *Bober v. New Mexico State Fair,* 111 N.M. 644, 808 P.2d 614 (1991), our Supreme Court stated that " 'Section 41–4–6 * * * contemplate[s] waiver of immunity where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government * * *.' " *Id.* at 653, 808 P.2d at 623 (quoting *Castillo v. County of Santa Fe,* 107 N.M. 204, 205, 755 P.2d 48, 49 (1988)). This language makes me uncertain about the basis for the majority's statement that Section 41–4–6 is inapplicable because it applies only to operation and maintenance of works used for diversion or storage of water in public parks and on the grounds of public buildings. For this reason, I propose that Section 41–4–6 does not apply because Section 41–4–8(A) is the more-specific provision applicable to the facts of this appeal. Thus, even if Section 41–4–8(A) conflicts with Section 41–4–6, the more-specific statute governs. *See Redding,* 93 N.M. at 759, 605 P.2d at 1158. It would be reasonable for the legislature to distinguish between maintenance and operation of public utilities and services, *see* § 41–4–8(A), and other publicly owned property, such as reservoirs. *See* § 41–4–6. Therefore, Section 41–4–6 does not apply to situations where the injury arose from the alleged negligent operation of a public service.

For these reasons, I specially concur in the majority's decision to reverse the district court's grant of summary judgment to Defendant and to remand for further proceedings.

849 P.2d 1071

STATE of New Mexico, Plaintiff–Appellee,

v.

Manuel CHAVEZ, Defendant–Appellant.

No. 13,231.

Court of Appeals of New Mexico.

March 27, 1992.

Certiorari Granted May 29, 1992.

Certiorari Quashed March 30, 1993.

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

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Opinion

PICKARD, Judge.

Defendant appeals the sentence imposed after he pleaded guilty to one count of conspiracy to commit armed robbery, one count of aggravated battery, and one count of conspiracy to commit aggravated battery, all arising out of an attack on an eighty-one-year-old man. The trial court imposed the basic sentence for each crime and also imposed a two-year enhancement to each basic sentence pursuant to NMSA 1978, Section 31–18–16.1 (Repl.Pamp.1990). That section provides for sentence enhancement when elderly or handicapped people are intentionally injured in the commission of certain crimes. The trial court ordered that the enhanced basic sentences be served consecutively. The sole issue raised by defendant on appeal is whether the trial court erred by imposing the enhancements consecutively instead of concurrently. The resolution of the issue depends on the interpretation of Section 31–18–16.1(C) and raises a matter of first impression. We affirm.

Section 31–18–16.1(C) provides that "[a]ny alteration of the basic sentence of imprisonment pursuant to the provisions of this section shall be served concurrently with any other enhancement alteration of basic sentence pursuant to the provisions of the Criminal Sentencing Act [31–18–12 to 31–18–21 NMSA 1978]." Each side argues that the plain meaning of the statute and legislative intent support its position.

Defendant contends that Section 31–18–16.1(C) applies to prohibit consecutive enhancement when more than one sentence is enhanced under it, because the words "any other enhancement alteration of basic sentence" plainly encompass enhancements of more than one sentence. Defendant also argues that the rules of strict construction and lenity support the construction more favorable to him.

The state contends that in enacting Section 31–18–16.1(C) the legislature did not intend to address enhancements of multiple basic sentences and the second reference in Section 31–18–16.1(C) to "basic sentence" plainly shows that the section only addresses multiple enhancements of a single sentence. The state suggests that the statutory construction for which defendant contends conflicts with established case law, which treats a basic sentence together with any enhancements as a single sentence, and other cases in which this jurisdiction has rejected a "single transaction" theory of sentencing.

Contrary to the parties' contentions, we do not find the plain meaning of the statute enough to resolve this case. However, we conclude that the state's reading of the statute is more reasonable in light of its express language, its relationship to other like statutes, the legislative environment, the legislative history, and the law in existence at the time the statute was enacted. *See generally State v. Alderette,* 111 N.M. 297, 299, 804 P.2d 1116, 1118 (Ct.App.1990) (legislature is presumed to know the law and existing judicial pronouncements). Section 31–18–16.1(C) uses the words "basic sentence" twice. Because the article "the" precedes the first occurrence, it makes sense that the second reference, which lacks an article, should refer to "the basic sentence" as well. Additionally, it appears to us that the plain meaning of the word "other" is a reference to enhancements other than the one appearing in Section 31–18–16.1, e.g., habitual offender enhancements and firearm enhancements.

We are reinforced in our view by a review of sentencing provisions generally. Each is written in the singular. The basic sentence statute provides, "If a person is convicted of *a* noncapital felony, *the* basic sentence of imprisonment is as follows...." NMSA 1978, § 31–18–15(A) (Repl.Pamp.1990) (emphasis added). The various enhancement statutes provide the following: (1) "The court may alter *the* basic sentence as prescribed in Section 31–18–15 NMSA 1978 upon a finding by the judge of any mitigating or aggravating circumstances surrounding *the* offense...." NMSA 1978, § 31–18–15.1(A) (Repl.Pamp.1990) (emphasis added); (2) "When ... a firearm was used in the commission of *a* noncapital felony, *the* basic sentence ... shall be increased...." NMSA 1978, § 31–18–16(A) (Repl.Pamp.1990) (emphasis added); (3) "When ... in the commission of *a* noncapital felony a person sixty years of age or older or who is handicapped was intentionally injured, *the* basic sentence ... shall be increased...." Section 31–18–16.1(A) (emphasis added); and (4) "Any person convicted of *a* noncapital felony ... who has incurred one prior felony conviction ... is a habitual offender and his basic sentence shall be increased...." NMSA 1978, § 31–18–17(B) (Repl.Pamp.1990) (emphasis added). Thus, when the legislature refers to an alteration of the basic sentence in Section 31–18–16.1(C), we can only conclude that it is following the standard pattern and referring to the same singular sentence for a singular crime used in other statutes.

We note that Section 31–18–16.1(C) was part of the original enactment of this particular enhancement provision. At the time of its enactment, the legislature had provided that the enhancement was to be the first year or years served and that it could not be suspended or deferred. 1980 N.M.Laws, ch. 36, § 1. The former provision was consistent with the firearm enhancement, and the latter was consistent with both the firearm enhancement and habitual offender enhancement. *See* §§ 31–18–16, –17. If the enhancement pursuant to Section 31–18–16.1 was to be the first year or years served and if it could not be suspended or deferred, then of necessity it had to be served concurrently with the firearm enhancement. When the legislature amended Section 31–18–16.1 in 1989 to provide for enhancement when a handicapped person was intentionally injured, it deleted the requirements that the enhancement be the first year or years served and that it not be suspended or deferred. Nonetheless, Section 31–18–16.-1(C) was not altered. While this supports defendant's lenity argument, we do not be-

lieve it necessarily requires the result defendant advocates. It simply means that the trial court may suspend or defer enhancements under Section 31–18–16.1 and that, if there are other enhancements to a sentence, e.g., firearm or habitual offender, the enhancement under Section 31–18–16.1 shall be served concurrently with them. We do not, therefore, believe the ambiguity that may exist in Section 31–18–16.1(C) is enough to warrant the application of the rule of lenity. *Cf. Swafford v. State,* 112 N.M. 3, 15, 810 P.2d 1223, 1235 (1991) (lenity is not indicated where legislative intent to punish separately can be found through canons of construction).

Nor do we believe that the out-of-state cases cited by defendant offer much guidance. They do show that, generally, limitations in punishment are evidence of legislative intent. *See Busic v. United States,* 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); *State v. Treadway,* 558 S.W.2d 646 (Mo.1977) (en banc), *cert. denied,* 439 U.S. 838, 99 S.Ct. 124, 58 L.Ed.2d 135 (1978), *overruled on other grounds by Sours v. State,* 593 S.W.2d 208 (Mo.1980) (en banc), *vacated,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). However, given the very different statutes and language involved in those cases, they are of little help in this case.

Finally, we look to the law at the time Section 31–18–16.1 was amended. At that time, the law was clear that a sentence and its enhancements were one continuous sentence. *State v. Bachicha,* 111 N.M. 601, 808 P.2d 51 (Ct.App.1991); *State v. Mayberry,* 97 N.M. 760, 643 P.2d 629 (Ct.App. 1982). In many ways, defendant is suggesting that the legislature intended to adopt a "single transaction" scheme of sentencing through Section 31–18–16.1(C). However, we do not agree with such an interpretation of the legislature's motives. We believe that if the legislature intended such a result, it would have clearly said so. *Cf. Ruybalid v. Segura,* 107 N.M. 660, 666, 763 P.2d 369, 375 (Ct.App.1988). We also note that the "single transaction" theory has been previously rejected in the area of firearm enhancements. *See State v. Espinosa,* 107 N.M. 293, 756 P.2d 573 (1988); *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct.App.), *rev'd on other grounds,* 90 N.M. 191, 561 P.2d 464 (1977). New Mexico case law has rejected the contention that when several crimes are committed with a firearm during the same transaction, the firearm enhancement should only be applied to one of the crimes and not all of them. *Id.*

Although defendant is correct that statutes are strictly construed against the state, in this case we believe that the legislative history of the statute, combined with the case law and other statutory language which existed at the time the statute was adopted, supports the conclusion that the legislature only intended Section 31–18–16.-1(C) to apply to situations in which a single basic sentence is subject to multiple enhancements. We do not believe that the legislature intended to have Section 31–18–16.1(C) apply to situations in which several basic sentences arising out of the same incident are all subject to an enhancement pursuant to Section 31–18–16.1.

Accordingly, we affirm defendant's judgment and sentence.

IT IS SO ORDERED.

MINZNER and BLACK, JJ., concur.

849 P.2d 1073

STATE of New Mexico, Plaintiff–Appellee,

v.

Richard Lee SAVAGE, Defendant–Appellant.

No. 13,277.

Court of Appeals of New Mexico.

Dec. 1, 1992.

Certiorari Granted Feb. 24, 1993.

[redacted]

Tom Udall, Atty. Gen., Joel K. Jacobsen, 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

MINZNER, Judge.

Defendant appeals his conviction by a jury for trafficking cocaine, contrary to NMSA 1978, Section 30-31-20 (Repl.Pamp.1989). He raises four issues on appeal. We conditionally affirm. *See State v. Debarry,* 86 N.M. 742, 527 P.2d 505 (Ct.App.1974). We remand to permit the trial court to reconsider whether Defendant was entitled to dismissal under *Baca v. State,* 106 N.M. 338, 742 P.2d 1043 (1987), as clarified by *State v. Sheetz,* 113 N.M. 324, 825 P.2d 614 (Ct.App.1991). The conviction in this case arose out of the same "sting operation" as in *Sheetz.*

Motion for Directed Verdict/Objective Entrapment.

Defendant's first issue is whether the trial court erred in denying his motion for directed verdict at the close of all the evidence. In his motion, Defendant raised the issue of objective entrapment. In support of his motion, Defendant argued to the court that the uncontradicted evidence at trial showed that he had acquired the cocaine from a confidential informant (Danny Goree), sold the cocaine to an undercover police officer (Thomas Mabrey), and therefore the State failed to prove he was guilty of trafficking beyond a reasonable doubt. The record shows that Defendant relied on a particular theory of objective entrapment, which was that the police exceeded the standards of proper investigation because "the government was both the supplier and the purchaser of the contraband and defen-

dant was recruited as a mere conduit." *Baca,* 106 N.M. at 341, 742 P.2d at 1046. Defendant's particular theory of objective entrapment depended on whether he himself was a credible witness. Under *Sheetz,* which was decided while this case was pending on appeal, the proper resolution of Defendant's motion depends on whether the trial court found Defendant to be a credible witness regarding the transaction for which he was convicted.

The question presented by a motion for directed verdict is whether there is substantial evidence to support the charge, *see State v. Maestas,* 92 N.M. 135, 584 P.2d 182 (Ct.App.1978), and in resolving this question the trial court must view the evidence in the light most favorable to the State. *See, e.g., State v. Gilbert,* 99 N.M. 316, 657 P.2d 1165 (1982). To view the evidence in the light most favorable to the state is to consider whether a reasonable person could decide that Defendant was not credible. Although Defendant, like the defendants in *Baca* and *Sheetz,* moved for a directed verdict on grounds of objective entrapment, a motion for directed verdict is no longer the proper means to raise that issue.

In *Sheetz,* the trial court denied the defendant's motion for directed verdict because the entrapment defense was raised solely by the defendant's testimony and the defendant's credibility was at issue. 113 N.M. at 326, 825 P.2d at 616. In interpreting *Baca,* as well as New Mexico entrapment law in general, we explained that a trial court should first make its own determination of whether there was objective entrapment. *Sheetz,* 113 N.M. at 326, 825 P.2d at 616. Once a defendant raises the issue of objective entrapment, there is an initial fact-finding problem for the trial court. "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 [*State v.*] *Sainz* [84 N.M. 259, 501 P.2d 1247 (1972)], the court shall dismiss the charges." *Id.* at 329, 825 P.2d at 619. Therefore, the correct method of raising the issue of objective entrapment in the trial court is by motion to dismiss because of governmental misconduct.

The trial court need not decide—as it would have to on a motion for directed verdict—that the evidence, even when viewed in the light most favorable to the government, compels a finding of objective entrapment; it need only be itself convinced that there was objective entrapment. Of course, any time the trial court denied a motion to dismiss, the court would necessarily have denied a motion for directed verdict since denial of the motion to dismiss implies that at least one reasonable person, the judge, could find in favor of the government on the claim of objective entrapment.

Although after *Sheetz* a defendant should raise the issue of objective entrapment in a motion to dismiss, we hold that in this case Defendant adequately preserved the issue by moving for a directed verdict. We require compliance with rules of preservation to ensure that the trial court had a fair opportunity to decide an issue on which a claim of reversible error is based. *See State v. Lucero,* 104 N.M. 587, 725 P.2d 266 (Ct.App.1986). We think that Defendant clearly preserved legal issues under *Baca.* The difficult problem in this case has been what issues his motion, based on *Baca,* preserved. Although the State suggests on appeal that Defendant preserved only the issue of whether he was entitled to a directed verdict as a matter of law, we conclude that Defendant preserved the issue of whether he was entitled to dismissal if the trial court found him to be a credible witness because he relied on *Baca,* which *Sheetz* clarified. In *Sheetz* itself we remanded for a determination by the district court of whether it believed the defendant's testimony regarding objective entrapment, even though at trial the defendant had not requested such a fact-finding by the court. Thus, we believe Defendant is entitled to the benefit of the holding in *Sheetz* that establishes his right to dismissal if the trial court rules in his favor on the particular theory of entrapment he raised.

There is no dispute that Mabrey was acting as an undercover agent for the

police, although he was not a police officer. It is also undisputed that Goree was a confidential informant for the state. Defendant testified that he obtained the cocaine from Goree, sold the substance to Mabrey at Goree's urging, and gave the money he received from selling the substance to Goree. As in *Sheetz,* then, Defendant's only evidence of entrapment was his own testimony. Because the trial court judge was not obligated to believe Defendant's version of what happened, *State v. Sutphin,* 107 N.M. 126, 753 P.2d 1314 (1988), the trial court could have found that Defendant was not objectively entrapped as a matter of law. However, under *Sheetz,* Defendant was entitled to dismissal of the trafficking charge if the trial judge found him to be credible. If the court believed that he had been a "mere conduit" between a government supplier and a government purchaser, he was entitled to dismissal of the trafficking charge. Therefore, we remand to permit the trial court to reconsider the question of objective entrapment in light of *Sheetz.*

Error in Instructing the Jury/Objective Entrapment.

In this case defense counsel neither tendered an instruction on objective entrapment nor objected to any of the instructions tendered by the State. Indeed, in renewing her motion for a directed verdict, defense counsel argued that "*Baca* says as a matter of law entrapment has occurred."

The State contends that Defendant has waived any argument that the issue should have been submitted to the jury. Defendant argues that the trial court had been alerted to this line of defense and had an obligation to instruct the jury. *See* SCRA 1986, 5–608. This rule states that a court "must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury." R. 5–608(A). Otherwise, a party must submit a correct, written instruction to preserve an objection for failing to instruct on an issue. R. 5–608(D).

We agree with the State that Defendant did not preserve any right to a jury trial on the issue of objective entrapment. His theory was that he was entitled to dismissal because the State failed to rebut his prima facie showing of objective entrapment under *Baca.* He argued that he was entitled to a ruling by the trial court dismissing the charge, because the evidence of the kind of misconduct described in that case was undisputed. That theory and argument did not encompass a claim that the jury should decide the question of objective entrapment described in *Sheetz. See Andrus v. Gas Co.,* 110 N.M. 593, 798 P.2d 194 (Ct.App. 1990); *cf. State v. Goss,* 111 N.M. 530, 807 P.2d 228 (Ct.App.1991) (defendants failed to preserve for appellate review challenge to constitutionality of roadblock, where specific challenge to roadblock not made to district court).

We agree with Defendant that the trial court has an obligation to instruct on "all questions of law essential for a conviction of any crime submitted to the jury." R. 5–608(A). However, entrapment is an affirmative defense. Its absence is not an element of the offense. There is no issue essential to conviction on which the trial court failed to instruct the jury. Because Defendant did not offer a written instruction to be given to the jury, he has waived a jury's resolution of any issue of objective entrapment. *State v. Lopez,* 109 N.M. 578, 787 P.2d 1261 (Ct.App.1990).

Right to Confrontation.

It is undisputed that the State had subpoenaed Goree, the confidential informant, and requested a warrant for his arrest when he failed to appear. Under these circumstances, Goree was not a witness against Defendant. *See State v. Barton,* 79 N.M. 70, 439 P.2d 719 (1968) (an informer is neither a witness nor an accuser within the meaning of the confrontation clause). Defendant's right to confrontation did not arise, and therefore he was not denied this right.

Ineffective Assistance of Counsel.

Defendant also argues that he was denied effective assistance of counsel because counsel failed to move for a mistri-

al when Goree failed to testify. He notes that his counsel "specifically told the jury during the opening statement that the defense would depend upon being able to question" Goree.

Since there is no indication that defense counsel should have known the informant would not appear under the State's subpoena, we are not persuaded that he was denied effective assistance of counsel by defense counsel's comment during opening statement. Moreover, the failure to move for a mistrial could have been part of defense counsel's trial tactics, since Goree's testimony could have been more prejudicial to Defendant's case than not having him testify at all. *See State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986) (this court will not second-guess trial tactics or strategy). *See also State v. Powers,* 111 N.M. 10, 800 P.2d 1067 (Ct.App.1990).

The remaining grounds Defendant asserts for ineffective assistance of counsel include the fact that counsel introduced evidence of the nature of Defendant's prior convictions. He also argues that counsel provided ineffective assistance of counsel in failing to request a jury instruction on objective entrapment.

It is clear from counsel's questioning of Defendant that the evidence of prior convictions came in as a matter of trial strategy. *See Dean,* 105 N.M. at 8, 727 P.2d at 947. After Defendant admitted to having been sentenced for selling marijuana in 1983, Defendant stated that, despite those convictions, he did not sell drugs he had acquired on his own but only drugs that he acquired from Goree. Since the nature of Defendant's prior convictions was relevant and admissible to his propensity to commit the crime, which was at issue under the subjective entrapment defense on which the jury was instructed, it was reasonable for defense counsel to introduce this evidence to mitigate the damaging effect it might have. *See id.*

The question of a jury instruction on objective entrapment is more difficult. We note, however, that the only evidence to support a jury instruction on objective entrapment was evidence that Defendant was a mere conduit under *Baca.* Until *Sheetz* was decided, the scope of objective entrapment under *Baca* was unclear and, until it was clarified, defense counsel's position that Defendant was entitled to a motion for directed verdict was based on a reasonable interpretation of *Baca,* as was the trial court's decision denying the motion. After *Sheetz* was decided, it was clear that, on these facts, there was an issue of fact to be considered initially by the trial court and, in an appropriate case, to be decided by the jury.

It is Defendant's obligation to show both a lack of competence and prejudice. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). Absent such a showing, counsel is presumed competent. *Id.* On this record, Defendant has not carried his burden of showing a lack of competence. A showing that counsel has not anticipated a future development in the law is not sufficient. *See Sullivan v. Wainwright,* 695 F.2d 1306, 1309 (11th Cir.), *aff'd per curiam,* 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Foster v. State,* 748 S.W.2d 903, 910 (Mo.Ct.App. 1988). "The adequacy of counsel's performance must be determined by the law in effect at the time of ... trial." *James v. State,* 564 So.2d 1002, 1005 (Ala.Crim.App. 1989).

Conclusion.

We conditionally affirm Defendant's conviction, but we remand this case to the trial court for further proceedings. *See Debarry,* 86 N.M. at 744, 527 P.2d at 507. If the trial court believes Defendant's version of events concerning objective entrapment, the court shall enter an order vacating the conviction and dismissing the charge against Defendant. *See Sheetz,* 113 N.M. at 330, 825 P.2d at 620. If the trial court does not believe Defendant's evidence, Defendant's conviction is affirmed, and the judgment and sentence will stand.

IT IS SO ORDERED.

HARTZ and BLACK, JJ., concur.

849 P.2d 1079

State of New Mexico, ex rel. Human Services Department:

In the Matter of the TERMINATION Of the PARENTAL RIGHTS OF JAMES W.H., Respondent, with respect to Desiree and Norma H., Children,

James W.H., Appellant.

No. 14,031.

Court of Appeals of New Mexico.

Feb. 26, 1993.

James W.H., Los Lunas, pro se.

Simon Romo, Children's Court Atty., Albuquerque, for New Mexico Human Services Dept.

Jennifer Davis Hall, Albuquerque, Guardian Ad Litem.

Opinion

MINZNER, Chief Judge.

Father appeals the termination of his parental rights concerning his two daughters, Desiree and Norma. He is presently incarcerated for sexually abusing both girls. The children's mother has previously relinquished her parental rights. The sole issue Father raises on appeal is that his court-appointed trial attorney was ineffective because (1) he did not have the girls independently examined by experts to determine whether there was any physical evidence of sexual abuse, and (2) he did not arrange for Father to have a polygraph examination, which Father argues would have shown that he had not sexually abused Desiree and Norma. We assigned this case to the summary calendar and proposed to affirm on the basis that Father's claim did not appear to have any merit. Father has filed a pleading opposing the proposed disposition. A panel of this Court having reviewed the proposed disposition and Father's response, we now affirm.

■ In affirming, we determine that a parent is entitled to effective assistance of counsel in a termination of parental rights proceeding, and that such a claim may be reviewed on direct appeal. We conclude, however, that Father was not denied effective assistance of counsel.

■ Although many jurisdictions have addressed the issue of a parent's right to the effective assistance of counsel in a proceeding seeking to terminate parental rights, this is a matter of first impression in New Mexico. Because the relevant facts are undisputed and the application of legal principles to the facts of this case is clear, we conclude disposition on the summary calendar is appropriate. *Cf. Garrison v. Safeway Stores,* 102 N.M. 179, 180, 692 P.2d 1328, 1329 (Ct.App.) (disposition on summary calendar of appeal raising issue of first impression appropriate; both parties moved for summary disposition and filed memoranda in support), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1984). We believe the state of the law elsewhere is sufficiently settled and the facts of this case are such that it is appropriate to decide this appeal at this time. In addition, the child's guardian ad litem has moved this Court to expedite the appeal. For these reasons, the case will be resolved on the summary calendar, and for the reasons discussed below, we hold that in a termination of parental rights proceeding, a parent is entitled to effective assistance of counsel, and a claim that trial counsel was ineffective may be raised on direct appeal.

NMSA 1978, Section 32–1–55(E) (Repl.Pamp.1989), provides that in a termination of parental rights proceeding, the "court shall, upon request, appoint counsel for any parent who is unable to obtain counsel for financial reasons, or, if in the court's discretion, appointment of counsel is required in the interest of justice." In *State ex rel. Juvenile Department v. Geist,* 310 Or. 176, 796 P.2d 1193, 1200 (1990), the Oregon Supreme Court determined that an Oregon statute similar to Section 32–1–55(E) included a right to adequate assistance of counsel. Similarly, the Wisconsin Supreme Court recently concluded that "where the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel." *In re M.D.(S.),* 168 Wis.2d 996, 485 N.W.2d 52, 55 (1992). "It is axiomatic that the right to be represented by appointed counsel is worthless unless that right includes the right to *effective* counsel. Representation by counsel means more than just having a warm body with 'J.D.' credentials sitting next to you during the proceedings." *Id.,* 485 N.W.2d at 54 (footnote omitted). A number of intermediate appellate courts have reached the same conclusion. *See Powell v. Simon (In re Simon),* 171 Mich.App. 443, 431 N.W.2d 71, 74 (1988); *In re J.C., Jr.,* 781 S.W.2d 226, 228 (Mo.Ct.App.1989); *In re Erin G.,* 139 A.D.2d 737, 527 N.Y.S.2d 488, 490 (1988); *Buncombe County Dep't of Social Servs. v. Burks (In re Bishop),* 92 N.C.App. 662, 375 S.E.2d 676, 678 (1989); *Jones v. Lucas County Children Servs. Bd.,* 46 Ohio App.3d 85, 546 N.E.2d 471, 473 (1988). *But see Posner v. Dallas County Child Welfare Unit,*

784 S.W.2d 585, 588 (Tex.Ct.App.1990) (retained counsel). We also conclude that the legislature would not have statutorily guaranteed an indigent parent the right to counsel without also guaranteeing that the court-appointed counsel be effective. In *In re Ronald A.*, 110 N.M. 454, 455, 797 P.2d 243, 244 (1990), our Supreme Court realized that "[a] parent's right [to] custody is constitutionally protected." We hold that the right of a parent to counsel under Section 32-1-55(E) includes a right to competent counsel.

We also conclude that a parent's claim that he or she has been denied effective assistance of counsel in a termination proceeding is cognizable on direct appeal. *Cf. Burks,* 375 S.E.2d at 678 (if no remedy is provided for inadequate representation, then statutory right to counsel becomes empty formality). We agree with the Oregon Supreme Court that "[f]inality in the resolution of parental rights termination cases should be achieved as expeditiously as possible, consistent with due process." *Geist,* 796 P.2d at 1200. "[A]fter an adjudication terminating parental rights, appellate courts must not permit children to remain in the limbo of impermanent foster care (which we believe often will be detrimental to their best interests) any longer than is absolutely necessary." *Id.* at 1201. Therefore, we hold that Father's claim is cognizable in this direct appeal from the children's court decision terminating his parental rights. *Id.; see also In re Adoption of T.M.F.,* 392 Pa.Super. 598, 573 A.2d 1035, 1043 (1990).

That is not to say that the claim may not be raised in any other way nor that in an appropriate case a remand for an evidentiary hearing would not be appropriate. *Compare In re Stephen,* 401 Mass. 144, 514 N.E.2d 1087, 1091 (1987) (preferred method is motion for new trial) *with Geist,* 796 P.2d at 1204 n. 16 (describing proposed procedure at intermediate appellate court level involving motion for remand to children's court to develop record). We hold only that the claim may be raised on direct appeal; we need not decide whether it may be raised by post-trial motion as well. *See* SCRA 1986, 1-059 (Repl.1992). In this case, Father filed a timely notice of appeal and raised the issue in his docketing statement. In addition, after filing his notice of appeal but within thirty days after entry of judgment, he filed a motion for relief from judgment pursuant to SCRA 1986, Rule 1-060(B)(6) (Repl.1992), and a motion for a stay pending the resolution of his appeal. In both motions he raised the issue that he had been denied effective assistance of counsel appointed under statutory authority. In this case, there is no need to decide whether the claim Father makes could have been raised by post-trial motion and, if so, whether a motion for new trial under SCRA 1-059, which must be filed within ten days after judgment is entered, is preferable to a motion under SCRA 1-060(B). *See Archuleta v. New Mexico State Police,* 108 N.M. 543, 545, 775 P.2d 745, 747 (Ct. App.), *cert. denied,* 108 N.M. 384, 772 P.2d 1307 (1989) (comparing the two rules).

■ However, because in these cases there is a very important third party—the child—whose interests can be harmed needlessly and irrevocably if a termination proceeding must be reopened, we encourage the trial judge to inquire of a parent, who has been represented by appointed counsel, immediately after terminating parental rights whether that parent has any concerns about the representation provided by counsel. Under our holding that a parent represented by appointed counsel has a right to effective counsel, we conclude that the trial judge has an obligation to facilitate the resolution of the issue of whether that parent has received effective assistance of counsel by holding an evidentiary hearing if he or she expresses concerns that merit such a hearing. For this reason, we recommend an inquiry by the trial judge prior to entering a written judgment. We recognize that a parent may have a difficult time expressing his or her concerns at this time, but we believe that in the interests of the child or children who are involved, an inquiry is desirable, because if concerns are expressed, then an early resolution of those concerns would be appropriate.

Father has asked us to measure the assistance provided parents in termination hearings by the same ineffective-assistance-of-counsel standard developed in the criminal law context. *See State v. Talley,* 103 N.M. 33, 35–36, 702 P.2d 353, 355–56 (Ct.App.1985) (test is whether defense counsel exercised skill of a reasonably competent attorney). Our research indicates that, at the present time, that is the majority rule. *See In re V.M.R.,* 768 P.2d 1268, 1270 (Colo.Ct.App.1989); *In re R.G.,* 165 Ill.App.3d 112, 116 Ill.Dec. 69, 78–79, 518 N.E.2d 691, 700–01 (1988); *In re A.R.S.,* 480 N.W.2d 888, 891 (Iowa 1992); *In re Rushing,* 9 Kan.App.2d 541, 684 P.2d 445, 449 (1984); *In re Stephen,* 514 N.E.2d at 1091; *Powell v. Simon (In re Simon),* 431 N.W.2d at 74 (citing *In re Trowbridge,* 155 Mich.App. 785, 401 N.W.2d 65 (1986)); *In re Erin G.,* 527 N.Y.S.2d at 490; *Burks,* 375 S.E.2d at 678; *Jones,* 546 N.E.2d at 473; *In re M.D.(S.),* 485 N.W.2d at 55. There is, however, contrary authority. *See Geist,* 796 P.2d at 1201–03 (question is whether proceeding was "fundamentally fair," which includes inquiry into whether counsel exercised professional skill and judgment); *In re Adoption of T.M.F.,* 573 A.2d at 1040 (same); *In re J.C., Jr.,* 781 S.W.2d at 228 (question is whether counsel was effective in providing a meaningful hearing); *In re Moseley,* 34 Wash.App. 179, 660 P.2d 315, 318 (1983) (applying test). The contrary authority appears to provide lesser standards, but we are not certain that the result reached would have been different under the criminal law standard. We also note, however, the "inadvisability of mechanically applying criminal law standards to a civil juvenile proceeding where the resolution turns not on guilt or innocence, but on the best interest of the child." *In re J.P.B.,* 419 N.W.2d 387, 390 (Iowa 1988). Nevertheless, we need not decide in this case which standard to apply. Even under the criminal law standard advocated by Father, his claim lacks merit.

In New Mexico, the criminal law test for ineffective assistance of counsel is whether (1) counsel exercised the skill of a reasonably competent attorney, and (2) whether the defendant was prejudiced as a result. *State v. Stenz,* 109 N.M. 536, 537, 787 P.2d 455, 456 (Ct.App.), *cert. denied,* 109 N.M. 562, 787 P.2d 842 (1990) (citing *Talley,* 103 N.M. 33, 702 P.2d 353). The defendant has the burden of proving his or her counsel's incompetence and the prejudice resulting from that incompetence. *Id.* Applying the above standard to the present case, we conclude that Father's claims do not support a conclusion that he was prejudiced by ineffective assistance of counsel or merit remand.

Father contends that his attorney was ineffective because he did not have the girls independently examined by experts to determine whether there was any physical evidence of sexual abuse, and because he did not arrange for Father to have a polygraph examination, which Father argues would have shown that he had not sexually abused the girls. We need not decide whether Father's attorney's decisions not to pursue a polygraph examination and not to have the girls independently examined by a physician were reasonable tactical decisions, and therefore that counsel provided competent representation, because Father clearly was not prejudiced by these decisions.

Father is presently serving a prison sentence for sexually abusing Desiree and Norma. Moreover, Father stipulated in an earlier abuse and neglect proceeding that he had sexually abused his daughters. Therefore, counsel's decisions not to have the girls independently examined for physical signs of sexual abuse or to have Father take a polygraph test did not prejudice him.

Father's claim that he was denied effective assistance of counsel has no merit when reviewed under the standard applied in criminal cases. Therefore, the judgment terminating Father's parental rights is affirmed.

IT IS SO ORDERED.

DONNELLY and HARTZ, JJ., concur.

850 P.2d 319

The GARDNER ZEMKE COMPANY, a New Mexico corporation, Plaintiff–Appellant,

v.

DUNHAM BUSH, INC., a Connecticut corporation, Defendant–Appellee.

No. 20336.

Supreme Court of New Mexico.

March 22, 1993.

OPINION

FRANCHINI, Justice.

This case involves a contract for the sale of goods and accordingly the governing law is the Uniform Commercial Code—Sales, as adopted in New Mexico. NMSA 1978, §§ 55–2–101 to –2–725 (Orig.Pamp. & Cum.Supp.1992) (Article 2). In the course of our discussion, we will also refer to pertinent general definitions and principles of construction found in NMSA 1978, Sections 55–1–101 to –1–209 (Orig.Pamp. & Cum.Supp.1992). Section 55–2–103(4). The case presents us with our first opportunity to consider a classic "battle of the forms" scenario arising under Section 55–2–207. Appellant Gardner Zemke challenges the trial court's judgment that a Customer's Acknowledgment (Acknowledgment) sent by appellee manufacturer Dunham Bush, in response to a Gardner Zemke Purchase Order (Order), operated as a counteroffer, thereby providing controlling warranty terms under the contract formed by the parties. We find merit in appellants' argument and remand for the trial court's reconsideration.

I.

Acting as the general contractor on a Department of Energy (DOE) project, Gardner Zemke issued its Order to Dunham Bush for air-conditioning equipment, known as chillers, to be used in connection with the project. The Order contained a one-year manufacturer's warranty provision and the requirement that the chillers comply with specifications attached to the Order. Dunham Bush responded with its preprinted Acknowledgment containing extensive warranty disclaimers, a statement that the terms of the Acknowledgment controlled the parties' agreement, and a provision deeming silence to be acquiescence to the terms of the Acknowledgment.

The parties did not address the discrepancies in the forms exchanged and proceeded with the transaction. Dunham Bush delivered the chillers, and Gardner Zemke paid for them. Gardner Zemke alleges that the chillers provided did not comply with

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their specifications and that they incurred additional costs to install the nonconforming goods. Approximately five or six months after start up of the chillers, a DOE representative notified Gardner Zemke of problems with two of the chillers. In a series of letters, Gardner Zemke requested on-site warranty repairs. Through its manufacturer's representative, Dunham Bush offered to send its mechanic to the job site to inspect the chillers and absorb the cost of the service call only if problems discovered were within any component parts it provided. Further, Dunham Bush required that prior to the service call a purchase order be issued from the DOE, to be executed by Dunham Bush for payment for their services in the event their mechanic discovered problems not caused by manufacturing defects. Gardner Zemke rejected the proposal on the basis that the DOE had a warranty still in effect for the goods and would not issue a separate purchase order for warranty repairs.

Ultimately, the DOE hired an independent contractor to repair the two chillers. The DOE paid $24,245.00 for the repairs and withheld $20,000.00 from its contract with Gardner Zemke.[1] This breach of contract action then ensued, with Gardner Zemke alleging failure by Dunham Bush to provide equipment in accordance with the project plans and specifications and failure to provide warranty service.

II.

On cross-motions for summary judgment, the trial court granted partial summary judgment in favor of Dunham Bush, ruling that its Acknowledgment was a counteroffer to the Gardner Zemke Order and that the Acknowledgment's warranty limitations and disclaimers were controlling. Gardner Zemke filed an application for interlocutory appeal from the partial summary judgment in this Court, which was denied. A bench trial was held in December 1991, and the trial court again ruled the Acknowledgment was a counteroffer which Gardner Zemke accepted by silence and that under the warranty provisions of the Acknowledgment, Gardner Zemke was not entitled to damages.

On appeal, Gardner Zemke raises two issues: (1) the trial court erred as a matter of law in ruling that the Acknowledgment was a counteroffer; and (2) Gardner Zemke proved breach of contract and contract warranty, breach of code warranties, and damages.

III.

Karl N. Llewellyn, the principal draftsman of Article 2, described it as "[t]he heart of the Code." Karl N. Llewellyn, *Why We Need the Uniform Commercial Code,* 10 U.Fla.L.Rev. 367, 378 (1957). Section 2–207 is characterized by commentators as a "crucial section of Article 2" and an "iconoclastic Code section." *Bender's Uniform Commercial Code Service* (Vol. 3, Richard W. Duesenberg & Lawrence P. King, Sales & Bulk Transfers Under The Uniform Commercial Code) § 3.01 at 3–2 (1992). Recognizing its innovative purpose and complex structure Duesenberg and King further observe Section 2–207 "is one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory." *Id.* § 3.02 at 3–13.

Section 55–2–207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

1. The government has the right to set off the remaining $4,245.00 from any other Gardner Zemke government contract. *See Project Map, Inc. v. United States,* 203 Ct.Cl. 52, 486 F.2d 1375 (1973) (per curiam).

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act [this chapter].

Relying on Section 2–207(1), Gardner Zemke argues that the trial court erred in concluding that the Dunham Bush Acknowledgment was a counteroffer rather than an acceptance. Gardner Zemke asserts that even though the Acknowledgment contained terms different from or in addition to the terms of their Order, it did not make acceptance expressly conditional on assent to the different or additional terms and therefore should operate as an acceptance rather than a counteroffer.

At common law, the "mirror image" rule applied to the formation of contracts, and the terms of the acceptance had to exactly imitate or "mirror" the terms of the offer. *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th Cir.1979). If the accepting terms were different from or additional to those in the offer, the result was a counteroffer, not an acceptance. *Id.; see also Silva v. Noble*, 85 N.M. 677, 678–79, 515 P.2d 1281, 1282–83 (1973). Thus, from a common law perspective, the trial court's conclusion that the Dunham Bush Acknowledgment was a counteroffer was correct.

However, the drafters of the Code "intended to change the common law in an attempt to conform contract law to modern day business transactions." *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F.Supp. 546, 551 (D.Del.1981). As Professors White and Summers explain:

> The rigidity of the common law rule ignored the modern realities of commerce. Where preprinted forms are used to structure deals, they rarely mirror each other, yet the parties usually assume they have a binding contract and act accordingly. Section 2–207 rejects the common law mirror image rule and converts many common law counteroffers into acceptances under 2–207(1).

James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 1–3 at 29–30 (3d ed. 1988) (footnotes omitted).

On its face, Section 2–207(1) provides that a document responding to an offer and purporting to be an acceptance will be an acceptance, despite the presence of additional and different terms. Where merchants exchange preprinted forms and the essential contract terms agree, a contract is formed under Section 2–207(1). Duesenberg & King, § 3.04 at 3–47 to –49. A responding document will fall outside of the provisions of Section 2–207(1) and convey a counteroffer, only when its terms differ radically from the offer, or when "acceptance is expressly made conditional on assent to the additional or different terms"—whether a contract is formed under Section 2–207(1) here turns on the meaning given this phrase.

Dunham Bush argues that the language in its Acknowledgment makes acceptance expressly conditional on assent to the additional or different terms set forth in the Acknowledgment. The face of the Acknowledgment states:

> IT IS UNDERSTOOD THAT OUR ACCEPTANCE OF THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS ENUMERATED ON THE REVERSE SIDE HEREOF, IT BEING STRICTLY UNDERSTOOD THAT THESE TERMS AND CONDITIONS BECOME A PART OF THIS ORDER AND THE ACKNOWLEDGMENT THEREOF.

The following was among the terms and conditions on the reverse side of the Acknowledgment.

> Failure of the Buyer to object in writing within five (5) days of receipt thereof to

> Terms of Sale contained in the Seller's acceptance and/or acknowledgment, or other communications, shall be deemed an acceptance of such Terms of Sale by Buyer.

In support of its contention that the above language falls within the "expressly conditional" provision of Section 2–207, Dunham Bush urges that we adopt the view taken by the First Circuit in *Roto–Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir.1962). There, Roto–Lith sent an order for goods to Bartlett, which responded with an acknowledgment containing warranty disclaimers, a statement that the acknowledgment reflected the terms of the sale, and a provision that if the terms were unacceptable Roto–Lith should notify Bartlett at once. *Id.* at 498–99. Roto–Lith did not protest the terms of the acknowledgment and accepted and paid for the goods. The court held the Bartlett acknowledgment was a counteroffer that became binding on Roto–Lith with its acceptance of the goods, reasoning that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror" falls within the "expressly conditional" language of 2–207(1). *Id.* at 500.

Dunham Bush suggests that this Court has demonstrated alliance with the principles of *Roto–Lith* in *Fratello v. Socorro Electric Cooperative, Inc.*, 107 N.M. 378, 758 P.2d 792 (1988). *Fratello* involved the terms of a settlement agreement in which one party sent the other party a proposed stipulated order containing an additional term. In the context of the common law, we cited *Roto–Lith* in support of the proposition that the additional term made the proposed stipulation a counteroffer. *Fratello*, 107 N.M. at 381, 758 P.2d at 795.

We have never adopted *Roto–Lith* in the context of the Code and decline to do so now. While ostensibly interpreting Section 2–207(1), the First Circuit's analysis imposes the common law doctrine of offer and acceptance on language designed to avoid the common law result. *Roto–Lith* has been almost uniformly criticized by the courts and commentators as an aberration in Article 2 jurisprudence. *Leonard Pevar Co.*, 524 F.Supp. at 551 (and cases cited therein); Duesenberg & King, § 3.05[1] at 3–61 to –62; White & Summers, § 1–3 at 36–37.

Mindful of the purpose of Section 2–207 and the spirit of Article 2, we find the better approach suggested in *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir.1972). In *Dorton*, the Sixth Circuit considered terms in acknowledgment forms sent by Collins & Aikman similar to the terms in the Dunham Bush Acknowledgment. The Collins & Aikman acknowledgments provided that acceptance of orders was subject to the terms and conditions of their form, together with at least seven methods in which a buyer might acquiesce to their terms, including receipt and retention of their form for ten days without objection. *Id.* at 1167–68.

Concentrating its analysis on the concept of the offeror's "assent," the Court reasoned that it was not enough to make acceptance expressly conditional on additional or different terms; instead, the expressly conditional nature of the acceptance must be predicated on the offeror's "assent" to those terms. *Id.* at 1168. The Court concluded that the "expressly conditional" provision of Section 2–207(1) "was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein." *Id.* This approach has been widely accepted. *Diatom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1576–77 (10th Cir.1984); *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 588 F.Supp. 1280, 1288 (E.D.Pa. 1984); *Idaho Power Co.*, 596 F.2d at 926–27.

We agree with the court in *Dorton* that the inquiry focuses on whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offerors "assent" to additional or different terms. An exchange of forms containing identical dickered terms, such as the identity, price, and quantity of goods, and conflicting undickered boilerplate provisions,

such as warranty terms and a provision making the bargain subject to the terms and conditions of the offeree's document, however worded, will not propel the transaction into the "expressly conditional" language of Section 2–207(1) and confer the status of counteroffer on the responsive document.

While *Dorton* articulates a laudable rule, it fails to provide a means for the determination of when a responsive document becomes a counteroffer. We adopt the rule in *Dorton* and add that whether an acceptance is made expressly conditional on assent to different or additional terms is dependent on the commercial context of the transaction. Official Comment 2 to Section 55–2–207 suggests that "[u]nder this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract." [2] While the comment applies broadly and envisions recognition of contracts formed under a variety of circumstances, it guides us to application of the concept of "commercial understanding" to the question of formation. *See* 2 William D. Hawkland, *Uniform Commercial Code Series* § 2–207:02 at 160 (1992) ("The basic question is whether, in commercial understanding, the proposed deal has been closed.").

Discerning whether "commercial understanding" dictates the existence of a contract requires consideration of the objective manifestations of the parties' understanding of the bargain. It requires consideration of the parties' activities and interaction during the making of the bargain; and when available, relevant evidence of course of performance, Section 55–2–208; and course of dealing and usage of the trade, Section 55–1–205. The question guiding the inquiry should be whether the offeror could reasonably believe that in the context of the commercial setting in which the parties were acting, a contract had been formed. This determination requires a very fact specific inquiry. *See* John E. Murray, Jr., *Section 2–207 Of The Uniform Commercial Code: Another Word About Incipient Unconscionability,* 39 U.Pitt.L.Rev., 597, 632–34 (1978) (discussing *Dorton* and identifying the commercial understanding of the reasonable buyer as the "critical inquiry").

Our analysis does not yield an iron clad rule conducive to perfunctory application. However, it does remain true to the spirit of Article 2, as it calls the trial court to consider the commercial setting of each transaction and the reasonable expectations and beliefs of the parties acting in that setting. *Id.* at 600; § 55–1–102(2)(b) (stating one purpose of the act is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties").

The trial court's treatment of this issue did not encompass the scope of the inquiry we envision. We will not attempt to make the factual determination necessary to characterize this transaction on the record before us. Not satisfied that the trial court adequately considered all of the relevant factors in determining that the Dunham Bush Acknowledgment functioned as a counteroffer, we remand for reconsideration of the question.

In the event the trial court concludes that the Dunham Bush Acknowledgment constituted an acceptance, it will face the question of which terms will control in the exchange of forms. In the interest of judicial economy, and because this determination is a question of law, we proceed with our analysis.

2. While we recognize that the Official Comments do not carry the force of law, they are a part of the official text of the Code adopted by our legislature and we do look to them for guidance. *Reardon v. Alsup (In Re Anthony),* 114 N.M. 95, 98 n. 1, 835 P.2d 811, 814 n. 1 (1992). As Professor Llewellyn explained, the Comments were:

> prepared, as was the Code itself, under the joint auspices of the Conference of Commissioners on Uniform State Laws and the American Law Institute. These comments are very useful in presenting something of the background and purposes of the sections, and of the way in which the details and policies build into a whole. In these aspects they greatly aid understanding and construction.

Karl N. Llewellyn, *Why We Need the Uniform Commercial Code,* 10 U.Fla.L.Rev. 367, 375 (1957).

IV.

The Gardner Zemke Order provides that the "[m]anufacturer shall replace or repair all parts found to be defective during initial year of use at no additional cost." Because the Order does not include any warranty terms, Article 2 express and implied warranties arise by operation of law. Section 55–2–313 (express warranties), § 55–2–314 (implied warranty of merchantability), § 55–2–315 (implied warranty of fitness for a particular purpose). The Dunham Bush Acknowledgment contains the following warranty terms.

> WARRANTY: We agree that the apparatus manufactured by the Seller will be free from defects in material and workmanship for a period of one year under normal use and service and when properly installed: and our obligation under this agreement is limited solely to repair or replacement at our option, at our factories, of any part or parts thereof which shall within one year from date of original installation or 18 months from date of shipment from factory to the original purchaser, whichever date may first occur be returned to us with transportation charges prepaid which our examination shall disclose to our satisfaction to have been defective. THIS AGREEMENT TO REPAIR OR REPLACE DEFECTIVE PARTS IS EXPRESSLY IN LIEU OF AND IS HEREBY DISCLAIMER OF ALL OTHER EXPRESS WARRANTIES, AND IS IN LIEU OF AND IN DISCLAIMER AND EXCLUSION OF ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ALL OTHER IMPLIED WARRANTIES, IN LAW OR EQUITY, AND OF ALL OTHER OBLIGATIONS OR LIABILITIES ON OUR PART. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION HEREOF.... Our obligation to repair or replace shall not apply to any apparatus which shall have been repaired or altered outside our factory in any way....

The one proposition on which most courts and commentators agree at this point in the construction of the statute is that Section 2–207(3) applies only if a contract is not found under Section 2–207(1). *Dorton*, 453 F.2d at 1166; Duesenberg & King, § 3.03[1] at 3–40; 2 Hawkland, § 2–207:04 at 178–79; White & Summers, § 1–3 at 35. However, there are courts that disagree even with this proposition. *See Westinghouse Elec. Corp. v. Nielsons, Inc.*, 647 F.Supp. 896 (D.Colo.1986) (dealing with different terms, finding a contract under 2–207(1) and proceeding to apply 2–207(2) and 2–207(3)).

The language of the statute makes it clear that "additional" terms are subject to the provisions of Section 2–207(2). However, a continuing controversy rages among courts and commentators concerning the treatment of "different" terms in a Section 2–207 analysis. While Section 2–207(1) refers to both "additional or different" terms, Section 2–207(2) refers only to "additional" terms. The omission of the word "different" from Section 55–2–207(2) gives rise to the questions of whether "different" terms are to be dealt with under the provisions of Section 2–207(2), and if not, how they are to be treated. That the terms in the Acknowledgment are "different" rather than "additional" guides the remainder of our inquiry and requires that we join the fray. Initially, we briefly survey the critical and judicial approaches to the problem posed by "different" terms.

One view is that, in spite of the omission, "different" terms are to be analyzed under Section 2–207(2). 2 Hawkland, § 2–207:03 at 168. The foundation for this position is found in Comment 3, which provides "[w]hether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2)." Armed with this statement in Comment 3, proponents point to the ambiguity in the distinction between "different" and "additional" terms and argue that the distinction serves no clear purpose. *Steiner v. Mobile Oil Corp.*, 20 Cal.3d 90, 141 Cal. Rptr. 157, 165–66 n. 5, 569 P.2d 751, 759–60 n. 5 (1977); *Boese–Hilburn Co. v. Dean Machinery Co.*, 616 S.W.2d 520, 527 (Mo.

Ct.App.1981). Following this rationale in this case, and relying on the observation in Comment 4 that a clause negating implied warranties would "materially alter" the contract, the Dunham Bush warranty terms would not become a part of the contract, and the Gardner Zemke warranty provision, together with the Article 2 warranties would control. § 55–2–207(2)(b).

Another approach is suggested by Duesenberg and King who comment that the ambiguity found in the treatment of "different" and "additional" terms is more judicially created than statutorily supported. While conceding that Comment 3 "contributes to the confusion," they also admonish that "the Official Comments do not happen to be the statute." Duesenberg & King, § 3.05 at 3–52. Observing that "the drafters knew what they were doing, and that they did not sloppily fail to include the term 'different' when drafting subsection (2)," Duesenberg and King postulate that a "different" term in a responsive document operating as an acceptance can never become a part of the parties' contract under the plain language of the statute. *Id.* § 3.03[1] at 3–38.

The reasoning supporting this position is that once an offeror addresses a subject it implicitly objects to variance of that subject by the offeree, thereby preventing the "different" term from becoming a part of the contract by prior objection and obviating the need to refer to "different" terms in Section 55–2–207(2). *Id.* § 3.05[1] at 3–77; *Air Prods. & Chems. Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 206 N.W.2d 414, 423–25 (1973). Professor Summers lends support to this position. White & Summers, § 1–3 at 34. Although indulging a different analysis, following this view in the case before us creates a result identical to that flowing from application of the provisions of Section 2–207(2) as discussed above—the Dunham Bush warranty provisions fall out, and the stated Gardner Zemke and Article 2 warranty provisions apply.

Yet a third analysis arises from Comment 6, which in pertinent part states:

> Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in Subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act, including Subsection (2).

The import of Comment 6 is that "different" terms cancel each other out and that existing applicable code provisions stand in their place. The obvious flaws in Comment 6 are the use of the words "confirming forms," suggesting the Comment applies only to variant confirmation forms and not variant offer and acceptance forms, and the reference to Subsection 55–2–207(2)—arguably dealing only with "additional" terms—in the context of "different" terms. Of course, Duesenberg and King remind us that Comment 6 "is only a comment, and a poorly drawn one at that." Duesenberg & King, § 3.05[1] at 3–79.

The analysis arising from Comment 6, however, has found acceptance in numerous jurisdictions including the Tenth Circuit. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578–79 (10th Cir.1984). Following a discussion similar to the one we have just indulged, the court found this the preferable approach. *Id.* at 1579; *accord Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 503–04, 567 P.2d 1246, 1254–55 (1977), *appeal dismissed and cert. denied*, 434 U.S. 1056, 98 S.Ct. 1225, 55 L.Ed.2d 757 (1978). Professor White also finds merit in this analysis. White & Summers, § 1–3 at 33–35. Application of this approach here cancels out the parties' conflicting warranty terms and allows the warranty provisions of Article 2 to control.

We are unable to find comfort or refuge in concluding that any one of the three paths drawn through the contours of Section 2–207 is more consistent with or true to the language of the statute. We do

find that the analysis relying on Comment 6 is the most consistent with the purpose and spirit of the Code in general and Article 2 in particular. We are mindful that the overriding goal of Article 2 is to discern the bargain struck by the contracting parties. However, there are times where the conduct of the parties makes realizing that goal impossible. In such cases, we find guidance in the Code's commitment to fairness, Section 55–1–102(3); good faith, Sections 55–1–203 & –2–103(1)(b); and conscionable conduct, Section 55–2–302.

While Section 2–207 was designed to avoid the common law result that gave the advantage to the party sending the last form, we cannot conclude that the statute was intended to shift that advantage to the party sending the first form. Such a result will generally follow from the first two analyses discussed. We adopt the third analysis as the most even-handed resolution of a difficult problem. We are also aware that under this analysis even though the conflicting terms cancel out, the Code may provide a term similar to one rejected. We agree with Professor White that "[a]t least a term so supplied has the merit of being a term that the draftsmen considered fair." White & Summers, § 1–3 at 35.

Due to our disposition of this case, we do not address the second issue raised by Gardner Zemke. On remand, should the trial court conclude a contract was formed under Section 2–207(1), the conflicting warranty provisions in the parties' forms will cancel out, and the warranty provisions of Article 2 will control.

IT IS SO ORDERED.

BACA, J., and PATRICIO M. SERNA, District Judge (sitting by designation).

850 P.2d 972

Ben RUIZ and Margaret Ruiz, his wife, Third-Party Plaintiffs/Appellees

v.

Annie N. GARCIA, Third-Party Defendant/Appellant.

Annie N. GARCIA, Fourth-Party Plaintiff/Appellant,

v.

NEW MEXICO TITLE CO., A New Mexico Corp., Fourth-Party Defendant/Appellee.

No. 19624.

Supreme Court of New Mexico.

Feb. 10, 1993.

Rehearing Denied April 12, 1993.

Thomas A. Tabet, Albuquerque, for appellant Garcia.

Moses, Dunn, Beckley, Espinosa & Tuthill, Joseph L. Werntz, Albuquerque, for appellee Ruiz.

Oldaker, Oldaker & Norris, Gene D. Reneau, Albuquerque, for appellee New Mexico Title Co.

OPINION

FROST, Justice.

This matter comes before us on appeal from two Orders granting two Motions for Summary Judgment in favor of the Fourth-Party Defendant/Appellee New Mexico Title Company ("New Mexico Title") against the Fourth-Party Plaintiff/Appellant, Annie N. Garcia ("Garcia"). All of the facts recited below are undisputed. Because no genuine issue of material fact is in dispute and because New Mexico Title is entitled to judgment as a matter of law on the first and third counts, we affirm the District Court as to those issues. We reverse the District Court's decision, however, on the negligence count.

FACTS

In July 1987, Garcia as seller entered into a contract with Ben and Margaret Ruiz (the "Ruizes") as buyers of certain real estate. After Garcia and the Ruizes executed a document entitled "Purchase Agreement," Garcia engaged New Mexico Title as closing agent to finalize the transaction. Garcia also engaged New Mexico Title to issue a title insurance policy to the Ruizes. Lawyers Title Insurance Corporation, as underwriter, issued an Owner's Policy of Title Insurance through its agent,

New Mexico Title. The Ruizes were the named insureds under the insurance policy.

After Garcia conveyed the property to the Ruizes, the Ruizes discovered that the State of New Mexico previously had condemned a portion of the land and that accordingly there was a cloud on the title to the property. This lawsuit followed.

PROCEDURAL HISTORY

Beatriz Rivera, as assignee of the rights of Garcia, initiated this action against the Ruizes to collect the amount due from the Ruizes under a promissory note and mortgage that were executed for the sale of the property.[1] The Ruizes filed a Third-Party Complaint against Garcia, the details of which are not relevant to this appeal. The Ruizes also made a claim against their insurer, Lawyers Title, which they settled. In a realignment of parties, Garcia was substituted for Rivera as party plaintiff.

Garcia then filed a Fourth-Party Complaint against New Mexico Title, alleging two counts: negligent provision of title services and breach of contract. In an Amended Fourth-Party Complaint, Garcia also alleged that New Mexico Title was guilty of negligent misrepresentation. It is the District Court's award of summary judgment to New Mexico Title on these three issues that is the subject of this appeal.

THE ISSUES

In her Fourth-Party Complaint, Garcia alleged that as a proximate result of the failure of New Mexico Title to discover the defects in the title to the property, she suffered damages. Garcia also alleged that the failure to find the defect from the title search constituted breach of contract by New Mexico Title. On the other hand, New Mexico Title claimed that it owed no duty to Garcia to conduct a title search, and it denied any contractual relationship with her. Instead, New Mexico Title alleged that its only connection with Garcia in the transaction was that of a closing agent.

New Mexico Title moved for summary judgment by way of stipulated documents, affidavits, and party admissions. The District Court granted summary judgment, dismissing with prejudice any claim by Garcia based on negligence or breach of contract. The court granted leave to Garcia, however, to file an amended complaint to plead negligent misrepresentation.

In her Amended Fourth-Party Complaint, Garcia alleged that New Mexico Title was guilty of misrepresenting to her at closing the state of the title to the property. New Mexico Title made a prima facie showing that it was entitled to summary judgment. It argued that it did not undertake any function as an abstractor to search the title for Garcia, and it denied that it owed Garcia a duty to disclose the condition of the title. New Mexico Title claimed that it was responsible only for issuing an insurance policy to the Ruizes and for performing administrative functions at the closing. It also claimed that it made no representations to Garcia regarding the title, that Garcia did not justifiably rely upon any information from New Mexico Title, and that she suffered no damages. The trial court granted summary judgment on Garcia's claim of negligent misrepresentation, and she filed her notice of appeal.

Standard of Review

Notwithstanding New Mexico Title's assertion that Garcia raised the breach of contract issue for the first time on appeal, the District Court addressed the issue in its first order granting summary judgment. Accordingly, we will address the merits of each of the issues. We do so in the aspect most favorable to support a trial on the issues because the purpose of summary judgment is not to preclude a trial on the merits if a triable issue of fact exists. *See Kelly v. St. Vincent Hosp.*, 102 N.M. 201, 204, 692 P.2d 1350, 1353 (Ct.App.1984). The burden rests upon the moving party to

1. Other parties were named as defendants in the initial complaint, but they were dismissed and are not parties to this appeal.

sustain the award of summary judgment. *Id.*

Breach of Contract

It is undisputed that the only written contracts in existence here were the contract of title insurance issued to the Ruizes and the Purchase Agreement between Garcia and the Ruizes. The title insurance policy insured the Ruizes against the unmarketability of and any defects in the title to the property that they bought. The Purchase Agreement required Garcia to deliver a warranty deed conveying merchantable title to the Ruizes. It did not require New Mexico Title to deliver merchantable title to the Ruizes for Garcia. Rather, New Mexico Title issued a contract of insurance through Lawyers Title, which insured the Ruizes against any defects in the title to the property.

Garcia admitted that she neither requested nor ordered from New Mexico Title a title search, a title commitment, or a title binder. In fact, both Garcia and the Ruizes advised New Mexico Title that they did not need a title binder or commitment because they were in a hurry to close the transaction. Garcia, therefore, had no contract, express or implied, with New Mexico Title except for its engagement as a closing agent.

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the burden shifts to the nonmoving party to demonstrate that a genuine, triable issue of fact exists. *Koenig v. Perez,* 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). At this stage, the nonmoving party may not rely upon its pleadings, but must make an affirmative showing that a material issue of fact is in dispute. *Oschwald v. Christie,* 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980).

To support her position, Garcia offered only conclusory statements that were at best a restatement of the allegations in her complaint. Garcia made no showing that New Mexico Title undertook anything more than the role it performed as closing agent, and she admitted that it had no obligation to make a title search for her under the terms of the title policy. After an opportunity to rebut the moving party's factual showing, when the material facts are not in dispute and only the legal effect of the undisputed facts remains to be decided, summary judgment is the proper disposition of the issue. *Koenig,* 104 N.M. at 666, 726 P.2d at 343.

Negligence

Garcia claims further that the District Court erred in holding that because New Mexico Title had no contractual duty to make a title search, no duty whatsoever existed. Garcia argues that because New Mexico Title, in fact, performed a title search, it had an implied duty to exercise reasonable care in conducting the search, the breach of which (failing to discover the defect in title) gave Garcia a cause of action. New Mexico Title asserts that under well-settled case law, a title company owes no duty to the seller in a transaction like this one. New Mexico Title is correct in its assertion that there is no duty under the case law, but we conclude that one exists under NMSA 1978, Section 59A–30–11(A) (Repl.Pamp.1992).[2]

The existence of a tort duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law. *Calkins v. Cox Estates,* 110 N.M. 59, 62, 792 P.2d 36, 39 (1990). Because we find that a statutory duty exists, a review of the relevant case law is necessary in order to place our ruling in proper context.

In *Horn v. Lawyers Title Insurance Corp.,* 89 N.M. 709, 557 P.2d 206 (1976), a buyer sued the title company for breach of contract for failing to report on items in the land records that were specifically ex-

2. Section 59A–30–11(A) states:

> No title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title using an abstract plant meeting the requirements of Section 59A–12–13 NMSA 1978 and has caused to be made a determination of insurability of title in accordance with sound underwriting practices.

cluded under the title insurance policy. We held that if a title company had no duty to conduct a title search, any search that it performed anyway was solely for its own use and protection. *Id.* at 711, 557 P.2d at 208. Accordingly, we concluded that no breach of contract existed when the title company had not contracted to perform a search for the contested items.

In *Devlin v. Bowden,* 97 N.M. 547, 641 P.2d 1094 (Ct.App.1982), in which an insured sued the title company for tortiously conducting a title search, the Court of Appeals, citing *Horn,* held that if no contractual duty existed to search the records for matters excluded from coverage under the insurance contract, then no tort duty existed either. In reaching this result, the Court of Appeals quite correctly reasoned that there could be no negligence for failing to perform an act when no duty to perform the act existed. *Id.* at 553, 641 P.2d at 1100.

In *Roscoe v. U.S. Life Title Insurance Co.,* 105 N.M. 589, 734 P.2d 1272 (1987), in which the buyer sued the title company and its agent for negligence, we held that the defendants were not liable for breaching a duty by failing to search the records for matters expressly excluded from coverage under the insurance policy. *Id.* at 591, 734 P.2d at 1274. Citing *Horn* and *Devlin,* we stated in *Roscoe* that we would not find a duty when none was undertaken by the title company or its agent. *See id.*

Recently, however, we decided *Cottonwood Enterprises v. McAlpin,* 111 N.M. 793, 810 P.2d 812 (1991), in which an insured buyer sued the title company's agent for negligently performing title services. *Id.* at 795, 810 P.2d at 814. The plaintiff buyer was insured by a title policy procured by the defendant title insurance agent on behalf of the insurer. The plaintiff alleged that the defendant negligently performed the title search and claimed that it suffered damages as a proximate result of the defendant's breach. We held that a title insurance agent owed a duty of reasonable care to the buyer/insured in conducting a title search arising out of the provision of title insurance as prescribed by NMSA 1978, Section 59A–30–11(A) (Repl.Pamp.1988). *Id.* at 796, 810 P.2d at 815. Thus, we concluded that the defendant was subject to the standard of care defined in the statute.

New Mexico Title argues that our opinion in *Cottonwood* is inapposite here. It concedes that in *Cottonwood,* there was a statutory basis for the duty that we concluded was independent from the title insurance contract and its attendant obligations. *See id.* New Mexico Title claims, however, that the basis for such a statutory duty is not present here because New Mexico Title did not issue a title insurance policy to Garcia. In addition, it asserts that the cause of action in *Cottonwood* inured to the benefit of the buyer of the property who was also the insured under the policy, not to the seller.

The purpose and legislative intent of the New Mexico Title Insurance Law, however, is to "provide for the protection of *consumers and purchasers* of title insurance policies...." Section 59A–30–2(B) (emphasis added). Our opinion in *Cottonwood* dealt with the title company's duty to a buyer of property. Generally, it is the buyer of property who is the insured, and it is the seller of property who purchases the title insurance policy. We construe the statute as extending the same protection to sellers of property ("purchasers of title insurance") that we extended to buyers of property ("consumers") in *Cottonwood.* So, even though New Mexico Title had no express contractual duty to perform a title search for Garcia and did not undertake to act in any capacity for Garcia other than as a closing agent in a real estate transaction, it nevertheless had a statutory duty to Garcia independent of any contract. Thus, we reject New Mexico Title's argument, based upon *Horn,* 89 N.M. at 711, 557 P.2d at 208, that if it had no contractual obligation to conduct a search for Garcia, any search undertaken was for its own benefit.[3] We

3. We do not overrule *Horn* because the plaintiff's claim in that case was breach of contract, and we found that there was no contract to perform a search for the contested items. *Horn,*

hold that New Mexico Title owed a duty of reasonable care to Garcia under Section 59A-30-11(A) and that its failure to discover a defect of title is actionable for her. *See Cottonwood,* 111 N.M. at 796, 810 P.2d at 815.

Furthermore, in *Cano v. Lovato,* 105 N.M. 522, 734 P.2d 762 (Ct.App.), *cert. denied,* 104 N.M. 246, 719 P.2d 1267 (1986), *cert. quashed,* 105 N.M. 438, 733 P.2d 1321 (1987), the Court of Appeals found that New Mexico Title had a fiduciary duty to communicate both to the buyer and the seller information that it acquired from its title search that it knew could affect the outcome of the real estate transaction. *Id.* 105 N.M. at 534, 734 P.2d at 774. New Mexico Title appears to have undertaken the same duties in *Cano* that it undertook here. The factor distinguishing *Cano* from this case, however, is that New Mexico Title twice discovered defects in the title to the property from its search in *Cano* which it knew could affect the status of the property being closed, but it failed to convey that knowledge to the parties. *Id.* at 535, 734 P.2d at 775. Here, Garcia alleged that New Mexico Title failed to discover defects in the title, not that it failed to communicate information that it discovered. The duty enunciated in *Cano* is to communicate relevant information from a title search that the title insurance agent should have known would alter the outcome of the real estate transaction. *Id.* Accordingly, our opinion today is not inconsistent with *Cano.*

Negligent Misrepresentation

In addition to finding that New Mexico Title undertook no obligation and thus had no duty to Garcia regarding the condition of the title, the District Court found that New Mexico Title did not represent the condition of the title to Garcia. The court, therefore, dismissed her claim for negligent misrepresentation.

Garcia claims that because New Mexico Title assumed a duty to conduct the closing under the Purchase Agreement, it had an obligation to disclose to Garcia that merchantable title could not be conveyed to the Ruizes. Because New Mexico Title failed to disclose the defects, Garcia argues, its role in the closing transaction amounted to an inadvertent misrepresentation to her that title to the property was good.

New Mexico Title secured an insurance policy that would pay the Ruizes for any losses to them as a result of a defect in the title to the property. A title insurance policy, however, is not a report from the land records, nor does it purport to represent that information. A title insurance contract only obligates the insurer to indemnify the insured for losses sustained when one of the risks insured against occurs. Thus, a title policy does not constitute a representation that the contingency insured against will not occur. *See Lawrence v. Chicago Title Ins. Co.,* 192 Cal.App.3d 70, 237 Cal.Rptr. 264, 266 (Ct.App.1987). Accordingly, there can be no cause of action for negligent misrepresentation regarding a title search by the title company based upon the title policy alone. *See id.*

The law of negligent misrepresentation is governed by negligence principles. *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank,* 108 N.M. 84, 88, 766 P.2d 928, 932 (Ct.App.1988). In New Mexico, to recover under a claim of negligent misrepresentation, also referred to as negligence by words, the offending party must have breached a duty of disclosure owed to the injured party, the injured party must have had a right to rely on the misinformation, and it must have sustained damages. *Stotlar v. Hester,* 92 N.M. 26, 28, 582 P.2d 403, 405 (Ct.App.), *cert. denied,* 92 N.M. 180,

89 N.M. at 711, 557 P.2d at 208. The enactment of Section 59A-30-11(A) in 1985 and our opinion in *Cottonwood* do modify *Horn* insofar as it held that a title company is under no duty to perform a title search unless contractually obligated to do so.

Our holding in *Cottonwood* regarding the statutory duty to perform a title search whenever issuing a title policy, however, overrules *Devlin* and *Roscoe* insofar as they interpreted *Horn* as holding that no tort duty existed in the absence of a contractual duty to search the records under the title insurance contract. *See Roscoe,* 105 N.M. at 591, 734 P.2d at 1274; *Devlin,* 97 N.M. at 553, 641 P.2d at 1100.

585 P.2d 324 (1978). Thus, if New Mexico Title breached a duty of disclosure that it owed to Garcia independent of the insurance contract, it might be liable to her for negligent misrepresentation.

As we stated above, New Mexico Title owed a duty of reasonable care to Garcia under Section 59A-30-11(A), but not a duty to disclose information. In addition, Garcia had no cause of action for negligent misrepresentation because she could not satisfy the element of justifiable reliance as a matter of law. Garcia admitted that she was aware that her property had been condemned and that she received notice of the condemnation proceedings. Garcia's knowledge, therefore, foreclosed any justifiable reliance upon the title search to apprise her of information about which she was already aware. *See Kenny v. Safeco Title Ins. Co.*, 113 Cal.App.3d 557, 169 Cal. Rptr. 808, 810 (Ct.App.1980); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697, 700 (1985).

CONCLUSION

From the facts in the record below, the District Court correctly found that New Mexico Title owed no contractual duty to Garcia and that she failed to establish a cause of action for negligent misrepresentation. Because all material facts are undisputed and no triable issue of fact exists, we affirm the District Court's award of summary judgment on these two issues.

The District Court erred, however, in dismissing Garcia's negligence action. New Mexico Title owed Garcia a duty under Section 59A-30-11(A) that existed outside of their contractual relationship. Garcia, therefore, has a cause of action for the violation of that statutory duty as enunciated in *Cottonwood*. Accordingly, this cause is remanded to the District Court for proceedings consistent with this opinion.

IT IS SO ORDERED.

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

850 P.2d 978

Harley H. SWINK, Trustee, Plaintiff-Appellant,

v.

Valetta Ruth FINGADO, Defendant-Appellee.

No. 20364.

Supreme Court of New Mexico.

March 2, 1993.

Leslie C. King, III, James R. Jurgens, Santa Fe, for plaintiff-appellant.

Robert Waldman, J. Bart Wright, Albuquerque, for defendant-appellee.

OPINION

MONTGOMERY, Justice.

The United States Court of Appeals for the Tenth Circuit certified to this Court the following question of New Mexico law: [1]

> Do the 1984 amendments to § 40–3–8 N.M.S.A.1978 (as enacted), apply retroactively so as to convert property acquired by husband and wife as joint tenants prior to the passage of the amendments, and thus originally held as separate property, into community property which would be included in the bankruptcy estate?

Swink v. Sunwest Bank (In re Fingado), 955 F.2d 31, 32 (10th Cir.1992).

The 1984 amendments referred to in the question were contained in an act passed by the legislature that year, 1984 N.M.Laws, Chapter 122, entitled "AN ACT RELATING TO PROPERTY; AMENDING CERTAIN SECTIONS OF THE NMSA 1978 TO CLARIFY KINDS OF COMMUNITY PROPERTY; DECLARING AN EMERGENCY." Section 1 of the act ("the 1984 Act") amended NMSA 1978, Subsection 40–3–8(A) (Repl.Pamp.1983), to delete from the definition of "separate property" the phrase "each spouse's undivided interest in property owned in whole or in part by the spouses as co-tenants in joint tenancy or as co-tenants in tenancy in

1. Pursuant to NMSA 1978, § 34–2–8 (Repl.Pamp.1990), and SCRA 1986, 12–607 (Supreme Court may answer questions certified by certain federal courts if questions involve propositions of New Mexico law determinative of cause before certifying court and there are no controlling precedents from New Mexico appellate courts).

common." Section 1 of the 1984 Act also amended Subsection 40-3-8(B) by adding the following sentence to the definition of "community property" in that subsection: "Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise will be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section." NMSA 1978, § 40-3-8(B) (Repl.Pamp.1989).

Section 2 of the 1984 Act amended one of the sections of Article 2 of the Probate Code, dealing with the subject of intestate succession and wills. That section, NMSA 1978, Section 45-2-804 (Repl.Pamp.1989), is headed "Death of spouse; community property" and provides that upon the death of either spouse one-half of the community property belongs to the surviving spouse and the other half is subject to the testamentary disposition of the decedent. The 1984 amendment added this clause: "except that *community property that is joint tenancy property* under Subsection B of Section 40-3-8 NMSA 1978 shall not be subject to the testamentary disposition of the decedent." Subsection 45-2-804(A) (emphasis added).

The effect of the 1984 amendments, then, was to make clear that marital property which is not separate property under Subsection 40-3-8(A), even though acquired by the spouses through an instrument designating them as joint tenants, is presumed to be held as community property and that such property may be *both* community property *and* joint tenancy property, in which case it is not subject to the testamentary disposition of either spouse. In other words, under the 1984 amendments the right of survivorship—the principal attribute of joint tenancy property, *Trimble v. St. Joseph's Hospital (In re Trimble's Estate),* 57 N.M. 51, 54, 253 P.2d 805, 807 (1953)—continues to inhere in community property that is joint tenancy property. *See* § 40-3-8(B); *see also* § 40-3-8(D) (legal incidents of holding property as joint tenants, including the right of survivorship, are not altered by 1973 revision of community property statutes).

For the reasons explained and subject to the qualification noted in this opinion,[2] we answer the Tenth Circuit's question in the affirmative. We hold that property acquired before 1984 by a husband and wife through an instrument designating them as joint tenants is presumed to be held as community property, even though it may also be held as joint tenancy property.

I.

The properties in question were acquired by Mr. and Mrs. Fingado in 1964 and 1969. The parcel acquired in 1964 was located on Vermont Street in Albuquerque, New Mexico, and was purchased for rental purposes; the other parcel was located on Rio Grande Boulevard in Albuquerque and was purchased as the Fingados' residence. Both properties were conveyed to "H.S. Fingado and Valetta Ruth Fingado, his wife, as joint tenants."[3] The record contains no evidence as to whether the funds used to make the purchases were community or separate in character.

In 1987, an involuntary petition in bankruptcy was filed against the Fingados under Chapter 7 of the United States Bankruptcy Code.[4] The petition was later dismissed as to Mrs. Fingado. In October 1989, the Trustee in bankruptcy, Harley H. Swink, sold the property on Vermont Street but retained the proceeds pending an adjudication of the rights of the parties to those proceeds.

Two months later, the Trustee petitioned the bankruptcy court for authority to sell the property on Rio Grande Boulevard. Mrs. Fingado objected to this sale, claiming a one-half interest in the property. She also claimed one-half of the proceeds from the sale of the Vermont Street property.

2. *See infra* note 21.

3. Under NMSA 1978, § 47-1-35 (Repl.Pamp.1991), a conveyance in this form is sufficient to create a joint tenancy.

4. The Bankruptcy Code is codified as Title 11 of the United States Code (1988 & Supp. III 1992).

She asserted that both properties were joint tenancy properties and that, under Bankruptcy Code Subsections 363(h) and (j), her one-half interest as a joint tenant in the proceeds from the sales of the properties was her separate property and not property of the bankruptcy estate.

The Trustee, on the other hand, alleged that both properties were community property of the bankrupt debtor, Mr. Fingado, and his spouse and that the interests of both spouses were therefore property of the bankruptcy estate under Subsection 541(a)(2) of the Bankruptcy Code.[5] Mrs. Fingado concedes that if she and her husband held the properties as community property, both her interest and his became the property of the bankruptcy estate under Subsection 541(a)(2) and the proceeds from the sales of the property are distributable, under Subsection 726(c) of the Bankruptcy Code, to holders of community claims against the Fingados. It is now undisputed that all creditors asserting claims against Mr. Fingado are creditors of the community.[6]

In asserting that the Vermont Street and Rio Grande Boulevard properties were community property, the Trustee relied on Subsection 40–3–8(B), as amended by the 1984 Act. Mrs. Fingado disputed the applicability of this statute; she argued that the 1984 amendment did not apply retroactively to change the status of the properties, which, at the time of their acquisition (she maintained), were separate, not community, property.

The United States Bankruptcy Court for the District of New Mexico applied Subsection 40–3–8(B), as amended; determined that Mrs. Fingado had failed to overcome the presumption in the subsection that the properties, although held in joint tenancy, were community property; and held that, as community property, they were part of the bankruptcy estate and not subject to any claim that Mrs. Fingado would otherwise have as a co-owner under Subsections 363(h) and (j) of the Bankruptcy Code. *Swink v. Sunwest Bank (In re Fingado)*, 113 B.R. 37, 40–41 (Bankr.D.N.M.1990) (Opinion of McFeeley, B.J.). The bankruptcy court accordingly authorized the sale of the Rio Grande Boulevard property, which, pursuant to Bankruptcy Code Subsection 363(i), Mrs. Fingado purchased for $320,000 less her homestead exemption of $20,000, for a net purchase price of $300,000.

Mrs. Fingado appealed to the United States District Court for the District of New Mexico, which reversed the bankruptcy court's judgment and ordered payment to Mrs. Fingado of one-half of the net sales proceeds from both properties. The district court did not issue an opinion in connection with its judgment, but apparently took the view that the New Mexico Legislature had not intended that the 1984 amendments to Subsection 40–3–8(B) would operate retroactively. The court therefore held that the properties were each spouse's separate property when acquired and remained such at the time they were sold. The Trustee appealed to the Court of Appeals for the Tenth Circuit, which certified to us the question noted at the beginning of this opinion.

In their briefs to the Tenth Circuit (which have been submitted to us) and in their arguments here, the parties take essentially the same positions that they argued before the bankruptcy court and the federal district court. Mrs. Fingado relies principally on the thoroughly entrenched principle of New Mexico community property law that property acquired by a married couple takes its status as community or separate property at the time of its acquisition, *e.g.*, *English v. Sanchez*, 110 N.M. 343, 345, 796 P.2d 236, 238 (1990), and on the similarly well-accepted propositions

5. Subsection 541(a)(2) provides that the bankruptcy estate is comprised, inter alia, of "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—(A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

6. The bankruptcy court so determined, and that determination has not been appealed.

that a statute applies retroactively only when there is clear legislative intent that it should do so, *e.g., Psomas v. Psomas,* 99 N.M. 606, 609, 661 P.2d 884, 887 (1982), *overruled on other grounds by Walentowski v. Walentowski,* 100 N.M. 484, 672 P.2d 657 (1983), and that when a statute affects vested or substantive rights, it is presumed to operate prospectively only, *see, e.g., Gray v. Armijo,* 70 N.M. 245, 247–48, 372 P.2d 821, 823 (1962). The Trustee responds that this Court's task is the familiar one of construing a statute—*i.e.,* determining legislative intent—so that we must answer the question: Did the 1984 legislature intend that the 1984 Act would operate retrospectively when it created a new presumption that, even when property is acquired and held in joint tenancy, the property is *both* community *and* joint tenancy property? The Trustee points to various indicia of legislative intent which, he asserts, demonstrate an intent to apply the 1984 amendments retroactively to property previously acquired by a husband and wife as joint tenants.

For the reasons that follow, we basically agree with the Trustee's position. Property acquired through an instrument establishing, or indicating ownership in, joint tenancy, even though acquired before 1984 and even though having the legal incident of the right of survivorship, is nonetheless presumed to be community property—a presumption which can be rebutted by showing that the property is properly characterized as separate property as defined by Subsection 40–3–8(A).

II.

We begin by discussing some of the history of the 1984 amendments. In 1972, effective July 1, 1973, the people of New Mexico adopted the Equal Rights Amendment to our Constitution: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18. In order to implement the amendment with respect to our community property laws, the legislature enacted the Community Property Act of 1973, 1973 N.M.Laws, Chapter 320 ("the 1973 Act"). NMSA 1978, § 40–3–7 (Repl.Pamp.1989) (purpose of act). *See generally* Anne K. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi–Legislative History,* 5 N.M.L.Rev. 1 (1974).[7] The 1973 Act, with post–1973 amendments, is presently compiled as NMSA 1978, Sections 40–3–6 to –17 (Repl.Pamp.1989 & Cum.Supp.1992). To comply with the Equal Rights Amendment, the 1973 Act significantly changed several of this state's community property laws by eliminating property-law distinctions based on gender. *See* Bingaman, *supra,* at 1.

Left intact by the 1973 Act were several sections from prior law, dating from 1907 [8] and providing generally (with certain exceptions [9]) that a husband and wife may own property as they see fit. Thus, NMSA 1978, Section 40–2–2 (Repl.Pamp.1989), provides that "[e]ither husband or wife may enter into any engagement or transaction with the other ... which either might, if unmarried...." Section 40–2–8 provides: "A husband and wife cannot by any contract with each other alter their legal relations, *except of their property....*" (Emphasis added.) Section 40–3–2 states: "Husband and wife may hold property as joint tenants, tenants in common or as community property." [10] Not essentially af-

7. The author of this article, then an associate professor at the University of New Mexico School of Law, was a member of a committee of distinguished New Mexico lawyers appointed by the State Bar to assist the Equal Rights Committee of the legislature in drafting changes to New Mexico law required by the Equal Rights Amendment. Bingaman, *supra,* at 1 & n. 2.

8. 1907 N.M. Laws, ch. 37.

9. The common-law estates of dower and curtesy have been abolished since 1907. 1907 N.M. Laws, ch. 37, § 17 (current version at NMSA 1978, § 45–2–113 (Repl.Pamp.1989)). Tenancies by the entireties were abrogated when New Mexico enacted statutes adopting the community property system. *McDonald v. Senn,* 53 N.M. 198, 207, 204 P.2d 990, 995 (1949) (per curiam).

10. Although in common usage the conjunction "or" denotes alternatives, the alternatives are not necessarily mutually exclusive. *See Haynes v. Bonem,* 114 N.M. 627, 632, 845 P.2d 150, 155, (1992) ("The disjunctive 'or' does not exclude the

fected by the new Act, but incorporated into it, was the bedrock presumption of our community property system: "Property acquired during marriage by either husband or wife, or both, is presumed to be community property." Subsection 40-3-12(A); [11] *see* Bingaman, *supra,* at 24.

Section 3 of the 1973 Act enacted a new section in the 1953 Compilation of our statutes, Section 57-4A-2, headed "Classes of property." In Subsection 57-4A-2(A), "separate property" was defined comprehensively, the components of the definition for the most part being consistent with prior law but with a few changes added by the drafters to accomplish various purposes. *See* Bingaman, *supra,* at 3-7. One of these changes was the addition of the following new component in Section 57-4A-2(A): "(6) each spouse's undivided interest in property owned in whole or in part by the spouses as co-tenants in joint tenancy or as co-tenants in tenancy in common." *See* 1973 N.M.Laws, ch. 320, § 3.

According to Professor Bingaman,

> This subsection reflects the basic conceptualization of the community property system: property in which each of the spouses owns an interest can be held by them only as community property or as the separate property of each of them. Under [NMSA 1978, § 40-3-2], which remains in effect, the spouses are accorded the right to hold property between them as community property, as joint tenants or as tenants in common. This subsection merely states that the common law property estates of joint tenancy and tenancy in common are, in a community property system, a separate property interest of each spouse, not community property in which the other spouse has a one-half interest.

Bingaman, *supra,* at 7.

As such, the new component reflected the common-sense notion that each spouse's interest in property held by them together in some form of co-ownership constituted his or her separate property; that is, neither spouse had any claim on the undivided interest of the other spouse in property held by the two of them in some form of cotenancy. From this common-sense standpoint, the statute might as easily have declared that each spouse's undivided interest in property owned by the spouses as community property was his or her separate property.

In any event, however rooted in common sense this new definitional component may have been, its conceptual underpinning had not been followed by this Court twenty-six years previously. In *August v. Tillian,* 51 N.M. 74, 178 P.2d 590 (1947), we upheld the contention of the successors of a deceased wife that a conveyance to her and her husband granted her a one-half interest as her separate property and that she and her husband held the other half as their community property. *Id.* at 75-77, 178 P.2d at 590-92. Professor Bingaman states that Subsection 57-4A-2(A)(6) of the 1953 Compilation reversed the decision in *August v. Tillian* and made it clear that the interest of each spouse in property owned by the two of them, whether those interests are equal or unequal, is the separate property of that spouse. Bingaman, *supra,* at 7-8.

Of course, classifying a spouse's undivided interest in a joint tenancy with the other spouse as separate property did not *ipso facto* answer every conceivable question. For example, if the spouse's interest was

conjunctive 'and' unless the context so requires.").

11. Before 1973, this basic presumption—which we have characterized as "the mainstay of our community property system," *In re Trimble's Estate,* 57 N.M. at 53, 253 P.2d at 806—was contained in the first clause of NMSA 1953, Repl.Vol. 8, Part 2 (1962) § 57-4-1, which read: "All other real and personal property acquired after marriage by either husband or wife, or both, is community property...." Although phrased as a declaration, this statute was consistently treated as creating a presumption. *See, e.g., Campbell v. Campbell,* 62 N.M. 330, 340, 310 P.2d 266, 272 (1957) (stating that presumption "was part of Spanish community property law and was recognized as an element of the community property system in this state prior to ... its statutory pronouncement" by 1907 N.M.Laws, ch. 37, § 10). Section 57-4-1 of the 1953 Compilation was repealed by § 14 of the 1973 Act and was replaced by what are now NMSA 1978, §§ 40-3-8 and 40-3-12(A).

truly separate property, would it be subject to the statutes of descent and distribution upon the spouse's death (as is the case with an undivided interest in a tenancy in common)? Even to pose such a question seems absurd, because, as already noted, the chief incident of a joint tenancy is the right of survivorship, so that the deceased spouse's interest passes by survivorship to the surviving joint tenant. *Id.* at 8. This difference in treatment for the distinct nature of a spouse's undivided interest in a joint tenancy with his or her spouse was expressly preserved by the legislature in Section 3 of the 1973 Act (NMSA 1953, § 57-4A-2(D), now NMSA 1978, § 40-3-8(D)), providing that the legal incidents of holding property as joint tenants or as tenants in common, including but not limited to the right of survivorship in a joint tenancy, are not altered by the 1973 Act. The question does, however, illustrate the difficulties that may arise when one assumes that *all* legal consequences are automatically determined by classifying an item of property, or an interest in property, as "separate" or "community."

While the 1973 Act preserved the right of survivorship of a spousal joint tenancy, it altered other legal incidents of holding property in such a joint tenancy. Those incidents concern the liability of property in which each spouse owns an undivided equal interest (as a joint tenant or a tenant in common) for satisfaction of one spouse's separate debts; the liability of property in which each spouse owns an undivided equal interest for satisfaction of community debts; and the requirement that (except for purchase-money mortgages) the spouses must join in all transfers, conveyances, or mortgages (or contracts to transfer, convey, or mortgage) any interest in real property owned by the spouses as cotenants in joint tenancy (or in tenancy in common). These provisions from the 1973 Act now appear in substantially the same form in NMSA 1978, Subsections 40-3-10(A), 40-3-11(A), and 40-3-13(A), respectively.

With respect to the debt collection provisions, Professor Bingaman notes:

> The thought here was that community funds are probably used to purchase property in which each spouse holds either an equal or a one-half interest and that such property should be treated as community property is treated insofar as debt collection is concerned.
>
> These sections change a legal incident of the common law estates of joint tenancy and tenancy in common: the traditional unhampered ability of a creditor to levy on the interest of a debtor joint tenant or tenant in common to satisfy a debt.

Bingaman, *supra,* at 10. Similarly, she comments:

> Although a spouse's interest in a joint tenancy is separate property under the definition contained in § 57-4A-2(A)(4) [sic] [NMSA 1978, § 40-3-8(A)(6) before its amendment in 1984], the creditor may not, under this section, reach property in which the spouses hold equal interests as joint tenants or tenants in common. Such property was excluded from the first stage of debt satisfaction because of the preference for the joint tenancy form of property ownership which banks, savings and loans, brokerage houses, realtors and title companies seem to have. Many married persons, because of the common use of joint tenancy forms by such institutions, have arguably transmuted what was community property to the separate property interest of each of them by opening joint checking accounts, stock accounts or the like on joint tenancy forms provided by these institutions. Because of this common occurrence, it was thought desirable, for purposes of debt satisfaction, to equate property in which each spouse had one-half interest in the form of community property, and property in which each had an equal interest as joint tenants or tenants in common.

Id. at 18 (footnote omitted).

Professor Bingaman provides a similar rationale for the requirement that both spouses join in conveyances, mortgages, etc., of property held in joint tenancy. She says:

> This represents a change both from present New Mexico law where persons not spouses are co-tenants, and from the common law rule that a tenant in either a joint tenancy or a tenancy in common may convey his interest without joinder of the other tenants. Once the decision was made to retain the present requirement that the spouses join in any conveyance of community real property held in some other form of joint ownership, it seemed inconsistent not to extend the joinder requirement to situations where the spouses held real property as joint tenants or tenants in common, especially in an era when the joint tenancy form of ownership is so preferred by lay persons, title companies and real estate brokers.

Id. at 10–11 (footnote omitted).[12]

From this bit of "quasi-legislative history," we see that the 1973 New Mexico Legislature enacted several measures dealing with a spouse's interest in property held in joint tenancy form. First, that interest was defined as the spouse's separate property, even though the asset in which he or she held the interest may have been acquired with community funds or may have been otherwise traceable to community property. Second, to forestall any possible argument that this characterization of the interest had all of the characteristics of true separate property, the legislature expressly preserved the survivorship incident of joint tenancy property. Third, recognizing that, owing to the practices of banks, title companies, and others—as well perhaps as to the preference of many married couples to hold their assets in a form enabling the survivor to receive full ownership without the intervention of probate in the event of one spouse's death—the legislature treated as community property, for debt satisfaction purposes, *all* property in which the spouses held equal undivided interests as joint tenants (or tenants in common) and, for purposes of transfers of property, likewise required joinder by each spouse for *all* property in which the spouses were cotenants. Thus, the 1973 legislature came close to recognizing the "hybrid" form of property ownership (community property in joint tenancy form) that had

12. Professor Bingaman cites a 1954 study by a noted authority on the community property law of New Mexico, Joe W. Wood, former Chief Judge of the New Mexico Court of Appeals and at the time Assistant Director of the New Mexico Legislative Council Service. Judge Wood's study found that 70 percent of the deeds to real property held by husbands and wives in Bernalillo County, the most populous county in New Mexico, were joint tenancy deeds. Bingaman, *supra,* at 11 n. 19 (citing Joe W. Wood, *The Community Property Law of New Mexico* 20 (1954)).

Similarly, a 1961 article in the *Stanford Law Review* reported that over 85 percent of all deeds to husbands and wives in twelve California counties were issued in joint tenancy form, and stated that the vast majority of California property acquired by families was financed by community funds. Yale B. Griffith, *Community Property in Joint Tenancy Form,* 14 Stan.L.Rev. 87, 88 & nn. 4–5 (1961). The author of this article, who advocated legislative and judicial recognition of the hybrid form of property ownership suggested by the title to his article, remarked:

> The *Siberell* rule that community property and joint tenancy cannot coexist has been interpreted to mean that the property involved must have either all the characteristics of true joint tenancy or all the characteristics of community property. This interpretation must be modified. It does not comport with the practices of the real estate and securities markets....
>
> Obviously the incidents of these two types of property are so different that they cannot, in all respects, coexist. But there is nothing which precludes community property being held in joint tenancy form and, in proper cases, having the survivorship incident of that form....
>
> ....
>
> One of the greatest advantages of this hybrid property is that the little fellow gets a break. In clear 'no-tax' situations where the debts are honestly paid, the termination of joint tenancy is simple and inexpensive. The joint tenancy form gives adequate protection to innocent purchasers and the surviving spouse can sell without the delays or expense of probate through the use of a simple affidavit establishing the fact of death. Courts openly accept this practice and recognize that, for the purpose of termination and when there is no prejudice to others, the survivorship feature of this hybrid stands.

Id. at 101–04 (footnotes omitted) (referring to *Siberell v. Siberell,* 214 Cal. 767, 7 P.2d 1003, 1005 (1932)) ("[F]rom the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property.").

been advocated in California several years before.[13] The stage was thus set for adoption of the amendments in the 1984 Act.

As we have seen in the introduction to this opinion, the 1984 legislature deleted from the definition of "separate property" in Subsection 40-3-8(A) the phrase "each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy or as cotenants in tenancy in common." The subsection now reads:

> A. "Separate property" means:
>
> ....
>
> (5) property designated as separate property by a written agreement between the spouses, including a deed or other written agreement concerning property held by the spouses as joint tenants or tenants in common *in which the property is designated as separate property.*

NMSA 1978, § 40-3-8(A) (Cum.Supp.1992) (emphasis added). Then, as also noted at the beginning of this opinion, the 1984 legislature added this sentence to Subsection (B) of Section 40-3-8:

> Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise will be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section.

1984 N.M.Laws, ch. 122, § 1. And finally, the legislature in the 1984 Act made the other changes referred to at the beginning of this opinion and that will be referred to below.

The question, as certified to us by the Tenth Circuit Court of Appeals, is: Were these changes intended to operate retroactively so as to apply to property acquired before their enactment?

III.

■ We begin with the proposition, stressed by Mrs. Fingado, that "New Mexico law presumes a statute to operate prospectively unless a clear intention on the part of the legislature exists to give the statute retroactive effect." *Psomas,* 99 N.M. at 609, 661 P.2d at 887. The very statement of this proposition demonstrates (by use of the word "presumes") that it is a rule or canon of statutory construction, not an inflexible determinant of legislative intent. Several reiterations of the principle by our Court of Appeals confirm this view of the rule as one of statutory construction. *See, e.g., City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque,* 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct.App.1991) ("New Mexico law presumes that a statute will operate prospectively...."), *cert. denied,* 113 N.M. 524, 828 P.2d 957 (1992); *Minero v. Dominguez,* 103 N.M. 551, 552, 710 P.2d 745, 746 (Ct. App.1985) ("It is presumed that a statute will operate prospectively only, unless a legislative intention to give it retroactive effect is clearly apparent."); *State v. Padilla,* 78 N.M. 702, 703, 437 P.2d 163, 164 (Ct.App.1968) ("The rule of statutory construction ... [is that] 'it is presumed that statutes will operate prospectively....' "). Many other state courts have accorded the proposition this same treatment. *See, e.g., Harris v. Bauer,* 206 Mont. 480, 672 P.2d 26, 29 (1983) ("As a general rule of statutory construction, 'retroactive effect is not to be given to a statute unless commanded by its context, terms or manifest purpose.' ").

■ If the statute expressly declared that it was to be applied prospectively only, we would of course give it that effect. Conversely, if it expressly stated that it was to operate retroactively, we presumably would abide by that statement (absent some constitutional objection). The 1984 Act does not declare the legislature's intent, one way or the other. Legislative silence is at best a tenuous guide to determining legislative intent, *see Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't,* 113

13. *See supra* note 12. In this connection, we note that at least three other community property states have adopted statutes providing that community property may have the survivorship incident of joint tenancy. *See* Nev.Rev.Stat. § 111.064(2) (1991); Tex.Prob.Code Ann. art. 451 (West Supp.1993); Wash.Rev.Code § 64.28.-040 (1992).

N.M. 593, 598, 830 P.2d 145, 150 (1992), so we start with a presumption that the legislature intended the 1984 Act to operate prospectively only—but our search cannot, or should not, end there.

"[T]he prospective application of a newly enacted act to [a preexisting and ongoing transaction] must also be determined by the words of the statute, the legislature's intent in enacting the statute, and by the public policy considerations which are evident from the statute." *City of Albuquerque,* 111 N.M. at 617, 808 P.2d at 67. We interpret "the legislature's intent in enacting the statute" to mean the purpose of the new law—the objective the legislature has sought to accomplish. *See, e.g., Lopez v. Employment Sec. Div.,* 111 N.M. 104, 105, 802 P.2d 9, 10 (1990) (in construing statute, court looks to object legislature sought to accomplish and wrong it sought to remedy). Other state courts have applied a similar approach in construing a statute not expressly declared to be either retroactive or prospective in effect. *See, e.g., State v. Von Geldern,* 64 Haw. 210, 638 P.2d 319, 322 (1981) (statute providing that no law operates retrospectively unless otherwise expressly and obviously intended is only a rule of statutory construction and is no longer determinative when legislative intent may be ascertained); *In re Bomgardner,* 711 P.2d 92, 95–96 (Okla.1985) (when legislature has not explicitly set forth its intent, presumption against retroactivity should not be followed in complete disregard of factors that may indicate intent; only if supreme court were to fail in detecting legislative intent after looking at all available indicia would presumption of prospectivity operate).

Based on our review of the legislative history preceding the 1984 Act and of the parties' briefs in this case, we discern two primary purposes of the 1984 Act. The first purpose, as indicated by the title of the Act (*see supra*), was to "clarify" kinds of property under the community property laws then in effect. The second purpose—a much narrower and more specific purpose—was to make it clear that, under the law as so clarified, joint tenancy property held by spouses could be characterized as community property so that, upon the death of either, the survivor's tax basis in the entire property would increase (or decrease, as the case might be) to the fair market value of the property at the time of the deceased spouse's death.

A.

As to the first purpose, we have already seen how the Community Property Act of 1973 created something of an amalgam between community property and joint tenancy concepts. We have nothing but high praise for the drafters of the 1973 Act in implementing the Equal Rights Amendment, but the result of their efforts to accommodate revised community property law concepts with the realities of the ways in which married people hold property in modern society left certain questions unanswered.

If most marital property held in joint tenancy was subject to the same strictures as applied to community property, did not the 1973 Act create—or come close to creating—a "hybrid" form of community property in joint tenancy form? Given the ways in which most married couples acquire and hold property—not just real property, but bank accounts, stocks and bonds, and other assets commonly held in the names of both spouses and joined by the word "or"—was there any reason not to give legal recognition to an undeniable fact of modern life: that many married couples hold their community assets in joint tenancy form so as to achieve the objective, if one of them dies, of vesting ownership of those assets in the survivor?

We believe that the legislature intended to answer these and similar questions, at least in part, by recognizing a new species of community property called, in the language of Section 2 of the 1984 Act (amending NMSA 1978, § 45–2–804(A)), "community property that is joint tenancy property."

It is an accepted principle of statutory construction in other states that a statute which clarifies existing law may

properly be regarded as having retroactive effect. Although we have found no New Mexico cases enunciating this principle, it is articulated in several opinions of our sister states. *See, e.g., Tomlinson v. Clarke,* 118 Wash.2d 498, 825 P.2d 706, 713 (1992) (en banc) ("When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive."); *GTE Sprint Communications Corp. v. State Bd. of Equalization,* 1 Cal. App.4th 827, 2 Cal.Rptr.2d 441, 444–45 (1991) ("Where a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved.").

Applying this principle in the present case is somewhat problematic, because the law in New Mexico at the time the 1973 Act was enacted, and probably afterwards, seems to have differentiated fairly sharply between the civil-law form of property ownership known as community property and the common-law estates of joint tenancy and tenancy in common. Indeed, in a case decided more than a half-century ago, and in language strikingly similar to that used by the California Supreme Court in *Siberell v. Siberell,* decided at about the same time (*see supra* note 12), this Court said:

> It is evident that the title to community property is a different and distinct thing from either tenancy in common or joint tenancy. What are the incidents or attributes of the community title? We must look to the statute for our answer, instead of to the common law, as we might in cases of either of the other classes of tenancy, both of which are known to the common law. Community property is, however, a concept foreign to the English common-law system, and with us is a creature of statute.

State v. Chavez (In re Chavez's Estate), 34 N.M. 258, 261, 280 P. 241, 242 (1929).

Over the years since this dictum (and it *was* a dictum), this Court and our Court of Appeals have frequently expressed the view, or taken it for granted, that joint tenancy property is a species of separate property and that to convert community property into separate property, including joint tenancy property, and vice versa, a husband and wife must "transmute" their property from one form into the other.[14] *See, e.g., In re Trimble's Estate,* 57 N.M. 51, 253 P.2d 805 (1953); *Chavez v. Chavez,* 56 N.M. 393, 244 P.2d 781 (1952); *Wiggins v. Rush,* 83 N.M. 133, 489 P.2d 641 (1971); *Estate of Fletcher v. Jackson,* 94 N.M. 572, 578, 613 P.2d 714, 720 (Ct.App.) (opinion of Wood, C.J.) ("Once the initial legal status of property, as separate or community, is determined, a change in the legal status is a transmutation issue and the *Trimble* requirement is involved when the change is between spouses."), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980). These cases, by referring to the "transmutation" of community property into joint tenancy property, thus imply that community property and joint tenancy property are inconsistent or mutually exclusive.

On principle, however, and as a practical matter, there is no good reason why the

14. The terms "transmute" and "transmutation" are thoroughly embedded in our community property law and the law of other community property states, but the terms have unfortunate connotations. Although the word "transmute" is defined simply as "to change or alter in form, appearance, or nature: convert," another definition is "to change into another substance or element" especially gold or silver. *Webster's Third New International Dictionary* 2430 (Philip B. Gove, ed. 1976). The dictionary definitions refer to the efforts of ancient alchemists to transform base metals into gold or silver, and in this sense the term "transmutation" has acquired an almost metaphysical or "mystical sounding" connotation. *See* Robert E. Clark, *Transmutations in New Mexico Community Property Law,* 24 Rocky Mtn.L.Rev. 1, 2 (1952). It is as though community property were some kind of substance into which (or from which) another substance—separate property—could only be converted by some kind of mysterious process. We expressly disclaim any such "mystical" use of the term. Transmutation is simply "a general term used to describe arrangements between spouses to convert property from separate property to community property and vice versa." *Allen v. Allen,* 98 N.M. 652, 654, 651 P.2d 1296, 1298 (1982) (citing William A. Reppy & William de Funiak, *Community Property in the United States* 421 (1965)).

incidents of community property should be regarded as altogether inconsistent with the incidents of joint tenancy property. In fact, our statutes, while perhaps not expressly or impliedly recognizing that these two forms of ownership may overlap, certainly do not preclude their coexistence in the same property at the same time. Although, as noted earlier, joint tenancy is one of the common-law estates incorporated into the law of this state from English law, it is now, and has been since 1971, defined by statute. NMSA 1978, Section 47–1–36 (Repl.Pamp.1991), reads:

> A joint tenancy in real property is one owned by two or more persons, each owning the whole and an equal undivided share, by a title created by a single devise or conveyance, when expressly declared in the will or conveyance to be a joint tenancy, or by conveyance ... from husband and wife when holding as community property or otherwise to themselves or to themselves and others, when expressly declared in the conveyance to be a joint tenancy....

This statute, which embraces the classical "four unities" of time, title, interest, and possession,[15] certainly covers a deed to a husband and wife conveying real property, acquired by them with community funds and intended to be part of their community estate, even though the same instrument conveys title in joint tenancy. Each spouse owns the whole and an equal undivided share, and each has taken a single title through a single conveyance.

Section 47–1–36, of course, relates to real property; and real property is only one type of asset—and not necessarily the most significant—in a married couple's portfolio, large or small, of assets. What is the law relating to other kinds of assets, such as bank accounts, stocks and bonds, and the like? First, NMSA 1978, Section 47–1–16 (Repl.Pamp.1991), provides that an instrument transferring title to real *or personal property* to two or more persons as joint tenants is prima facie evidence that such property is held in a joint tenancy.[16] In *Kinney v. Ewing*, 83 N.M. 365, 369–72, 492 P.2d 636, 640–43 (1972), we accepted the contention that registering securities in joint tenancy form and establishing a joint bank account constituted prima facie evidence that the assets were held in joint tenancy (although we went on to hold that, under the facts of that case, by placing the assets in this form of ownership the original owner had not made a gift of a one-half interest in the assets to the other joint tenant).

Second, under Article 6 of our Probate Code, entitled "Nonprobate Transfers" as enacted in 1975,[17] NMSA 1978, Section 45–6–101(A) (Repl.Pamp.1989), defined an "account" as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement[.]" Section 45–6–101(D) defined a "joint account" as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship[.]" And Section 45–6–104, headed "Right of survivorship," provided in pertinent part: "A. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party

15. "The unities of time and title require that the joint tenants' interests accrue at the same time by the same conveyance. By unity of interest is meant that the joint tenants' shares are all equal and the duration and quality (legal or equitable) of their estates are the same. Unity of possession means that each joint tenant is in possession of the whole estate, and that each is also entitled to an equal undivided share of the whole." 4A Richard R. Powell, *The Law of Real Property* ¶ 617[1], at 51–9 (rev. ed. 1992) (footnote omitted).

16. Section 47–1–16 provides in part: "An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants ... shall be prima facie evidence that such property is held in a joint tenancy.... In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same."

17. The 1992 legislature extensively revised Article 6 of the Probate Code, effective July 1, 1992, after this case was certified to us by the Tenth Circuit. The revisions, while amending or repealing the sections cited in the text and replacing them with other provisions, do not alter the point made in the text. *See* NMSA 1978, §§ 45–6–101 to –311 (Cum.Supp.1992).

or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."

Finally, other statutes permit or recognize the creation of joint tenancies in savings and loan association accounts, in credit union accounts, and in motor vehicles. *See* NMSA 1978, §§ 58–10–63(B) (Repl. Pamp.1991), 58–11–43 (Repl.Pamp.1991), 66–3–122 (Repl.Pamp.1989).

Can it be seriously contended that a married couple who have placed their community funds in a joint checking or savings account, or who have invested in stocks or bonds carrying the familiar "JTWROS" designation, or who have registered a family automobile in joint tenancy, have thereby "transmuted" those funds from community property into the separate property of each of them, so that legal principles relating to community property no longer apply to that property?

The chief incident of joint tenancy is the right of survivorship. *In re Trimble's Estate,* 57 N.M. at 54, 253 P.2d at 807. The chief, or one of the chief, incidents of community property lies in the duty of the district court on dissolution of the spouses' marriage to divide the property equally. *Michelson v. Michelson,* 86 N.M. 107, 110, 520 P.2d 263, 266 (1974); *Otto v. Otto,* 80 N.M. 331, 332, 455 P.2d 642, 643 (1969). This has always been the law in New Mexico, *see Beals v. Ares,* 25 N.M. 459, 499–500, 185 P. 780, 793 (1919); community property is not the separate property of either or both spouses, whether it is held in joint tenancy or not. The 1984 legislature was on sound ground in clarifying this as the law in New Mexico and, we believe, intended to apply the 1984 amendments to *all* community property acquired by spouses as joint tenants, no matter when acquired.

B.

This brings us to the second purpose we find underlying the 1984 Act: correcting a problem that may have escaped the legislature's attention in the 1973 Act and that needed correction to assure New Mexico married couples of the same tax benefit as is available to residents of other community property states. In brief, the problem is this: Subsection 1014(a)(1) of the United States Internal Revenue Code provides that the tax basis of property in the hands of a person acquiring the property from a decedent is the fair market value of the property at the decedent's death. 26 U.S.C. § 1014(a)(1) (1988). I.R.C. § 1014(b)(6) then provides that a surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any state shall be considered to have been acquired from the decedent if at least one-half of the whole of the community interest in the property was includible in determining the value of the decedent's gross estate for federal estate tax purposes.

With the definition in the 1973 Act of "separate property" as including "each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy," a potential question existed as to whether that spouse's interest would qualify for a new (usually, a so-called "stepped-up") basis when the surviving spouse (*i.e.,* the surviving joint tenant) received it from the decedent. Under I.R.C. § 1014(b)(9), only that portion of joint tenancy property included in the decedent's gross estate receives a stepped-up basis. And, under I.R.C. § 2040(b), only one-half of the property held by a husband and wife as joint tenants is includible in the decedent's gross estate. The definition in former Subsection 40–3–8(A)(6) raised the prospect that a surviving spouse's one-half interest in joint tenancy property, even though that property was acquired with community funds or could otherwise be characterized as community property, would be ineligible, after the deceased spouse's death, for the stepped-up basis under I.R.C. § 1014(b)(6).

As a prominent federal tax service states,

> A step-up in basis for the entire community property on the death of the first spouse represents a significant advantage of community ownership over com-

> mon-law joint tenancies. Property held by the spouses in joint tenancy receives a stepped-up basis only to the extent it is included in the decedent's gross estate. If a husband and wife are the only joint tenants, only one half of the property is included in the gross estate of the first to die, and therefore only one half of the property receives a stepped-up basis. By contrast, the entire community property asset receives a stepped-up basis, regardless of the fact that only one half of the property is includable in the decedent's gross estate.

3 Bender's Fed.Tax Serv. (MB) § A:25.104, at A:25–21 (1991).

A 1958 tax case from a federal district court in Oklahoma (which at one time was a community property state) held that a wife's interest in a tract of land acquired by her and her husband as community property qualified for the stepped-up basis under I.R.C. § 1014(b)(6), even though the couple had taken title to the land as joint tenants. *McCollum v. United States,* 58–2 U.S.Tax Cas. (CCH) ¶ 9957 (N.D.Okla.1958). In reaching this holding, the court relied in part on *In re Trimble's Estate* and on Mr. and Mrs. McCollum's intent to hold title to the property as community property under Oklahoma law. *Id.* at 69,802. *In re Trimble's Estate* had held that "clear, strong, and convincing" evidence was necessary to prove a transmutation of community property into joint tenancy property. The court in *McCollum* apparently reasoned that the form of the deed was not conclusive and that there was otherwise insufficient evidence that the parties intended to hold the property in joint tenancy and not as community property.

While *McCollum* thus seemed to secure the eligibility of the surviving spouse's half of community property for a stepped-up basis, developments in New Mexico undermined the court's holding as it might be applied in this state. In 1955, the legislature partially overruled *In re Trimble's Estate* by passing 1955 N.M.Laws, Chapter 174, Section 1 (now compiled as NMSA 1978, Section 47–1–16, quoted *supra* note 16), providing that a transfer of property to two or more persons as joint tenants is prima facie evidence that the property is held in a joint tenancy.

Despite this statutory modification of the *Trimble* proof requirement, the eligibility of New Mexico community property for a stepped-up basis seemed secure when the 1973 Act was passed. This was especially true in light of this Court's 1971 decision in *Wiggins v. Rush,* holding that, notwithstanding a deed to the spouses as joint tenants and notwithstanding what is now Section 47–1–16, a trial court's conclusion that the spouses did not intend to hold their property in joint tenancy, but instead intended to hold it as their community property, had substantial support in the record. 83 N.M. at 135–36, 489 P.2d at 643–44.

In 1980, however, our Court of Appeals decided *Estate of Fletcher v. Jackson.* In that case, a New Mexico appellate court held, for the first time since the 1952 case of *Chavez v. Chavez,* that community property (in that case, shares of stock) was transmuted into joint tenancy property by the form of the instrument alone (in that case, reissued stock to the husband and wife as joint tenants). 94 N.M. at 576–79, 613 P.2d at 718–21. *Estate of Fletcher,* therefore, together with the definition of separate property in the 1973 Act, gave rise to the significant prospect that a court, or the Internal Revenue Service, might hold that appreciated property owned by spouses in joint tenancy form, though having all the earmarks of community property—acquisition during coverture, use of community funds for the acquisition, etc.—was not community property but was instead joint tenancy property and was therefore ineligible (insofar as the surviving spouse's half was concerned) for a stepped-up basis.

We suspect—although, given the absence of any official legislative history in New Mexico, we cannot be certain—that the 1984 Act was in large part a response to *Estate of Fletcher,* to minimize the possibility that community property in joint tenancy form might lose the advantage of receiving a stepped-up basis upon the death of

one of the spouses.[18] If so, applying the 1984 Act prospectively only would render the Act almost completely futile until after the passage of a significant amount of time. As so construed, the Act would provide no protection to the undoubtedly numerous spouses who took title to property in joint tenancy, using community funds, many years before the 1984 amendments. We therefore agree with the Trustee that the legislature intended the 1984 Act to apply retroactively to property acquired before its enactment.

C.

The Trustee argues that two other provisions of the 1984 Act manifest a legislative intent that the Act should apply retrospectively to property acquired before its passage. The first provision appears in identical "savings clauses," in Sections 1 and 2 of the Act, in which the legislature declared that the 1984 amendments would not affect the right of any creditor accruing before the effective date of the amendments. The second provision is the emergency clause in Section 3 of the Act.

The precise wording of the savings clauses was: "The provisions of the 1984 amendments to this section shall not affect the right of any creditor, which right accrued prior to the effective date of those amendments." Subsections 40–3–8(E), 45–2–804(C). We agree with the Trustee that this clause reflects a legislative intent to apply the Act retroactively; otherwise, there would be no need for the clause. If a creditor's rights accrued before the amendments became effective and if the amendments had been intended to apply only to property acquired thereafter, the clause reserving creditors' preamendment rights would serve no apparent purpose. Assuming, however, that the amendments *were* intended to apply to previously acquired property, protecting creditors' preamendment rights could have been viewed as highly desirable (from the creditors' standpoint), if not constitutionally required. *See Ranchers State Bank v. Vega*, 99 N.M. 42, 44, 653 P.2d 873, 875 (1982) (recognizing, in dictum, that retroactive application of statute to preexisting creditors may violate Contract Clause).

The emergency clause in Section 3 of the 1984 Act read: "It is necessary for the public peace, health and safety that this act take effect immediately." Under Article IV, Section 23, of our Constitution, a clause of this sort in legislation passed by a two-thirds vote of each house of the legislature results in the statute's becoming effective immediately upon its passage and approval by the Governor. It is thus clear that the legislature intended that the 1984 amendments would take effect as soon as possible and that their effectiveness would not be delayed until ninety days after adjournment of the legislature. *See* N.M. Const. art. IV, § 23. We question, however, whether the emergency clause suggests an intention that the statute would apply to transactions occurring or property acquired before the statute's effective date. Indeed, it may suggest just the opposite: The legis-

18. Our legislature's prescience in adopting this protective measure is suggested by a revenue ruling issued by the Internal Revenue Service in 1987. In Rev.Rul. 87–98, 1987–2 C.B. 206, the Service held: "If property held in a common law estate is community property under state law, it is community property for purposes of section 1014(b)(6) of the Code, regardless of the form in which title was taken." *Id.* at 207. Under the facts assumed in the ruling, the decedent and the decedent's spouse were residents of a community property state under the laws of which taking title in a common-law estate, like joint tenancy, raised the presumption that the spouses intended to terminate their community interest and transmute the property's character from community to separate. Further, under the assumed facts, the decedent and the decedent's spouse, after acquiring the property at issue, executed joint wills declaring the property to be a community asset. The ruling held that execution of these wills overcame the presumption that the spouses had transmuted their community property into joint tenancy property. Significantly, the ruling suggested that a presumption to terminate the spouses' community estate would not arise in a state which made "specific provision for the coexistence of a common law estate and a community property interest." *Id.* Revenue Ruling 87–98 thus supports the proposition that, when state laws *do* provide for the coexistence of joint tenancy and community property, the entire property owned by a decedent and the decedent's spouse will receive a stepped-up basis on the death of the decedent.

lature may not have intended that the statute apply retroactively and only intended that it should apply as soon as possible after it became effective. Perhaps the most that can be said is that the legislature was uncertain about whether it could constitutionally apply the 1984 amendments to property acquired previously. That it deemed the legislation sufficiently important to merit a declaration of emergency is clear, and that it wanted the statute to apply as soon as might be constitutionally permissible seems indisputable. As is true of legislative silence, however, legislative uncertainty provides a slender reed (or rod) upon which to lean in divining legislative intent.

D.

The subject of possible constitutional infirmity of applying the 1984 Act retroactively brings us to Mrs. Fingado's other principal criterion for determining legislative intent: the rule that when a statute affects vested or substantive rights, it is presumed to operate prospectively only. Citing *Ranchers State Bank v. Vega* and *Ashbaugh v. Williams,* 106 N.M. 598, 599, 747 P.2d 244, 245 (1987), Mrs. Fingado points out that the presumption of prospective-only effect may be constitutionally required, especially if applying a newly enacted law retrospectively would diminish rights or increase liabilities that have already accrued. *See also Rubalcava v. Garst,* 53 N.M. 295, 206 P.2d 1154 (1949) (statute requiring writing cannot be constitutionally applied to bar cause of action based on oral contract formed prior to statute's enactment).

We note first that the presumption of prospective-only effect when "vested" or "substantive" rights are affected, like the presumption obtaining when the legislature does not clearly express its intent, is just that—a *presumption,* a rule or canon of statutory construction to aid in determining legislative intent when that intent is not specifically declared. Therefore, all of the indicia of the legislature's intent discussed earlier in this opinion apply to the presumption now under consideration. However, if a valid constitutional objection exists to applying the 1984 Act retroactively, our inquiry is at an end; obviously we cannot construe the Act as applying retroactively if that construction would run afoul of the Constitution.

But we do not think that the 1984 Act violates the Constitution, and this for two reasons: First, we do not believe that the 1984 amendments, if applied retroactively to Mr. and Mrs. Fingado's properties acquired in 1964 and 1969, diminished or otherwise altered Mrs. Fingado's rights in the properties. Second, even if some diminution or alteration occurred, it is an accepted principle of constitutional law that the legislature can alter, retroactively, the incidents of marital property in the exercise of its police power and in recognition of the state's strong interest in governing the relationships between married persons.

When the Fingados acquired the properties, assuming they had all of the characteristics of true joint tenancies and none of the characteristics of community property, either joint tenant could have conveyed his or her fractional interest without the consent of the other. 4 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 1780, at 32–33 (repl. vol. 1979); *see also* William E. Burby, *Handbook of the Law of Real Property* § 94, at 220–221 (3d ed. 1965) (joint tenant has the power and right to make an inter vivos conveyance of his undivided interest, to enter into a contract to transfer that interest, to execute a lease of that interest, and to mortgage that interest). There is no question that characterizing the Fingados' properties as community property under the 1984 amendments, even though those properties were held in joint tenancy for purposes of survivorship, altered Mrs. Fingado's rights in this respect. However, that alteration had already occurred, years before passage of the 1984 Act. As we have seen, under the 1973 Act Mr. Fingado's joinder was required for all transfers or mortgages, or contracts to transfer or mortgage, "any interest in community real property and separate real property owned by the spouses as cotenants in joint tenan-

cy or tenancy in common." Subsection 40–3–13(A).

Similarly, there might have been a question in 1964 or 1969 whether Mrs. Fingado's interest in the joint tenancy properties would have been liable for her and her husband's community debts. *See E. Rosenwald & Son v. Baca,* 28 N.M. 276, 278, 210 P. 1068, 1068 (1922) ("The separate property of the wife is not subject to community debts under the laws of this state.") (interpreting 1922 statute, which remained in effect until 1973). Again, however, this question was answered expressly in the 1973 Act, as amended in 1975, under which "[c]ommunity debts [are] satisfied first from all community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common...." Subsection 40–3–11(A).

Mrs. Fingado suggests that the 1973 Act might have unconstitutionally altered her rights, and possibly increased her liabilities, as a joint tenant in property acquired before 1973. The constitutionality of the 1973 Act, however, is not before us in connection with the question certified by the Tenth Circuit; and, even if it were, we would be loath to hold that the 1973 Act, which had the purpose and effect of ridding our law of unconstitutional distinctions (perhaps under the Equal Protection Clause and certainly under the Equal Rights Amendment) between property owners based on their sex, was itself unconstitutional. We believe that the 1973 Act, as well as the amendments thereto in the 1984 Act, represented competent and proper exercises of the legislature's lawmaking power to prescribe the incidents of marital property, as we shall now explain.

Professor Bingaman notes that a California commentator has concluded that "there is no substantial constitutional objection today to retroactive amendment of presumptions in community property law...." Bingaman, *supra,* at 26 n. 52 (citing Donald C. Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform,* 39 So.Cal.L.Rev. 240, 266–73 (1966) (stating at 267, "[T]here is no substantial constitutional objection to effective revision by the legislature of the methods it employs to protect its legitimate interest in the marital relationship, including the property rights incident thereto.")). The commentator's conclusion—which incidentally advocates recognition of the hybrid form of community property that includes the survivorship incident of joint tenancy, Knutson, *supra,* at 255—appears in an article relying extensively on an opinion of the Supreme Court of California, *Addison v. Addison,* 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965) (in bank). That case held that California's "quasi-community property" law (which in some respects at least was retroactive) was not unconstitutional. In so holding, the California Supreme Court relied strongly on a 1945 article in the *California Law Review,* Barbara N. Armstrong, *"Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?,* 33 Cal.L.Rev. 476 (1945). As quoted with approval in *Addison,* Professor Armstrong's basic thesis was:

> "Vested rights, of course, may be impaired 'with due process of law' under many circumstances. The state's inherent sovereign power includes the so called 'police power' right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people....
>
> ....
>
> "The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment."

Addison, 399 P.2d at 902 (quoting Armstrong, *supra,* at 495–96).[19] *Addison* has

19. Armstrong developed her thesis in part in reliance on two, at this point relatively old, United States Supreme Court cases, *Warburton v. White,* 176 U.S. 484, 20 S.Ct. 404, 44 L.Ed. 555 (1900), and *Arnett v. Reade,* 220 U.S. 311, 31 S.Ct. 425, 55 L.Ed. 477 (1911), *rev'g Reade v. De*

since been followed in California to uphold retroactive changes in marital property laws. *See In re Marriage of Powers,* 218 Cal.App.3d 626, 267 Cal.Rptr. 350 (statute abrogating "terminable interest rule" in connection with spousal retirement benefits could be applied retroactively), *review denied* (1990); *Taylor v. Taylor,* 189 Cal. App.3d 435, 234 Cal.Rptr. 486 (same), *review denied* (1987); *Howard v. Howard,* 184 Cal.App.3d 1, 228 Cal.Rptr. 813 (1986) (statute allowing modification of family home award could be applied retroactively).

We need not adopt the *Addison*–Armstrong theory in its entirety in order to say, as we do, that many of the principles espoused in the theory find strong support in New Mexico law and that the theory therefore provides still another basis for our holding that the 1984 Act applies retroactively to property acquired before its passage. In *Wiggins v. Rush,* for example, we said:

> The State of New Mexico has a vital interest in the marital status. This interest is clearly expressed in our statutory framework concerning the marital status, including its creation, dissolution, and the methods by which the parties to the marriage can hold property. It is this vital state interest in the marital status that distinguishes the marriage relationship from other contractual relationships....
>
> ... New Mexico's interest in the protection of the family relationship, as expressed in our statutes, indicates that the state deems itself an interested party when the community estate and the marriage itself are affected.

83 N.M. at 138, 489 P.2d at 646.

It is, after all, in large part a *presumption* we are dealing with in this case—the presumption added by the 1984 amendment as the second sentence in Subsection 40–3–8(B);[20] and presumptions and other remedial measures are the stuff of which retroactivity is made. *See, e.g., Minero v. Dominguez,* 103 N.M. 551, 552–53, 710 P.2d 745, 746–47 (Ct.App.1985) (general rule against retroactivity does not apply to statutes that are procedural); *Mota v. State (In re Mota),* 114 Wash.2d 465, 788 P.2d 538, 541 (1990) (en banc) (statutory amendment "deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect substantive or vested right"). The presumption is consistent with and reinforces the longstanding, basic presumption of New Mexico community property law, now contained in Subsection 40–3–12(A), that property acquired during marriage is community property. The presumption established by the 1984 amendment is rebuttable by showing that property is separate property under Subsection 40–3–8(A)—*e.g.,* that it was acquired by either spouse before marriage or by gift, bequest, devise, or descent.

It is well settled that when a spouse merely places his or her separate property into joint tenancy with the other spouse, without an intention to make a gift or otherwise transmute the separate property into a true joint tenancy in which each spouse has an undivided one-half interest, the property retains its character as separate property. *LeClert v. LeClert,* 80 N.M. 235, 237, 453 P.2d 755, 757 (1969); *Burlingham v. Burlingham,* 72 N.M. 433, 441–45, 384 P.2d 699, 705–08 (1963). By the same token, property which *is* community property—because it has been acquired during marriage and is attributable, for example, to the earnings of one or both spouses, *see Douglas v. Douglas,* 101 N.M. 570, 571, 686 P.2d 260, 261 (Ct.App.1984)—retains its character as such and is not

Lea, 14 N.M. 442, 95 P. 131 (1908). Both cases held that a community property state's modification of its community property law could apply, constitutionally, to property acquired before enactment of the modification. *Arnett* arose in New Mexico, and the Supreme Court's decision reversed a holding of this Court that such an application of a statute to previously acquired community property would impair vested rights and thus be unconstitutional.

20. "Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise will be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section."

"converted" from the community property of both spouses into the separate property of either or both,[21] absent persuasive evidence that the parties intended to transmute their community property into separate property. *See In re Trimble's Estate,* 57 N.M. at 56–64, 253 P.2d at 808–13; *Wiggins v. Rush,* 83 N.M. at 135–36, 489 P.2d at 643–44. The presumption in the second sentence of Subsection 40–3–8(B) reaffirms this basic tenet of community property law, while recognizing that such community property can be held in joint tenancy to achieve the survivorship feature of that form of ownership.

IV.

We do not perceive our holding as working any injustice upon Mrs. Fingado. Under Subsection 40–3–11(A), her interests in the Vermont Street and Rio Grande Boulevard properties were subject to payment of the Fingados' community debts (subject to applicable exemptions), whether those properties were deemed community property or property in which each spouse owned an undivided equal interest as a joint tenant. Our holding is that under the 1984 amendments to this state's community property statutes, the properties were properly characterized as community property and were therefore included in the bankruptcy estate under Subsection 541(a)(2) of the Bankruptcy Code.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

21. It is in this sense that we qualify our affirmative answer to the Tenth Circuit's question. The 1984 amendments to § 40–3–8 did not necessarily "convert" property originally held as separate property into community property; in a very real sense, the property may be regarded as having been community property all along. No evidence was adduced in the bankruptcy court or the district court as to the source of the funds used to acquire the properties or that the properties may have been classifiable as separate property under § 40–3–8(A), so the presumption in § 40–3–8(B) was applicable and the properties were properly regarded as the Fingados' community property.

850 P.2d 996

Richard J. SHOVELIN, Plaintiff–Appellee, and Cross–Appellant,

v.

CENTRAL NEW MEXICO ELECTRIC COOPERATIVE, INC., Defendant–Appellant, and Cross–Appellee.

No. 20083.

Supreme Court of New Mexico.

March 5, 1993.

Hinkle, Cox, Eaton, Coffield & Hensley, Robert P. Tinnin, Jr., Kara L. Kellogg, Margaret R. McNett, Albuquerque, for defendant-appellant.

Kenneth R. Wagner & Associates, Phillip P. Baca, Albuquerque, for plaintiff-appellee.

OPINION

BACA, Justice.

Defendant-appellant, Central New Mexico Electric Cooperative (the "Cooperative"), appeals a jury verdict and judgment in favor of plaintiff-appellee, Richard J. Shovelin. The jury determined that the Cooperative and Shovelin had entered into an implied employment contract and that the Cooperative had breached the contract. The jury awarded Shovelin $107,885 in damages on his breach of contract claim. In accordance with the trial court's instructions, however, the jury did not award Shovelin any damages on his retaliatory discharge claim. The Cooperative appeals this judgment and raises one issue that it contends mandates reversal of the contract judgment. This issue, which is an issue of first impression in New Mexico, is whether the doctrine of collateral estoppel should have precluded Shovelin from relitigating an issue that was previously decided by an administrative agency, in this case the Employment Security Department (the "ESD"). The Cooperative also maintains that the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings or, in the alternative, its motion for summary judgment regarding Shovelin's retaliatory discharge claim. Shovelin cross-appeals, contending that (1) the trial court correctly determined that public policy supported his right to seek office, (2) the trial court erred when it declined to grant his motion for partial summary judgment on the retaliatory discharge claim, and (3) the trial court erred when it instructed the jury not to consider his retaliatory discharge claim if it found in his favor on his breach of contract claim. We note jurisdiction under SCRA 1986, 12–102(A)(1) (Repl.Pamp.1992), and affirm in part and reverse in part.

I

Shovelin was employed by the Cooperative as an energy conservation advisor. At the same time, Shovelin was also a volunteer medical technician and a volunteer firemen. These volunteer duties required Shovelin to take time off from his work at the Cooperative. In 1986, Shovelin considered running for mayor of Mountainair, New Mexico. When Shovelin told his supervisor at the Cooperative, Fain Lawson, that he intended to run for mayor, Lawson told Shovelin that the Cooperative felt that the mayoral duties would further, and to an unreasonable extent, interfere with Shovelin's employment. Lawson warned Shovelin that he would be terminated from employment with the Cooperative if he were elected mayor. In spite of this warning, Shovelin ran for mayor of Mountainair. On March 4, 1986, Shovelin was elected mayor of Mountainair, and the Cooperative terminated his employment.

Following his termination, Shovelin filed for unemployment compensation, which the Cooperative contested. After a hearing on the matter, the ESD determined that Shovelin had voluntarily left his employment with the Cooperative without good cause and denied Shovelin unemployment benefits pursuant to NMSA 1978, Section 51–1–7(A) (Repl.Pamp.1983). Shovelin, who was represented by counsel at all stages of the ESD proceedings, appealed this determination to the district court, which reversed. The Cooperative appealed to this Court, and, in an unpublished decision, we held that the ESD decision was supported by substantial evidence.

> The evidence shows that [Shovelin's] decision not to comply with the [Cooperative's] reasonable condition of employment was the cause for his termination. Under these circumstances, ESD correctly determined that [Shovelin] left his employment voluntarily without good cause in connection with his employment and was therefore disqualified from receiving unemployment benefits under the provisions of Section 51–1–7(A).

Shovelin v. Employment Sec. Comm'n, No. 17,046, slip op. at 2 (N.M. Oct. 2, 1987). Accordingly, we reversed the district court and reinstated the ESD decision. *Id.*

While the appeal of the ESD decision was pending, Shovelin filed the instant action against the Cooperative in state court. His complaint alleged that the Cooperative breached an implied employment contract and that the Cooperative had violated his federal constitutional rights. After answering Shovelin's complaint, the Cooperative removed the action to federal court pursuant to 28 U.S.C. § 1441(a) (1988). Upon the Cooperative's motion, the federal district court ruled that "[Shovelin] fail[ed] to state a federal claim for violation of his constitutional rights because there [was] no governmental action involved in his dismissal from employment." *Shovelin v. Central New Mexico Elec. Coop.*, No. 87–0598 JC, slip op. at 4 (D.N.M. Aug. 17, 1988). The federal court dismissed the federal constitutional claim and remanded the breach of contract claim to the state court.

After the case was transferred back to state court, the Cooperative moved for summary judgment, contending that evidence adduced during discovery failed to create an issue of genuine fact as to whether Shovelin was anything other than an at-will employee and that the doctrine of collateral estoppel precluded Shovelin from relitigating the reasons for his termination. Shovelin subsequently moved to amend his complaint to add a cause of action for retaliatory discharge. The trial court denied the Cooperative's summary judgment motion and granted Shovelin's motion to amend his complaint.

On July 17, 1990, Shovelin filed his first amended complaint, alleging breach of an employment contract and retaliatory discharge. On January 18, 1991, Shovelin moved for summary judgment on his retaliatory discharge claim, and, subsequently, the trial court denied this motion. The Cooperative, on March 11, 1991, moved for judgment on the pleadings or, in the alternative, summary judgment on the retaliatory discharge claim. The Cooperative contended that the pleadings failed to allege a public policy violation sufficient to support a claim for retaliatory discharge under New Mexico law. The trial court denied both of the Cooperative's motions.

In June of 1991, the trial court conducted a jury trial. At the close of the evidence, the trial court instructed the jury on Shovelin's breach of an implied employment contract and retaliatory discharge claims. The trial court instructed the jury to first consider the breach of contract claim. The jury was also instructed not to consider Shovelin's retaliatory discharge claim unless it entered a verdict in favor of the Cooperative on the breach of contract claim. The jury returned a verdict in favor of Shovelin on his breach of contract claim and awarded him $107,885 in damages. In accordance with the trial court's instructions, the jury did not award Shovelin damages on his retaliatory discharge claim. From this verdict, the Cooperative appeals, contending that (1) the trial court erred when it denied the Cooperative's motion for summary judgment based on the doctrine of collateral estoppel, and (2) the trial court erred when it denied the Cooperative's motion for summary judgment or judgment on the pleadings in regard to Shovelin's retaliatory discharge claim. Shovelin cross-appeals, contending that (1) the trial court correctly determined that public policy supported his retaliatory discharge claim, (2) the trial court erred when it denied his motion for summary judgment on the retaliatory discharge claim, and (3) the trial court erred when it instructed the jury not to consider the claim of retaliatory discharge if it found for Shovelin on his breach of contract claim. As to the collateral estoppel issue, we hold that the trial court did not abuse its discretion in declining to apply the doctrine of collateral estoppel to the facts of this case, and, accordingly, we affirm the judgment in favor of Shovelin. As to the retaliatory discharge issue, we hold that the trial court erred when it refused to grant the Cooperative's motion for a judgment on the pleadings because Shovelin failed to allege a public policy violation sufficient to support a claim for retaliatory discharge under New Mexico law. Accordingly, we remand with

instructions to dismiss with prejudice Shovelin's retaliatory discharge claim.

II

The first issue that we address is whether the trial court erred when it declined to apply the doctrine of collateral estoppel. The Cooperative asserts that the trial court should have applied the doctrine of collateral estoppel and that Shovelin should have been precluded from relitigating the basis and reasons for his termination. According to the Cooperative, application of collateral estoppel is appropriate because (1) Shovelin was a party to the ESD hearing; (2) the cause of action in the instant case is different from the cause of action in the ESD proceeding; (3) the issue—whether Shovelin's separation from employment was voluntary or involuntary—is the same in both of the actions; and (4) the issue was necessarily determined in the prior litigation. The Cooperative cites numerous cases from other jurisdictions supporting its contention that the adjudicative determinations of an administrative tribunal should be given preclusive effect in subsequent litigation. *See, e.g., University of Tennessee v. Elliott,* 478 U.S. 788, 799, 106 S.Ct. 3220, 3227, 92 L.Ed.2d 635 (1986). The Cooperative concludes that, because the trial court erred when it failed to apply collateral estoppel to preclude Shovelin from relitigating the basis and reasons for his termination, the judgment should be reversed and remanded with instructions to enter a dismissal with prejudice against Shovelin.

Shovelin, on the other hand, contends that the trial court correctly refused to apply the doctrine of collateral estoppel. Shovelin asserts that giving an administrative agency ruling such preclusive effect would violate various constitutional guarantees: (1) Separation of powers pursuant to Article III, Section 1 of the New Mexico Constitution; (2) his right to a jury trial pursuant to Article II, Section 12 of the New Mexico Constitution; and (3) his right to due process. In addition, Shovelin contends that an application of collateral estoppel would be contrary to the legislative intent and purpose underlying the unemployment insurance structure. Finally, Shovelin contends that the application of collateral estoppel is inappropriate because the issue decided during the ESD proceedings is different from the issue decided by the jury in the instant action. Shovelin concludes that the trial court did not err in refusing to apply collateral estoppel and that the judgment should be affirmed.

The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of " 'ultimate facts or issues actually and necessarily decided in a prior suit.' " *International Paper Co. v. Farrar,* 102 N.M. 739, 741, 700 P.2d 642, 644 (1985) (quoting *Adams v. United Steelworkers,* 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). Before collateral estoppel is applied to preclude litigation of an issue, however, the moving party must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. *Silva v. State,* 106 N.M. 472, 474–76, 745 P.2d 380, 382–84 (1987). If the movant introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation. *Id.* at 474, 745 P.2d at 382. This issue is within the competence of the trial court, and we review the trial court's determination for an abuse of discretion. *See id.* at 476, 745 P.2d at 384.

In *Silva,* we approved of the use of both offensive and defensive collateral estoppel. *See id.* at 474–76, 745 P.2d at 382–84 (citing *inter alia Blonder–Tongue Labs., Inc. v. University of Illinois Found.,* 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), and *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). We held in *Silva* that, under the facts of that case, the use of offensive collateral estoppel against the defendant

was inappropriate because the ultimate issues of fact in that litigation were not actually and necessarily determined by the prior litigation. *Id.* at 476, 745 P.2d at 384. In contrast, in the instant case the Cooperative asks us to reverse the trial court's determination that defensive collateral estoppel did not preclude Shovelin from relitigating the issue of whether he voluntarily left his employment with the Cooperative.

The threshold question presented by this appeal, which, as noted above, is one of first impression in New Mexico,[1] is whether under the doctrine of collateral estoppel issues resolved in an administrative agency adjudicative decision should be given preclusive effect in later civil trials. We need not answer this question in a vacuum as it has been addressed by numerous courts and authorities. *See, e.g., United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421–22, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487 (N.Y.1984); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 Fla.L.Rev. 422 (1983); Restatement (Second) of Judgments § 83 (1982) (hereinafter the "Restatement"). These authorities and cases acknowledge that administrative adjudicative determinations may be given preclusive effect if rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing. *See, e.g., Utah Constr. Co.*, 384 U.S. at 422, 86 S.Ct. at 1560 ("When an administrative agency is acting in a judicial capacity and resolves disputed questions of fact properly before it which the parties have had an opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."); *Ryan*, 478 N.Y.S.2d at 825–26, 467 N.E.2d at 489–90 ("[C]ollateral estoppel [is] applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law.") (citations omitted); Restatement § 83 ("[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.").

In the instant case, the Cooperative argues that the ESD determination that Shovelin voluntarily left his employment should be given preclusive effect. The Cooperative argues that the ESD acted in a judicial capacity to resolve disputed issues of fact that were properly before it and that the parties had an adequate opportunity to litigate the issue. In addition, the Cooperative points out that the Unemployment Compensation Law in effect when Shovelin left his employment with the Cooperative, NMSA 1978, Sections 51–1–1 to –54 (Repl.Pamp.1983 & Cum.Supp.1986),[2] was silent as to whether an ESD decision could be given preclusive effect under the doctrine of collateral estoppel. As the Cooperative maintains, the legislature subsequently amended the Unemployment Compensation Law to provide that findings of fact or law from any unemployment compensation proceeding may not be given preclusive effect under the doctrines of res judicata or collateral estoppel in a separate proceeding between an individual and his present or former employer. NMSA 1978, § 51–1–55 (Repl.Pamp.1990). Citing *Martinez v. Research Park, Inc.*, 75 N.M. 672, 681, 410 P.2d 200, 206 (1965), *overruled on other grounds by Lakeview Investments, Inc. v. Alamogordo Lake Village, Inc.*, 86 N.M. 151, 155, 520 P.2d 1096, 1100 (1974),

1. The Cooperative, citing *Property Tax Department v. Molycorp, Inc.*, 89 N.M. 603, 605, 555 P.2d 903, 905 (1976), contends that "[a]djudicative determinations by administrative tribunals are subject to collateral estoppel effect." *Molycorp*, however, is inapposite because in that case we held that neither the doctrine of res judicata nor that of collateral estoppel applied to the facts of the case. 89 N.M. at 605, 555 P.2d at 905.

2. Unless otherwise noted, all citations to provisions of the Unemployment Compensation Act refer to the version of the statute found in the 1983 Replacement Pamphlet and the 1986 Cummulative Supplement.

the Cooperative contends that by enacting Section 51–1–55 the legislature changed the existing law. In other words, the Cooperative argues that the prior law allowed a court to give an ESD determination preclusive effect under the doctrine of collateral estoppel and that the trial court erred when it failed to preclude relitigation of the reason for Shovelin's termination of employment.

While we agree with the Cooperative that in enacting Section 51–1–55 the legislature intended to change the Unemployment Compensation Law, we cannot agree that the trial court must therefore apply the doctrine of collateral estoppel to every ESD determination that arose before amendment of the statute. The doctrine of collateral estoppel is a judicially created doctrine, *see* Perschbacher, *supra,* at 426–39, and, absent a statute to the contrary, whether to apply such a judicially created doctrine is a judicial determination. *See Roberts v. Southwest Community Health Servs.,* 114 N.M. 248, 252, 837 P.2d 442, 446 (1992) (holding that accrual of cause of action is judicial determination in absence of explicit statutory definition). Thus, the absence of a statute in the version of the Unemployment Compensation Law in effect when the instant case arose did not necessarily require the trial court to apply the doctrine of collateral estoppel. Whether the doctrine should be applied is within the trial court's discretion, and we review that decision for an abuse of discretion. *See Silva,* 106 N.M. at 476, 745 P.2d at 384.[3]

If we assume without deciding that, as the Cooperative argues, the Cooperative met its burden and proved that the application of collateral estoppel was appropriate, the trial court could then determine whether Shovelin was given a full and fair opportunity to litigate the issues at the ESD hearing. While the trial court did not state its reason for declining to apply the doctrine of collateral estoppel, we believe that Shovelin did not have a full and fair opportunity at the ESD hearing to litigate the issue of whether he was voluntarily or involuntarily discharged. In making this determination, we weigh countervailing factors including, but not limited to, the incentive for vigorous prosecution or defense of the prior litigation; procedural differences between the prior and current litigation, including the presence or absence of a jury; and the possibility of inconsistent verdicts. *See Silva,* 106 N.M. at 476, 745 P.2d at 384. A balancing of these factors shows that the trial court did not abuse its discretion in refusing to apply the doctrine of collateral estoppel to the facts of this case.

The first factor, whether Shovelin had the incentive to vigorously litigate the prior action, weighs in favor of upholding the trial court's refusal to apply collateral estoppel. At stake in the initial hearing was Shovelin's right to receive unemployment compensation. The amount in controversy in that litigation is small indeed when compared to the amount that Shovelin could possibly have been, and eventually was, awarded by the jury in his breach of contract action. Our determination on this matter comports with court decisions in other jurisdictions and the prevailing attitude in the scholarly literature. *See, e.g., McClanahan v. Remington Freight Lines, Inc.,* 517 N.E.2d 390, 394–95 (Ind.1988) (declining to apply offensive collateral estoppel to issue litigated at prior unemployment compensation hearing because such hearings were "designed for quick and inexpensive determinations of unemployment benefits"); *Board of Educ. v. New York State Human Rights Appeal Bd.,* 106 A.D.2d 364, 482 N.Y.S.2d 495, 497 (App.Div.1984) (refusing to apply defensive collateral estoppel to administrative agency decision in part because size of unemployment claim was small in comparison with employment discrimination claim); *Bresnahan v. May*

3. Citing N.M. Constitution Article IV, Section 34; *Stockard v. Hamilton,* 25 N.M. 240, 180 P. 294 (1919); and *Cass v. Timberman Corp.,* 110 N.M. 158, 793 P.2d 288 (Ct.App.), *withdrawn,* 110 N.M. 158, 793 P.2d 288 (Ct.App.1990), the Cooperative also argues that Section 51–1–55 cannot be applied retroactively. As demonstrated above, however, we are not giving Section 51–1–55 retroactive effect but rather are interpreting the common law doctrine of collateral estoppel.

Dep't Stores Co., 726 S.W.2d 327, 334 (Mo. 1987) (en banc) (Blarkmar, J., dissenting) (citing Restatement § 28(5)(c) & cmt. j); Restatement § 28(5)(c) (maintaining that collateral estoppel not applicable when party "did not have an adequate ... incentive to obtain a full and fair adjudication in the initial action"); Restatement § 28(5)(c) cmt. j ("[T]he amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair."); Committee on Benefits to Unemployed Persons, American Bar Ass'n, *The Preclusive Effect of Unemployment Decisions in Subsequent Litigation,* 4 Lab.Law. 69, 75 (1988) ("In sum, the incentive to fully litigate an unemployment claim pales in comparison to the incentive to fully participate in a civil suit, such that no collateral estoppel effect should attach to unemployment decisions."); Gregg J. Cavanagh, *The Collateral Estoppel Effect of Administrative Unemployment Insurance Decisions in Subsequent State and Federal Litigation,* 2 Lab.Law. 839, 840 (1986) ("The significance of [applying collateral estoppel to administrative unemployment insurance decisions to preclude subsequent litigation] is that decisions in administrative matters involving relatively small amounts of money can now have a potentially determinative impact upon subsequent civil suits in which substantial actual, compensatory, or punitive damages are at stake."); Merry Evans, Comment, *Collateral Estoppel and the Administrative Process,* 53 Mo.L.Rev. 779, 791 (1988) (hereinafter "Comment") ("If the interests at stake in an administrative hearing are relatively minor compared to those at stake in a subsequent legal proceeding, it may be unfair to afford the administrative proceeding a preclusive effect."). Moreover, because this is an issue of first impression in New Mexico, Shovelin had no way of knowing that an adverse determination by the ESD could be used to preclude his breach of contract claims. *See* Perschbacher, *supra,* at 458.[4] Thus, Shovelin did not have an adequate incentive to litigate the issue at the ESD hearing.

The second factor is whether procedural differences between the ESD proceedings and the breach of contract action would make it unfair to give preclusive effect to the ESD decision. The Unemployment Compensation Law is designed to "lighten [the] burden which now so often falls with crushing force upon the unemployed worker and his family," Section 51–1–3, by quickly placing the benefits into the hands of the unemployed worker. *See, e.g.,* § 51–1–8(I) (requiring prompt payment of benefits even though appeal is pending); § 51–1–8(M) (giving appeals of district court decisions to the Supreme Court priority over most other civil cases). In passing the Unemployment Compensation Law, the legislature intended that the procedural steps should be reduced to a minimum to allow the unemployed worker to obtain a prompt decision regarding his or her benefits. *Kennecott Copper Corp. v. Employment Sec. Comm'n,* 78 N.M. 398, 402, 432 P.2d 109, 113 (1967).

The proceedings in a district court are similar to those in an ESD hearing in several significant ways. First, issues of fact and law decided in the ESD proceedings, like issues decided in a district court, are reviewable, Section 51–1–8(G) (appeal of hearing officer determination to board of review), Section 51–1–8(M) (appeal of board of review decision to district court), including a final appeal from district court to this Court, Section 51–1–8(M).[5] As in the dis-

4. This problem is more acute when, as often is the case, the worker seeking unemployment benefits is not represented by counsel. *See* Comment, *supra,* at 791.

5. Citing *Stall v. Bourne,* 774 F.2d 657 (4th Cir. 1985), *withdrawn,* 783 F.2d 476 (4th Cir.1986); and *Leong v. Hilton Hotels Corp.,* 698 F.Supp. 1496, 1500 (D.Haw.1988), the Cooperative maintains that, because the ESD decision was subject to judicial review, we should be "particularly inclined to conclude that collateral estoppel should bar re-litigation." While we agree that whether a party availed himself of the opportunity to appeal an administrative decision is an important factor to consider when determining whether collateral estoppel is applicable, we note that this is merely one factor that we must consider in the calculus of whether a party had the full and fair opportunity to litigate. *See Silva,* 106 N.M. at 476, 745 P.2d at 384 (citing non-exclusive list of factors to consider when

trict court, the ESD must give the parties appealing the initial decision of a claims examiner notice and an opportunity to be heard prior to issuing a decision, and the parties must be given written notice of the decision and the reasons for the decision. Section 51–1–8(C). In addition, like a proceeding in the district court, the parties may subpoena witnesses, *see* Section 51–1–8(K), and may present evidence and argument. *See* § 51–1–8(C) & (G). Finally, both the unemployed person and the former employer may be represented by counsel. *Cf.* § 51–1–8(L) (department may be represented by attorney).

While an ESD hearing is similar in many ways to a trial in a district court, important differences between the two proceedings exist. Unlike a trial in district court, an ESD hearing does not have to "conform to common law or statutory rules of evidence or other technical rules of procedure." Section 51–1–8(J). Unlike a trial in district court, the petitioner in an ESD proceeding has no method of gaining or compelling any meaningful discovery. In addition, the claims examiners, hearing officers, and board of review members, unlike a judge in a district court, need not be lawyers. *See* § 51–1–8(B), (C), & (E) (providing for appointment of agency officials without regard to legal educational qualifications); N.M. Const. art. VI, § 14 (defining qualifications for district judge). In addition, the petitioner in an ESD proceeding is not entitled to a jury trial. *See* § 51–1–8.

In the instant case, the ESD proceeding was conducted by a hearing examiner during a two and one-half hour telephone conference. The hearing was conducted shortly after Shovelin's discharge, which provided minimal time for discovery. However, Shovelin was represented by counsel and availed himself of the opportunity to appeal the decision to the district court and ultimately to this Court. Even so, our assessment of the procedural differences between the agency and court actions discussed above leads us to conclude that the ESD decision was reached by an informal process, which militates against giving collateral estoppel effect to that decision in subsequent litigation in district court. *Accord Caras v. Family First Credit Union,* 688 F.Supp. 586, 589–90 (D.Utah 1988); *Salida Sch. Dist. v. Morrison,* 732 P.2d 1160, 1164–65 (Colo.1987) (en banc); *McClanahan,* 517 N.E.2d at 394–95; *Board of Educ. v. Gray,* 806 S.W.2d 400, 403 (Ky.Ct. App.1991). Even though the trial court's refusal to preclude relitigation led to inconsistent verdicts, a weighing of the fairness factors enumerated in *Silva* leads us to conclude that Shovelin did not have a full and fair opportunity to litigate the issue of whether he was voluntarily discharged at the ESD hearing.

A policy consideration, as articulated in the Restatement, lends further support to our conclusion. Applying the doctrine of collateral estoppel to preclude Shovelin from relitigating the reason for his termination would be incompatible with the legislative policy underpinning the Unemployment Compensation Law. *See* Restatement § 83(4) & cmt. h ("[I]ssue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding."). As demonstrated above, the Unemployment Compensation Law is intended to expeditiously place unemployment compensation benefits in the hands of those persons who without fault become unemployed. If a collateral estoppel effect is given to determinations of the ESD in cases such as the instant case, unemployed workers may forgo asserting their rights under the Unemployment Compensation Law to preserve their right to seek further civil redress. Alternatively, if the unemployed decides to assert his or her rights under the Unemployment Compensation Law, employers and the unemployed, armed with the knowledge that the ESD determination may preclude subsequent litigation, may try to turn ESD proceedings into full blown trials. This would thwart the legislative intent that unemployment benefits quickly flow to those in need—the unemployed. *Accord Storey v. Meijer, Inc.,* 431 Mich. 368, 429 N.W.2d 169, 174

determining whether party had full and fair opportunity to litigate).

(1988) ("There is also a substantial risk that the potential application of collateral estoppel will cause a qualified claimant to forego a claim for unemployment compensation in order to protect the right to pursue a civil claim with its full range of benefits.... This would unquestionably frustrate the legislative purpose of the [Michigan unemployment compensation] act[,] ... [which is] to benefit unemployed in financial straits, not to penalize them for being in that condition.") (citation omitted); *see also Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1284 (9th Cir.1986); *Mahon v. Safeco Title Ins. Co.*, 199 Cal.App.3d 616, 245 Cal.Rptr. 103, 107 (1988); *Salida Sch. Dist.*, 732 P.2d at 1164–65; *McClanahan*, 517 N.E.2d at 394–95. We hold that, under the facts of this case and the Unemployment Compensation Law in effect when Shovelin was terminated, the trial court did not abuse its discretion when it refused to apply the doctrine of collateral estoppel and preclude relitigation of the reason for Shovelin's termination.

III

The next issue that we address is whether the trial court erred when it denied the Cooperative's motion for a judgment on the pleadings or, in the alternative, the Cooperative's motion for summary judgment in regard to Shovelin's retaliatory discharge claim.[6] The Cooperative maintains that, as a matter of law, Shovelin's amended complaint failed to state a claim for retaliatory discharge because (1) the public policy asserted by Shovelin was inconsistent with New Mexico's rule of employment at will, and (2) the public policy asserted by Shovelin was insufficient to support a claim for retaliatory discharge under New Mexico law. Accordingly, the Cooperative maintains that the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings regarding the retaliatory discharge claim. We agree.

A motion to dismiss on the pleadings, SCRA 1986, 1–012(C) (Repl.Pamp.1992), is similar to a motion to dismiss for failure to state a claim upon which relief can be granted, SCRA 1986, 1–012(B)(6) (Repl.Pamp.1992), and, in situations such as the instant case, is treated identically. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1369, at 532 n. 6 (1990) (discussing similar Fed. R.Civ.P. 12). Under Rule 12(B)(6), a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. *Gonzales v. United States Fidelity & Guar. Co.*, 99 N.M. 432, 433, 659 P.2d 318, 319 (Ct.App. 1983).

> In determining whether a complaint states a claim upon which relief can be granted, we assume as true all facts well pleaded. In addition, a motion to dismiss a complaint is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. Only when there is a total failure to allege some matter which is essential to the relief sought should such a motion be granted. Moreover, a motion to dismiss for failure to state a claim is granted infrequently.

Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 299–300, 587 P.2d 444, 446–47 (Ct.App.1978) (citations omitted). In his amended complaint, Shovelin alleged that the Cooperative discharged him in retaliation for being elected mayor of Mountainair.[7]

6. Citing *Galvan v. Miller*, 79 N.M. 540, 548, 445 P.2d 961, 969 (1968), Shovelin contends that the Cooperative does not have standing to raise this issue because the jury did not consider the retaliatory discharge claim, and that, therefore, the Cooperative is not an aggrieved party. However, the Cooperative did have to defend against the retaliatory discharge claim and, thus, is an aggrieved party.

7. Count II of the amended complaint reads as follows:

COUNT TWO: RETALIATORY DISCHARGE

15. Plaintiff exercised his civic right when he campaigned for public office.

16. However, [the Cooperative] automatically and prematurely discharged [Shovelin] once he was elected Mayor of Mountainair.

17. [Shovelin's] election as Mayor was the sole reason he was discharged.

The tort of retaliatory discharge was first adopted in New Mexico by the Court of Appeals as a narrow exception to the rule that an at-will employee may be discharged with or without cause. *Vigil v. Arzola,* 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App.1983), *rev'd in part on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G. & G.,* 106 N.M. 279, 280–81, 742 P.2d 491, 492–93 (1987) (allowing retroactive application), *and modified by Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 649–50, 777 P.2d 371, 377–78 (1989) (lowering plaintiff's burden of proof of retaliatory discharge to a preponderance of the evidence and allowing recovery of damages for emotional distress). In *Chavez v. Manville Products Corp.,* we adopted the *Vigil* court's definition of the retaliatory discharge cause of action:

> "For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn."

108 N.M. at 647, 777 P.2d at 375 (quoting *Vigil,* 102 N.M. at 689, 699 P.2d at 620). The employee must also show a causal connection between his actions and the retaliatory discharge by the employer. *Id.* If the employee proves his case by a preponderance of the evidence, *id.* at 649, 777 P.2d at 377,[8] he is entitled to recover damages for his pecuniary loss as well as damages for emotional distress. *Id.* at 649–50, 777 P.2d at 377–78.

The linchpin of a cause of action for retaliatory discharge is whether by discharging the complaining employee the employer violated a "clear mandate of public policy." *See Vigil,* 102 N.M. at 688, 699 P.2d at 619. A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the legislature and the decisions of the courts and may fall into one of several categories. First, legislation may define public policy and provide a remedy for a violation of that policy. *Id.* at 688–89, 699 P.2d at 619–20 (citing the New Mexico Human Rights Act as an example). Second, legislation may provide protection of an employee without specifying a remedy, in which case an employee would seek an implied remedy. *Id.* at 689, 699 P.2d at 620. Third, legislation may define a public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. *Id.* Finally, "[t]here may, in some instances, be no expression of public policy, and here again the judiciary would have to imply a right as well as a remedy." *Id.*

Every statute enacted by the legislature is in a sense an expression of public policy but not every expression of public policy will suffice to state a claim for retaliatory discharge. " '[U]nless an employee at will

18. [Shovelin's] election as Mayor did not adversely affect his job performance for [the Cooperative].

19. [The Cooperative's] misconduct contravened state public policy which supports an employee's right to hold public office and supports the public's right to vote for candidates of their choice, as long as it does not adversely affect the employer's business operation.

. . . . .

20. [The Cooperative's] misconduct proximately caused [Shovelin] to suffer economic and emotional injury in an amount to be proven at trial.

8. In *Chavez,* we noted that, in similar situations, some jurisdictions utilize a shifting burden of production under which the plaintiff must prove a causal connection between the employer's improper motive and the employee's discharge from employment. 108 N.M. at 648 n. 2, 777 P.2d at 376 n. 2 (citing *inter alia Burrus v. United Tel. Co.,* 683 F.2d 339 (10th Cir.), *cert. denied,* 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982)). If the plaintiff meets this burden, the burden of production shifts to the employer to articulate a legitimate reason for the discharge. *Id.* The plaintiff then is given the opportunity to show that the reason given by the employer was a pretext. *Id.* While we have utilized a similar system in the context of employment discrimination cases, *see Martinez v. Yellow Freight System, Inc.,* 113 N.M. 366, 826 P.2d 962 (1992) (decided under the New Mexico Human Rights Act, NMSA 1978, Sections 28–1–1 to –7, 28–1–9 to –14 (Repl.Pamp.1991)), we do not consider whether to adopt such a procedure here as this issue has not been raised by the parties to this appeal.

identifies a specific expression of public policy, he may be discharged with or without cause.' " *Id.* (quoting *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (1980)). Accordingly, the courts interpreting New Mexico law have adhered to the rule that retaliatory discharge is a narrow exception to the rule of employment at will and have refused to expand its application. *See Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1475–76 (10th Cir.1988) (discharge for refusal to take polygraph examination did not violate public policy); *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir.1985) (discharge for use of employer's grievance procedure did not violate public policy); *Jeffers v. Butler*, 762 F.Supp. 308, 310 (D.N.M. 1990) (holding that no public policy stated where employee, and not public at large, would benefit from employee's whistleblowing actions), *aff'd without opinion*, 931 F.2d 62 (10th Cir.1991); *Salazar v. Furr's, Inc.*, 629 F.Supp. 1403, 1409 (D.N.M.1986) (family unity is not public policy protected by retaliatory discharge cause of action); *Paca v. K-Mart Corp.*, 108 N.M. 479, 480–81, 775 P.2d 245, 246–47 (1989) (discharge for violation of company policy did not violate public policy); *Francis v. Memorial Gen. Hosp.*, 104 N.M. 698, 701, 726 P.2d 852, 855 (1986) (nurse discharged for refusing to follow employer's policy regarding "floating" did not state claim for retaliatory discharge); *Maxwell v. Ross Hyden Motors, Inc.*, 104 N.M. 470, 474, 722 P.2d 1192, 1196 (Ct.App.1986) (Unemployment Compensation Law does not establish public policy prohibiting discharge in bad faith and without notice); *Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 416–17, 671 P.2d 662, 664–65 (Ct.App.) (discharge based on employer's erroneous belief that employee had attempted to steal from employer did not violate public policy), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983).[9] In fact, in only three reported cases have the courts in this state recognized a public policy sufficient to support a cause of action for retaliatory discharge: *Salazar*, 629 F.Supp. at 1409 (recognizing retaliatory discharge cause of action when employee discharged to prevent vesting of pension benefits); *Boudar*, 106 N.M. at 283, 285, 742 P.2d at 495, 497 (recognizing retaliatory discharge cause of action when plaintiff discharged for whistleblowing); *Vigil*, 102 N.M. at 690, 699 P.2d at 621 (recognizing retaliatory discharge cause of action when plaintiff discharged for reporting misuse of public funds). Whether an employee has stated a sufficient public policy to recover for the tort of retaliatory discharge is determined on a case-by-case basis. *Vigil*, 102 N.M. at 689, 699 P.2d at 620.

Shovelin articulates the following public policies that he contends are sufficient to avoid a dismissal for failure to state a claim: "(1) A citizen's right to pursue and hold public office if duly elected; and (2)

9. Other cases mentioning retaliatory discharge without discussing whether the plaintiff cited sufficient public policy include *Aviles v. Lutz*, 887 F.2d 1046, 1048 (10th Cir.1989) (holding that district court properly dismissed plaintiff's tortious interference with employment rights claims because district court lacked subject matter jurisdiction); *Romero v. Mason & Hanger-Silas Mason Co.*, 739 F.Supp. 1472, 1476 & n. 2, 1479 (D.N.M.1990) (declining to decide whether plaintiff stated claim under state law and remanding action to state court); *Russillo v. Scarborough*, 727 F.Supp. 1402, 1413 (D.N.M.1989) (holding that plaintiff failed to allege that his termination violated public policy), *aff'd on other grounds*, 935 F.2d 1167 (10th Cir.1991); *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 8–9, 791 P.2d 452, 459–60 (1990) (not considering whether termination was affront to public policy because employee's recovery on breach of contract claim precluded recovery for retaliatory discharge); *Sanchez v. The New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (holding that employee's discharge was not as a matter of law retaliatory); *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 106 N.M. 19, 21, 738 P.2d 513, 515 (1987) (finding no error when jury instructed that employee could recover for either breach of implied employment contract or retaliatory discharge); *Shores v. Charter Services, Inc.*, 106 N.M. 569, 570–71, 746 P.2d 1101, 1102–03 (1987) (holding that Workmen's Compensation Act, NMSA 1978, Sections 52–1–1 to –69 (Orig.Pamp. & Cum. Supp.1986), and retaliatory discharge provided mutually exclusive remedies when employer fails to qualify under the Act); *Williams v. Amax Chemical Corp.*, 104 N.M. 293, 294, 720 P.2d 1234, 1235 (1986) (Workmen's Compensation Act does not provide compensable retaliatory discharge claim).

[t]he public's right to vote for and elect political candidates of their choice." Shovelin purports to find these expressions of policy in several sections of the New Mexico Constitution,[10] a federal statute,[11] and several state statutes.[12] We cannot agree.

One category of statutes that create public policy potentially sufficient to support a cause of action for retaliatory discharge includes those statutes providing protection of an employee without specifying a remedy. *Vigil,* 102 N.M. at 689, 699 P.2d at 620. The *Vigil* court cited two examples of statutes that would meet this criteria and that are relevant to the instant case: (1) NMSA 1978, Section 1–20–13, which prohibits an employer from discharging an employee because of the employee's political beliefs or intention to vote; and (2) NMSA 1978, Section 38–5–18 (Cum.Supp.1982), which prohibits an employer from discharging an employee if the employee receives a summons or serves as a juror. *See Vigil,* 102 N.M. at 689, 699 P.2d at 620. Because each of these statutes clearly defines public policy supporting the employee's exercise of his civic duties, an employer may be held civilly liable to a wrongfully discharged employee as well as criminally liable for a violation of the statute. An implied remedy is given to the wrongfully discharged worker because absent such a remedy the statute would vindicate the State's interests without addressing the rights of the individual harmed by the violation of public policy.

Only one of the provisions cited by Shovelin, Section 3–8–78, falls within the category of statutes cited by *Vigil.* Section 3–8–78 creates criminal sanctions against an employer if the employer discharges, penalizes, or threatens to discharge or penalize an employee because of the employee's intention to vote or refrain from voting in a municipal election. Shovelin contends that Section 3–8–78, which mirrors Section 1–20–13 as cited in *Vigil,* expresses a public policy protecting electoral freedom. We do not give that section such a broad reading. While Section 3–8–78 clearly expresses a public policy that supports an employee's right to vote and would, in a case in which the employer interfered with the employee's right to vote or abstain from voting, support a cause of action for retaliatory discharge, it is not implicated in the instant case. Shovelin does not allege that the Cooperative interfered with his right to vote in the election but rather with his right to run for office. Thus, Shovelin's first contention must fail.

The next category of statutes that create a public policy potentially sufficient to support a cause of action for retaliatory discharge includes those statutes defining public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. *Vigil,* 102 N.M. at 689, 699 P.2d at 620. As examples of this category, the *Vigil* court cited two California appellate decisions: *Petermann v. Local 396, International Brotherhood of Teamsters,* 174 Cal.App.2d 184, 344 P.2d 25 (1959), and *Tameny v. Atlantic Richfield Co.,* 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980). In *Petermann,* the employee alleged that he was fired because he refused to commit perjury at the request of his employer. 344 P.2d at 26. The *Petermann* court recognized that the state's perjury statute reflected a public policy encouraging truthful testimony to ensure the proper administration of justice. 344 P.2d at 27. Similarly, in *Tameny* the employee alleged that he was fired because he had refused to engage in illegal price fixing. 610 P.2d at 1332. The *Tameny* court recognized that allowing an employee who

10. Shovelin cites the following sections of the New Mexico Constitution: Article II, Section 17 (free speech); Article II, Section 8 (free and open elections); Article VII, Section 1 (voter qualifications); Article VII, Section 2 (qualifications to hold elective office); Article VII, Section 5 (candidate receiving highest vote total is elected).

11. Shovelin cites 18 U.S.C. § 245(b) (1988) (making intimidation or interference with elections a federal crime).

12. Shovelin cites numerous sections from the Municipal Election Code, NMSA 1978, Sections 3–8–1 to –80 & 3–9–1 to –16 (Repl.Pamp.1985 & Supp.1992).

is terminated in retaliation for refusing to commit a crime to assert a cause of action for retaliatory discharge "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." 610 P.2d at 1335. To fully effectuate these policies, each court found that the plaintiff had stated a cause of action for wrongful discharge and may have been entitled to civil relief. *Petermann,* 344 P.2d at 28; *Tameny,* 610 P.2d at 1336–37.

In the instant case, Shovelin cites several statutes that, under proper circumstances, may be sufficient to support an action for retaliatory discharge. Initially, Shovelin cites 18 U.S.C. § 245(b), which prevents and punishes the violent interference with voting rights. *See Johnson v. Mississippi,* 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121 (1975). Shovelin does not allege, however, that the Cooperative interfered, violently or otherwise, with his right to vote. Shovelin also cites NMSA 1978, Section 3–8–76, which prohibits bribing a person to induce him to vote or refrain from voting, and NMSA 1978, Section 3–8–79, which prohibits a conspiracy to violate the Municipal Election Code. Both of these statutes are inapposite, however, because Shovelin contends neither that the Cooperative offered a bribe to influence his vote nor that the Cooperative conspired in any way to violate the Municipal Election Code.

Shovelin cites numerous other statutory provisions from the Municipal Election Code that he contends support a public policy encouraging a citizen to pursue and hold office, including Section 3–8–28 (defining candidate qualifications), Section 3–8–32(A) (guaranteeing right of properly elected candidate to hold office), and Sections 3–8–40 & –41 (guaranteeing the right to vote in municipal elections). None of these sections, however, are specific enough expressions of public policy to state a claim for relief under the facts of this case. *See Vigil,* 102 N.M. at 689, 699 P.2d at 620.

The final category of public policy as discussed in *Vigil* is limited to those instances in which the legislature did not express public policy but such policy was nonetheless recognized by a court. *Id.* In such instances, the employee must seek judicial recognition of both the right and the remedy. *Id.* The *Vigil* court cited two examples of when the judiciary may properly recognize an implicit right and remedy for the employee when his discharge violates public policy: *Palmateer v. International Harvester Co.,* 85 Ill.2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981), and *Cloutier v. Great Atlantic & Pacific Tea Co.,* 121 N.H. 915, 436 A.2d 1140, 1144 (1981) (holding that public policy giving rise to wrongful discharge action not exclusively found in statutes). In *Palmateer,* the Illinois Supreme Court, in the absence of a statutory expression of public policy, implied a right and a remedy for an employee who was discharged for assisting in the investigation and prosecution of crime because " '[p]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.' " 52 Ill.Dec. at 17, 421 N.E.2d at 880 (quoting *Joiner v. Benton Community Bank,* 82 Ill.2d 40, 44 Ill.Dec. 260, 262, 411 N.E.2d 229, 231 (1980)).

Shovelin asserts that *Vigil* and *Chavez,* 108 N.M. 643, 777 P.2d 371, created a common law right to political expression. In addition, Shovelin contends that Article II, Section 17 of the New Mexico Constitution supports a public policy in favor of freedom of political expression. Finally, Shovelin cites numerous other New Mexico constitutional provisions that he contends create a public policy encouraging a citizen to pursue and hold public office, including: Article II, Section 8 (prohibiting interference with right to vote); Article VII, Section 1 (defining voter qualifications); Article VII, Section 2 (defining qualifications to hold office); and Article VII, Section 5 (stating that candidate receiving highest vote total is elected to office). Shovelin concludes that these expressions of public policy are sufficient to state a cause of action for retaliatory discharge. We do not agree.

Neither *Vigil* nor *Chavez* supports the broad proposition that Shovelin asserts. In *Vigil,* the Court of Appeals held that the plaintiff stated a cause of action for retalia-

tory discharge when he alleged that he was fired for reporting his employer's misuse of public funds. 102 N.M. at 690, 699 P.2d at 621. In other words, the public policy recognized by the *Vigil* court was the right to expose misuse of public money by the employer and not, as Shovelin asserts, the right to political expression. In *Chavez,* we intimated that the right to political expression may have been a clear mandate of public policy. 108 N.M. at 649, 777 P.2d at 377. However, we did not address that issue because neither party appealed the trial court's determination that the employer had violated a clear public policy by allegedly firing the employee for refusing to participate in the employer's lobbying efforts. 108 N.M. at 647 n. 1, 777 P.2d at 375 n. 1.

In *Chavez,* we cited *Novosel v. Nationwide Insurance Co.,* 721 F.2d 894, 898–900 (3d Cir.1983), in which the Third Circuit Court of Appeals held that the protection of a private employee's freedom of political expression was a clearly mandated public policy under Pennsylvania law. *Chavez,* 108 N.M. at 647 n. 1, 777 P.2d at 375 n. 1. We did not, however, adopt the approach taken by the Third Circuit in *Novosel* and are not inclined to adopt that approach now. In *Novosel,* the Third Circuit, sitting in a diversity case, broadly interpreted Pennsylvania law regarding retaliatory discharge. *See* 721 F.2d at 903 (Becker, J., dissenting from denial of petition for rehearing en banc). The Third Circuit held that under the free speech provisions of the Pennsylvania and federal constitutions the plaintiff stated a cause of action for retaliatory discharge when he was fired for refusing to support his employer's lobbying efforts. *Id.* at 899 (majority opinion). The broad reading and application of Pennsylvania law by the Third Circuit has proven to be unfounded. *See, e.g., Paul v. Lankenau Hosp.,* 375 Pa.Super. 1, 543 A.2d 1148, 1155, 1157 (1988) ("[I]f we were to allow a broad application of the public policy exception, the at-will employment doctrine would almost certainly be dismembered by individual judicial notions of what constitutes the public weal."), *rev'd in part on other grounds,* 524 Pa. 90, 569 A.2d 346 (1990); *see also Lee v. Wojnaroski,* 751 F.Supp. 58, 62 (W.D.Pa.1990). Other Pennsylvania decisions, like similar decisions in New Mexico, have narrowly interpreted the public policy exception to the rule of at-will employment. *Compare Reuther v. Fowler & Williams, Inc.,* 255 Pa.Super. 28, 386 A.2d 119, 120–21 (1978) (holding that employee has a cause of action when discharged for serving on jury); *and Hunter v. Port Auth.,* 277 Pa.Super. 4, 419 A.2d 631, 631 (1980) (holding that public employer could not deny employment based on conviction when offender was subsequently pardoned) *with Boudar,* 106 N.M. at 283, 742 P.2d at 495 (recognizing retaliatory discharge cause of action when plaintiff discharged for whistleblowing); *and Vigil,* 102 N.M. at 690, 699 P.2d at 621 (recognizing retaliatory discharge cause of action when plaintiff discharged for reporting misuse of public funds). In fact, we have not found a single case adopting or endorsing the public policy recognized in *Novosel* to support a claim for retaliatory discharge.

Shovelin cites four cases from other jurisdictions that he contends have followed *Novosel* and have allowed a private employee to support a claim of retaliatory discharge for the violation of a public policy as evidenced by a constitutional provision: *Bloom v. General Electric Supply Co.,* 702 F.Supp. 1364, 1367 (M.D.Tenn.1988); *Parnar v. Americana Hotels, Inc.,* 65 Haw. 370, 652 P.2d 625, 631 (1982); *Burk v. K–Mart Corp.,* 770 P.2d 24, 28 (Okla.1989); and *Palmateer,* 52 Ill.Dec. at 15, 421 N.E.2d at 878. While each of these cases recite the proposition that a constitutional provision may reflect a public policy sufficient to support a claim for retaliatory discharge, none of the cases specifically involve a constitutional provision. In both *Bloom* and *Parnar,* the public policy was derived from statutes. *Bloom,* 702 F.Supp. at 1368; *Parnar,* 652 P.2d at 631. In *Burk,* the Oklahoma Supreme Court adopted the tort of retaliatory discharge but did not address any specific constitutional provisions that would support such a cause of action. *See* 770 P.2d at 26. In *Palmateer,* the employee stated a cause of

action for retaliatory discharge by alleging that he was discharged for assisting in the investigation and prosecution of crime; he did not allege that his discharge caused the violation of a constitutional right. 52 Ill. Dec. at 17, 421 N.E.2d at 880. Since the decision in *Palmateer*, Illinois has refused to recognize a retaliatory discharge cause of action based on state and federal constitutional rights to free speech. *See, e.g., Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520, 88 Ill.Dec. 628, 630-31, 478 N.E.2d 1354, 1356-57 (1985) (holding that state and federal constitutional provisions, such as right to free speech, limit power of government and are not limitation on relationship between private employer and its employees). Numerous courts in other jurisdictions have agreed. *See Lee v. Wojnaroski*, 751 F.Supp. at 62-63 (holding that discharge for alleged political activities did not state a claim for wrongful discharge under Pennsylvania law); *Newman v. Legal Servs. Corp.*, 628 F.Supp. 535, 540 (D.D.C.1986) (holding that allegations that plaintiffs were discharged for exercising constitutional rights of freedom of speech and association are not actionable against private employer); *Grzyb v. Evans*, 700 S.W.2d 399, 401-02 (Ky.1985) (rejecting public policy exception to employment at will based on constitutional right of freedom of association); *Allen v. Safeway Stores, Inc.*, 699 P.2d 277, 283 (Wyo.1985) (rejecting public policy exception to employment at will based upon state and federal constitutional rights to free speech).

Taking all well-pleaded facts in Shovelin's complaint as true, the complaint fails to state a claim upon which relief can be granted because, as a matter of law, it fails to assert a sufficient public policy to support a claim of retaliatory discharge. Accordingly, the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings on Shovelin's retaliatory discharge claim. Our disposition of this issue makes it unnecessary for us to address the other issues raised by the parties.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for proceedings consistent with the foregoing discussion.

IT IS SO ORDERED.

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

850 P.2d 1011

Ronald WHITELY, Mary Utton, Robert Silva, Richard M. Padilla, Douglas D. Mitchell, Ysmael Gomez, Ray Garley, Ray Anaya, Jo Ann F. Salcido, Pete Padilla, Reynaldo Garcia, Arnold Martinez, Solema Olga Herrera, George DiRe, and Sharon Bowen, Plaintiffs-Appellants,

v.

NEW MEXICO STATE PERSONNEL BOARD, Defendant-Appellee.

No. 20662.

Supreme Court of New Mexico.

April 1, 1993.

Freedman, Boyd, Daniels, Peters, Hollander, Guttmann & Goldberg, P.A., Joseph Goldberg, Dana E. Kanter, Albuquerque, for plaintiffs-appellants.

Tom Udall, Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

FROST, Justice.

This appeal requires us to determine whether plaintiffs-appellants juvenile probation officers and their staffs ("JPOs") who were recently transferred from the New Mexico judicial branch to the New Mexico executive branch pursuant to the Youth Authority Act, 1988 N.M.Laws, chapter 101, Section 47(C),[1] continue to ac-

1. Section 47, as a temporary provision of the Youth Authority Act, was never codified. The

crue annual vacation leave at judicial branch rates under the Act. Granting Defendant-appellee New Mexico State Personnel Board's ("Personnel Board") motions for summary judgment and dismissal, the district court held that the judicial branch rates of accrual for annual leave are not preserved by the Act's grandfather clause and that no unconstitutional impairment of contracts or diminution of compensation results. The district court also held that two documents containing statements of state legislators offered to prove legislative intent were inadmissible. We affirm the district court's decision in all respects.

The Personnel Board, an executive agency, administers the executive branch personnel system pursuant to the Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (Repl.Pamp.1992). Based upon its interpretation of Section 47(C) of the Youth Authority Act ("Section 47(C)"), the Personnel Board decided that transferred JPOs should accrue annual leave from the time of their transfer at rates specified under the Personnel Act regulations for the executive branch. The JPOs disagree, contending that Section 47(C) entitles them to continue accruing annual leave at the more generous judicial branch rates. The Personnel Board concedes that transferred JPOs retain earned but unused annual leave under Section 47(C) and that the JPOs' years of service in the judicial branch will count as continuous service for the purpose of calculating their new rate of accrual of annual leave under the Personnel Act.

The JPOs' complaint alleged that the Personnel Board's acts violated Section 47(C), impaired their contracts in violation of Article II, Section 19 of the New Mexico Constitution, and diminished their compensation in violation of Article IV, Section 27 of the New Mexico Constitution. The district court granted the Personnel Board's motion for summary judgment regarding the Section 47(C) and contract clause claims, and it dismissed the illegal diminution of compensation claim for failure to state a claim upon which relief can be granted. The JPOs appeal this decision. They also contend that the district court improperly excluded from evidence two documents expressing legislative intent to preserve the judicial rates of accrual, a letter by State Representative Raymond Sanchez and an affidavit by Chief Juvenile Probation Officer Mary Utton.

I. *Statutory Interpretation*

The Youth Authority Act transferred juvenile probation officers and personnel from the judicial branch of state government to a newly created agency within the executive branch of state government called the Youth Authority. Youth Authority Act, 1988 N.M.Laws, ch. 101, § 8 (codified at NMSA 1978, § 9-2A-5 (Supp.1992)). Section 47 of the Act specifically requires that transferred employees retain their classification, salary, and other "accrued benefits" enjoyed during their tenure as part of the judicial branch. The Act does not expressly define "accrued benefits," and the main issue on appeal is whether or not the rate of accrual of annual leave is a retained "accrued benefit." Section 47(C) of the Youth Authority Act states:

> C. At the time of transfer, the juvenile probation officers, support staff and chiefs shall retain their current classification and salary. Benefits including but not limited to annual leave, sick leave, pension and insurance benefits shall be established in accordance with the Personnel Act, provided no accrued benefits shall be forfeited. Those juvenile probation officers and chiefs employed after July 1, 1988 shall be subject to a classification and compensation plan

Act was originally codified at NMSA 1978, 9-20-1 to -18, but was repealed by 1992 N.M.Laws, chapter 57, Section 56. Comparable provisions are now codified in the Children, Youth and Families Department Act, NMSA 1978, §§ 9-2A-1 to -16 (Supp.1992). The JPOs remain administratively attached to the Children, Youth and

that will be established in accordance with the Personnel Act.[2]

Youth Authority Act, 1988 N.M.Laws, ch. 101, § 47(C).

In addressing issues of statutory interpretation, we must determine and effectuate the intent of the legislature, *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988), using the plain language of the statute as the primary indicator of legislative intent, *General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary. *State ex rel. Reynolds v. Aamodt,* 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990). No part of a statute should be construed so that it is rendered surplusage. *T.W.I.W., Inc. v. Rhudy,* 96 N.M. 354, 357, 630 P.2d 753, 756 (1981).

Contrary to the JPOs' contentions, the rate of accrual of annual leave is not an "accrued benefit" under the plain meaning and structure of Section 47(C), which clearly requires transferred JPOs to accrue annual leave at Personnel Act rates from the time of transfer to the executive branch. We agree with the trial court that "accrued" ordinarily and particularly in the context of the second sentence of Section 47(C) means accumulated, and that the term "accrued benefits" relates to benefits that were earned but unused at the effective date of transfer. This interpretation employs the ordinary meaning of the statute's terms, and it gives effect to Section 47(C) in its entirety. Adopting the JPOs' contention that "accrued benefits" include rates of accrual would effectively nullify the mandate that "[b]enefits including but not limited to annual leave ... shall be established in accordance with the Personnel Act," because this phrase is rendered meaningless surplusage if it does not refer to rates of accrual. *See T.W.I.W.,* 96 N.M. at 357, 630 P.2d at 756. Our interpretation effectuates the intent of this legislation as primarily evidenced in its clear terms, and it does not cause accrued benefits to be forfeited in violation of Section 47(C). The transferred JPOs retain "accrued benefits" because their earned but unused annual leave will transfer with them to the executive branch, and their years of service in the judicial branch will count as continuous service for the purpose of calculating their new rate of accrual of annual leave under the Personnel Act.

To support their contention that the rate of accrual of annual leave is an "accrued benefit," the JPOs cite several public and private pension cases from other jurisdictions which state that pension plan interest rates or other terms are "accrued benefits" under various statutes, regulations, and pension agreements. *See, e.g., Hauck v. Eschbacher,* 665 F.2d 843 (8th Cir.1981); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan,* 563 F.Supp. 653 (D.C.Cal.1983), *aff'd,* 750 F.2d 1458 (9th Cir.), *cert. denied,* 471 U.S. 1137, 105 S.Ct. 2678, 86 L.Ed.2d 696 (1985); *Flisock v. State, Div. of Retirement and Benefits,* 818 P.2d 640 (Alaska 1991). While these pension cases might establish that sometimes a rate or formula may be considered "accrued," they do not convince us that our legislature meant "accrued benefits" to encompass the rate of accrual of annual leave in Section 47(C). Clear statutory language is more probative of legislative intent than authority from other jurisdictions defining an isolated term in different contexts. *See General Motors,* 103 N.M. at 76, 703 P.2d at 173. The district court's dismissal of the JPOs' claim alleging violation of Section 47(C) is affirmed.

II. *Constitutional Challenges*

The JPOs contend that interpreting Section 47(C) of the Youth Authority Act to change their rate of accrual of annual leave to conform with Personnel Act regulations

Families Department pursuant to Section 9-2A-5.

2. The parties concede that the reference to "July 1, 1988" in Section 47(C) is a typographical error which should have read "July 1, 1989," the effective date of the Act. *See* N.M.Laws, ch. 101 § 52.

infringes their state constitutional rights in two respects. They argue that their contract rights embodied in Section 47(C) and created by their previous status as judicial branch personnel are unconstitutionally impaired in violation of New Mexico Constitution Article II, Section 19,[3] and that their compensation as public officers is unconstitutionally diminished in violation of New Mexico Constitution Article IV, Section 27.[4]

A prerequisite to a finding that a contract obligation is unconstitutionally impaired is proof of the existence of a contract, the benefits of which are somehow denied to the claimant due to the effect of legislation or other governmental action. *See Grant v. Nellius,* 377 A.2d 354, 356 (Del.1977). The clear defect in the JPOs' contract clause claim is that they are unable to prove the existence of a contract entitling them to retain the judicial branch rates of annual leave accrual.

It is well established that statutes fixing the compensation or terms of public employment are presumed merely to establish public policy subject to legislative revision, and not to create contractual or vested rights. *Dodge v. Board of Educ.,* 302 U.S. 74, 78–79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). Contractual rights are not created by statute unless "the language of the statute and the circumstances ... manifest a legislative intent to create private rights of a contractual nature enforceable against the State." *Wage Appeal v. Board of Personnel Appeals,* 208 Mont. 33, 676 P.2d 194, 199 (1984). This Court has said that holding constitutionally created public office generally does not confer vested or contractual rights, *Morris v. Gonzales,* 91 N.M. 495, 497, 576 P.2d 755, 757 (1978), and it follows that public employees do not generally have vested or contractual rights to specific rates of compensation, *see Hammond v. Temporary Compensation Review Bd.,* 473 A.2d 1267, 1272 (Me.1984).

As discussed above, Section 47(C) does not confer the right, contractual or otherwise, to retain the judicial branch rates of annual leave accrual. Also, neglecting to cite statutes, regulations, or other evidence demonstrating intent to create employment contracts, the JPOs fail to adequately explain how their position in the judicial branch conferred rights of a contractual nature. The applicable statute delegating authority to the judiciary to appoint, classify, and compensate JPOs before their transfer to the executive branch, NMSA 1978, Section 32–1–7 (Repl.Pamp.1986), does not contain language imparting contractual rights. The JPOs therefore fail to overcome the presumption that they did not have vested or contractual rights in their employment benefits. *See Dodge,* 302 U.S. at 78–79, 58 S.Ct. at 100. The New Mexico cases cited to support the contract claims are easily distinguishable by the fact that the claimants in those cases had completed performance under demonstrated contracts before an act of the state impaired vested contractual rights. *See, e.g., Rubalcava v. Garst,* 53 N.M. 295, 297, 206 P.2d 1154, 1155–56 (1949) (holding that legislation requiring that contracts to make bequests must be written to be enforceable unconstitutionally impaired vested rights in an oral contract to make a bequest which was fully performed and otherwise enforceable before the effective date of the legislation); *Hayner v. Board of Comm'rs,* 29 N.M. 311, 313, 222 P. 657, 658 (1924) (holding that legislation revoking a statute entitling citizens to a bounty for killing certain wild animals unconstitutionally impaired vested rights to the bounty of hunters who killed wild animals before the effective date of the revocation).

Other jurisdictions addressing similar questions of vested rights in public employ-

3. Article II, Section 19 of the New Mexico Constitution states: "No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."

4. Article IV, Section 27 of the New Mexico Constitution states:

> No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

ment have also rejected arguments that prospective reductions of employment benefits unconstitutionally impair contract obligations. *See, e.g., Anderson v. City of Northlake,* 500 F.Supp. 863, 866 (N.D.Ill. 1980) (holding statutes in question did not evidence legislative intent to create binding contract), *aff'd,* 657 F.2d 272 (7th Cir.), *cert. denied,* 454 U.S. 1081, 102 S.Ct. 636, 70 L.Ed.2d 615 (1981); *Washington Fed'n of State Employees v. State,* 101 Wash.2d 536, 682 P.2d 869, 872 (Wash.1984) (holding terms and conditions of public employment are basically controlled by statute rather than contract); *Grant v. Nellius,* 377 A.2d 354, 358 (Del.1977) (holding statute that altered future, unvested benefits of state employees may be altered by the legislature without violating contract clause).

The JPOs' constitutional challenge based on Article IV, Section 27 also lacks merit. In *State ex rel. Gilbert v. Board of Comm'rs,* 29 N.M. 209, 214, 222 P. 654, 655 (1924), we held that the constitutional prohibition against diminishing an officer's compensation during his term in office does not apply to public employees who do not hold "terms of office." This precludes application of the provision to public employees such as the JPOs who are not hired for a definite term nor particular period of time, but who are removable, consistent with applicable personnel rules, at the discretion of the appointing authority. *Id.* Because *Gilbert* is dispositive, we affirm the district court's dismissal of appellants' unlawful diminution of compensation claim.

III. *Evidentiary Issues*

The JPOs contend that two documents supporting their interpretation of Section 47(C) were improperly denied admission into evidence by the district court. The first document is an April 27, 1989 letter from New Mexico Representative Raymond Sanchez to Natalie Babcock, Director of the State Personnel Office. The letter advises Babcock that "[a]ll District Court employees who supported the Youth Authority bill were told by the sponsoring legislators that they would not lose any benefits in the transfer, especially those benefits relating to rates of accrual of annual leave." The letter further requests that Babcock effectuate this legislative intent and abandon her plan to lower accrual rates for transferring JPOs.

The second document at issue is a May 1990 affidavit of Mary Utton, a chief JPO. In the affidavit, Utton states that before the enactment of the Youth Authority Act, JPOs understood and "were assured by persons sponsoring the legislation that all of the employee benefits which they enjoyed under the judicial branch personnel rules would be preserved ... including rates of accrual for annual leave." The district court held that both documents were inadmissible because they recited incompetent evidence and were hearsay not meeting exceptions to the hearsay rule.

We have held that "[s]tatements of legislators, *after* the passage of legislation ... are generally not considered competent evidence to determine the intent of the legislative body enacting a measure." *United States Brewers Assoc., Inc. v. Director of the New Mexico Dep't of Alcoholic Beverage Control,* 100 N.M. 216, 218–19, 668 P.2d 1093, 1095–96 (1983), *appeal dismissed,* 465 U.S. 1093, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). This rule is derived from the principle that the legislature speaks with a single voice through the concerted action of enacting legislation. *See id.* at 218, 668 P.2d at 1095 (quoting *Haynes v. Caporal,* 571 P.2d 430, 434 (Okla.1977)). The views of individual legislators are not controlling in judicial interpretation of statutes under the circumstances present here because the sovereign authority of the legislature is instilled in the representative body, not its individual members.

Representative Sanchez's letter, written after enactment of the Youth Authority Act, is clearly inadmissible evidence of legislative intent. The JPOs' argument that the letter is admissible because Representative Sanchez's statements were made contemporaneously with the passage of the Act is factually incorrect since the Act was passed in March 1988 and Sanchez's letter was written in April 1989. The fact that

Sanchez's statement was made before the effective date of the Act is immaterial. *See Brewers,* 100 N.M. at 218–19, 668 P.2d at 1095–96.

The trial court found that the Utton affidavit, because it purported to relate assurances to and understandings of persons other than the affiant, was not based on personal knowledge and was, therefore, not properly admissible. *See* SCRA 1986, 11–602; SCRA 1986, 11–802. Reviewing the trial court's determination of inadmissibility under the abuse of discretion standard, *State v. Bell,* 90 N.M. 134, 139, 560 P.2d 925, 930 (1977), we find that the two documents were properly excluded from evidence.

For the foregoing reasons, the district court's grant of summary judgment and dismissal of claims is AFFIRMED.

IT IS SO ORDERED.

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

850 P.2d 1017

Benjamin and Isabelle LaBALBO, Guardians and Next Friends of their Daughter, Joanne LaBalbo, Plaintiffs–Appellants,

v.

Cherie HYMES, Executive Director of the Albuquerque Association for Retarded Citizens, the Albuquerque Association for Retarded Citizens, and John Doe and Jane Doe, Numbers One through Ten, Defendants–Appellees.

No. 11094.

Court of Appeals of New Mexico.

Jan. 15, 1993.

Certiorari Denied April 2, 1993.

Kathryn M. Wissel, Levy & Geer, P.A., Albuquerque, for plaintiffs-appellants.

Mark J. Klecan, Klecan & Childress, Albuquerque, for defendants-appellees.

Janice D. Paster, Albuquerque, for amicus curiae, Parents Reaching Out, Inc.

Peter Cubra, Albuquerque, for amicus curiae, Protection and Advocacy System.

OPINION

ALARID, Chief Judge.

We granted plaintiffs' application for an interlocutory appeal from the denial of their application for a preliminary injunction to enjoin defendants from discharging plaintiffs' daughter from a private group home for the developmentally disabled. Plaintiffs also filed a general notice of appeal believing the order practically disposed of the merits of their cause. We consolidate the appeals and treat this as a general appeal for reasons discussed herein.

On appeal plaintiffs argue the trial court abused its discretion by denying their request for a preliminary injunction after finding no irreparable harm to plaintiffs and finding that plaintiffs' claims are not actionable under the Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West 1981), because no state action was present. On appeal, we review the state action question as a pure ruling of law. Because we hold that a private entity that is under state contract to provide services to mentally disabled persons is a state actor when it makes decisions regarding the treatment and discharge of those persons under its care, we vacate the order denying the requested injunctive relief, reinstate the Section 1983 action and remand for rehearing in light of the legal conclusions expressed in this opinion.

I. FACTS

Plaintiffs' developmentally disabled daughter, Joanne, began living at a group home owned by defendant Albuquerque Association for Retarded Citizens (AARC) in January 1984. The home is regulated by the Department of Health and Environment under the Developmental Disabilities Community Services Act, NMSA 1978, §§ 28-16-1 to 28-16-12 (Repl.Pamp.1991) (hereinafter "the Act"), and services are provided pursuant to the Mental Health and Developmental Disabilities Code, NMSA 1978, §§ 43-1-1 to 43-1-25 (Repl.Pamp.1989) (hereinafter "the Code").

On March 24, 1986, Dr. Follingstad, Joanne's treating physician, who had become increasingly worried about his patient's uncontrollable anxieties and excitability and resultant high blood pressure during the previous few years, concluded that he was unable to control her blood pressure in the group home environment and recommended that she be removed. On March 26, 1987, plaintiffs were asked to attend a meeting held the same day. At that meeting, AARC informed them that Joanne would be discharged from the home on April 1, 1987.

Plaintiffs did not seek administrative review of the decision. They proceeded directly to district court and, on March 30, 1987, filed a complaint seeking injunctive relief and damages. Subsequently, while AARC was under a temporary restraining order requiring it to not discharge Joanne, plaintiffs filed an amended complaint seeking preliminary and permanent injunctions as well as damages. On December 2, 1990, the district court denied all requested relief by order providing in pertinent part:

> 3. The Court's decision as set out herein practically disposes of the merits of this action, or in the alternative this Order involves a controlling question of law, specifically on the issue of state action, as to which there is substantial ground for difference of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation, and there is no just reason for delay.
>
> 4. An appeal of right lies from this Order because as a practical matter it deposes [sic] of the merits, or in the alternative if it does not practically depose [sic] of the merits this Order involves a controlling question of law, specifically the issue of the existence of state action, as to which there is substantial ground for difference of opinion, and an immedi-

ate appeal from the Order may materially advance the ultimate termination of the litigation, and there is no just reason for delay.

Joanne continues to reside in the home, the discharge having been forestalled by a temporary restraining order and a stay pending appeal.

II. DISCUSSION

The legal issue we address is whether state action exists sufficient for Plaintiffs to maintain a cause of action under Section 1983.

Plaintiffs argue Joanne was impermissibly discharged because she was denied pre-deprivation procedural due process. Plaintiffs' assertion rests on the grounds that Joanne has a protected liberty interest in retaining her group home placement and that AARC acts under color of state law, thereby making all procedural due process requirements guaranteed by the 14th Amendment to the United States Constitution binding. *See* U.S. Const. Amend. XIV (West 1987). Plaintiffs' position was supported by two amicus curiae briefs filed with this court by New Mexico Parents Reaching Out and New Mexico Protection and Advocacy System.

Defendants argue (1) AARC does not act under color of state law, (2) the in-house discharge procedures followed by AARC provide adequate procedural due process, (3) substantial evidence supported the district court ruling, (4) the plaintiffs failed to exhaust their administrative remedies, and (5) a contract, signed at the time of Joanne's admission to the group home, controlled the rights and responsibilities of the parties in the event of a proposed discharge and all the contract's requirements were met. Because we find the availability of a Section 1983 action to enforce the fundamental civil rights of perhaps our most-fragile class of citizens to be of the utmost public interest, this court properly has jurisdiction over all of the issues relevant to the propriety of a Section 1983 action. SCRA 1986, 12–216(B); *see also Newsom v. Norris,* 888 F.2d 371, 380 (6th Cir.1989) (general review permissible where trial court ruling rests solely on a premise as to applicable law).

A. *Mootness*

As a preliminary matter, defendants suggest that the trial court's decision may be moot because Joanne has retained her placement in the group home and plaintiffs were provided with an opportunity to present evidence on the merits in the district court. We understand defendants to be arguing that the appeal arising out of the denial of the motion for preliminary and permanent injunction is necessarily moot. We disagree. In *Carey v. Piphus,* 435 U.S. 247, 266–67, 98 S.Ct. 1042, 1053–54, 55 L.Ed.2d 252 (1978), the United States Supreme Court held that a deprivation of procedural due process is actionable under Section 1983 without regard to whether there was actual injury or whether the deprivation would have taken place had the proper procedures been afforded from the outset. Accordingly, plaintiffs may have a valid Section 1983 claim even if Joanne remains at the AARC home permanently.

Moreover, defendants do not press the matter strongly and concede that the controlling issue needs resolution for guidance to "agencies such as [AARC]." We agree with this sentiment. *See In re Pernell,* 92 N.M. 490, 493–94, 590 P.2d 638, 641–42 (Ct.App.1979) (mental health patient no longer in hospital under challenged trial court order; appeal not moot because order capable of repetition and of great public importance). Because we determine that this is a matter of great public interest and because plaintiffs' Section 1983 claim may be valid regardless of the denial of their requested injunction, we conclude that the Rule 12–216(B) exceptions may be applicable and proceed to review the merits. *See Mowrer v. Rusk,* 95 N.M. 48, 618 P.2d 886 (1980); *Johnson v. Francke,* 105 N.M. 564, 565 n. 1, 734 P.2d 804, 805 n. 1 (Ct.App. 1987).

B. *Standards for Issuance of a Preliminary Injunction*

In the absence of New Mexico authority concerning the factors a trial court

must consider in ruling on a motion for a preliminary injunction, we turn to federal cases interpreting Federal Rule of Civil Procedure 65, which is similar to SCRA 1986, 1–066. *See State v. Clements,* 108 N.M. 13, 765 P.2d 1195 (Ct.App.1988) (basis for consulting judicial interpretations of federal rule). To obtain a preliminary injunction, a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. *Tri–State v. Shoshone River Power, Inc.,* 805 F.2d 351 (10th Cir.1986). We review the trial court's decision regarding whether to grant injunctive relief for abuse of discretion. *Padilla v. Lawrence,* 101 N.M. 556, 685 P.2d 964 (Ct.App.1984). The trial court may abuse its discretion by applying the incorrect standard for a preliminary injunction or incorrect substantive law, resting issuance of the injunction on clearly erroneous findings of fact; or applying the standards in a manner that results in an abuse of discretion. 2 J. Moore, J. Lucas, & K. Sinclair, *Moore's Federal Practice* ¶ 65.04[2] (2d ed. 1990). However, if a plaintiff failed to establish one of the required factors, the reviewing court should affirm denial of the injunction. *See Libertarian Party of Texas v. Fainter,* 741 F.2d 728 (5th Cir.1984).

The trial court denied plaintiffs' motion for a preliminary injunction, apparently on the grounds that plaintiffs had not established any possibility of irreparable harm and because they had not demonstrated a substantial likelihood of success on the merits. The lack of irreparable injury finding was apparently based on medical evidence that Joanne should be discharged for health reasons and an absence of evidence that she was deprived of a constitutionally protected right. However, by concluding that AARC did not act under color of state law, the trial court foreclosed the possibility of finding irreparable injury in the form of a constitutionally impermissible deprivation of due process. *See Henry v. Greenville Airport Comm'n,* 284 F.2d 631, 633 (4th Cir.1960) (violation of constitutional right established by undisputed evidence deprives trial court of discretion to deny request for injunction); *Doe v. Human,* 725 F.Supp. 1499, 1502 (W.D.Ark.1989) (court issued preliminary injunction, finding that allegation of deprivation of constitutional right sufficient to establish irreparable harm); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948 n. 39 (1973) (where deprivation of constitutional right is shown, no further showing of irreparable harm need be demonstrated). Additionally, by determining that plaintiffs had not shown a substantial likelihood of success on the merits because they had not shown that AARC was a state actor, the trial court extinguished plaintiffs' Section 1983 claim. As we discuss, we believe that in reaching this conclusion, the trial court erred in its application of the substantive law.

C. *Section 1983 Action in State Court*

Plaintiffs' amended complaint alleged a Section 1983 action for impermissible deprivation of a substantive liberty interest without appropriate procedural due process.[1] The parties agree, and we assume for the purposes of this appeal, that AARC is a private entity. Section 43–1–9 (providing that no private contractor providing services under the Code is an entity of state government); *accord Armijo v. Dep't of Health and Env't,* 108 N.M. 616, 775 P.2d 1333 (Ct.App.1989) (private contractor

1. Plaintiffs have alleged that a substantive, protected liberty interest arises from the explicit and mandatory character of the language used by the New Mexico Legislature in the Code and in the Act. Plaintiffs predicate their denial of procedural due process claim on state statutory language, as well as on regulatory language issued by both the state and federal governments relating to the termination of services for residential clients. Plaintiffs have also argued the discharge was in contravention of an admission contract containing specific, mandatory discharge procedures. Plaintiffs also alleged in their amended complaint that the discharge violated rights secured by the New Mexico Constitution. However, the state constitutional argument appears to have been abandoned on appeal.

not state entity for Tort Claims Act purposes).

To recover under Section 1983, a plaintiff must establish two elements: (1) that the defendants acted under color of state law, and (2) that defendants' action caused them to be deprived of a right secured by the Federal Constitution or the laws of the United States. *Lugar v. Edmundsun Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753–54, 73 L.Ed.2d 482 (1982); *Stephenson v. Esquivel*, 614 F.Supp. 986, 989 (D.N.M.1985). We assume without deciding that Plaintiffs have a right secured by the constitution or the laws of the United States.[2] We turn to the dispositive issue below, the question of state action.

1. *State Action*

To constitute state action, "the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." "[S]tate employment is generally sufficient to render the defendant a state actor." It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State.

West v. Atkins, 487 U.S. 42, 49–50, 108 S.Ct. 2250, 2255–56, 101 L.Ed.2d 40 (1988) (citations omitted).

As an initial matter, defendants correctly assert that action undertaken by a private entity is not state action and does not implicate a Section 1983 claim. *See* § 1983; *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948) (Fourteenth Amendment no shield against private conduct). AARC correctly notes that the Act also provides that AARC is a private contractor and not a state entity. *See* § 28–16–11. We believe Section 28–16–11 expresses legislative intent as to the applicability of the New Mexico Tort Claims Act, NMSA 1978, Sections 41–4–1 *et seq.* (1989 Repl.Pamp.) (TCA), and does not go directly to the issue of whether any particular action taken by a private contractor providing services under the Code and the Act constitutes state action. *See Wells v. Valencia County*, 98 N.M. 3, 644 P.2d 517 (1982) (distinguishing tortious conduct under TCA and deprivation of rights secured by the Federal Constitution for Section 1983 purposes); *Armijo v. Dep't of Health & Env't*, 108 N.M. 616, 775 P.2d 1333 (Ct.App.1989). The legislature may no more demand that violation of state procedural protections constitutes a federal constitutional deprivation than it may preclude a judicial determination under federal law principles that the acts of its agents constitute state action for purposes of Section 1983. *See West v. Atkins. Compare* § 28–16–7 (holding contractors to constitutional standard) *with* § 28–16–11 (contractor not a state entity).

Accordingly, the United States Supreme Court has consistently found that a private entity may be characterized as a state actor for purposes of Fourteenth Amendment

2. The assumption that Joanne has a substantive liberty interest is well grounded in the provisions of the Act and the Code. First, Section 43–1–8 contains plain and unambiguous language indicating a statutory right to appropriate habilitation services pursuant to an individualized treatment plan and consistent with the least drastic means principle exists. Section 43–1–9 requires that each residential client have an individualized habilitation plan. The statute requires that the plan must include input from the client, to the maximum possible extent. § 43–1–9(B); *see also* § 43–1–9(C)(1) (requiring written statement of client's specific needs); § 43–1–9(C)(3) (written timetable for habilitation goal attainment); § 43–1–9(C)(4) (requiring statements of goals, rationales and services necessary to achieve habilitation goals); § 43–1–9(C)(6) (criteria for discharge and projected discharge date). Finally, Section 43–1–9(E) allows the habilitation plan to be altered only after notice and comment to the client and the client's guardian. The individualized nature of the treatment plan, the *personal* timeline that controls habilitation service delivery, the inclusion of discharge as an element of habilitation, and the notice-and-comment requirements prior to substantial alteration indicate legislative intent to create a protected interest in receiving state-funded habilitation services. This court has previously made clear that state law can create a substantive right entitled to federal protection. *See Garcia v. Las Vegas Med. Ctr.*, 112 N.M. 441, 816 P.2d 510 (Ct.App.1991).

analysis where the private party jointly participated with the state or its agents in the challenged action. *Lugar*, 457 U.S. at 941, 102 S.Ct. at 2755–56.

> Private parties are state actors,
>
> [I]f the State creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. Thus in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm causing individual.

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192, 109 S.Ct. 454, 461–62, 102 L.Ed.2d 469 (1988) (citations omitted), and, "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." *Id.* at 192 n. 12, 109 S.Ct. at 462 n. 12 (citations omitted) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974)). The Court later said:

> It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor. Thus, we recently held that a private physician who had contracted with a state prison to attend to the inmates' medical needs was a state actor.

Id. at 195, 109 S.Ct. at 463–64 (citing *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)).

To demonstrate the required nexus in this case, plaintiffs alleged, "The state has clearly delegated the authority to provide this care of these vulnerable citizens to private entities through contracts, statutes, regulations, and the expenditure of significant sums of public monies." AARC has defended on the premise that actions undertaken pursuant to the "delegated authority" by a private entity under contract to the state to provide services such as AARC provides are not state action.[3] We agree with Plaintiffs and disagree with AARC.

The required nexus is best exemplified by the trilateral relationship between the state, the private contractor, and the client established under the Act and the Code. *See West v. Atkins*, 487 U.S. at 56, 108 S.Ct. at 2259 ("Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the state, the physician, and the prisoner."); *Carnes v. Parker*, 922 F.2d 1506, 1509 (10th Cir.1991) (private entity under contract with public trust acts under color of state law) (citing *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir.1988)).

New Mexico does not distinguish between clients receiving services at private or public facilities and accepts the ultimate

3. It is well settled that once a state has voluntarily assumed a duty to provide an entitlement such as habilitation services that the state has "considerable discretion" to set the contours of its responsibility. *Romeo v. Youngberg*, 457 U.S. 307, 317, 102 S.Ct. 2452, 2458-59, 73 L.Ed.2d 28 (1982). It is equally well settled that when a person is institutionalized or in some other way is wholly dependent on the state, the federal constitution imposes a duty on the state to ensure minimal habilitation conditions are met. *Id.; West v. Atkins*, 487 U.S. at 56, 108 S.Ct. at 2259 ("Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the state, the physician, and the prisoner."). Moreover, once the right, entitlement or benefit is conferred, the state "may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492–93, 84 L.Ed.2d 494 (1985); *see also Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) (denial of federal statutory entitlement enforceable by § 1983 action); *Goldberg v. Kelly*, 397 U.S. 254, 262 at n. 8, 90 S.Ct. 1011, 1018 at n. 8, 25 L.Ed.2d 287 (1970); *but see 1st National Bank of Omaha v. Marquette National Bank*, 636 F.2d 195 (1980) (rights incidental to National Bank Act not in the nature of civil rights and are not enforceable under § 1983), *cert. denied*, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 240 (1981).

It is also well settled that if Joanne were admitted to a state-operated hospital, actions and decisions undertaken by employees relating to her habilitation would be state action sufficient to state a claim under § 1983. *See West v. Atkins; see also* N.M. Const. Art. XIV; NMSA 1978, Chap. 23 (Repl.Pamp.1987 & Cum.Supp. 1991); *Lombard v. Eunice Kennedy Shriver Ctr. for Mental Retardation, Inc.*, 556 F.Supp. 677 (D.Mass.1983).

responsibility to ensure protection of the statutory and constitutional rights of *all* clients. *See* § 43–1–3(S) (habilitation program defined; no distinction between state-operated and state-funded places of program delivery); § 43–1–3(B) (definition of client); § 43–1–13(B) (state-operated or state-funded evaluation facility must prepare habilitation plan consistent with all statutory criteria); § 43–1–13(C) (state-operated or state-funded entity may petition court for extended placement).

> *Each resident client* receiving developmental disabilities services shall have the right to prompt habilitation services pursuant to an individualized habilitation plan and consistent with the least drastic means principle.

§ 43–1–8 (emphasis added.) Such services are provided directly by the state at state-operated facilities. *See* N.M. Const. art. XIV; § 23–5–1. Community-based services are provided through contracts with private "contractors capable of providing habilitation and other needed services." § 28–16–6. Contract services must be "consistent with and in furtherance of the objectives of the state plan." *Id.* The state plan requires "all major state agencies *providing or funding services*" to submit plans to the Developmental Disabilities Planning Council. § 28–16–5 (emphasis added). Submissions are made to ensure that each agency shall:

> provide for such services as are required within the scope of each respective agency's applicable federal and state laws and regulations to achieve the goal of facilitating clients to maximize their potential and live as independently as possible in their own homes and communities and to achieve productive lives through involvement in integrated service settings.

§ 28–16–5. Finally, the state sets standards for client services without regard to whether it funds or provides the services. "The department shall promulgate regulations as are appropriate to ensure compliance with recognized minimum professional standards for services and the constitutional and statutory rights of clients. Contractors providing services shall comply with these regulations and standards as a condition of payment and continuation of contract." § 28–16–7. Accordingly, it is clear from the above analysis that the state sets regulations for state agencies (services it provides) and statutorily binds all private contractors (services it funds) to the same standards.[4]

Even without this broad statutory language indicating that, like state agencies making discharge decisions, private contractors providing state-funded services are state actors when making discharge decisions, Section 28–16–8 provides that "the department shall establish minimum requirements for admission, discharge, and withdrawal of clients for services funded by the department." Thus the state has reserved to itself exclusive authority to control the contours of the very action at issue in this case, namely discharge. A discharge decision, whether made directly by the state or by a private contractor providing services funded by the state, is subject to all binding state statutory sections and regulations and is among the most-regulated of all treatment decisions made by the private contractor. *See* § 28–16–9 (each agency has responsibility and authority to ensure compliance with its regulations for services it provides or funds).

4. Several other sections of the Code support our conclusion that the legislature intended that there be no material distinction in the scope of state oversight between state-operated facilities and state-funded facilities when providing services. *See, e.g.,* § 43–1–3(B) (definition of client includes voluntary admissions, guardian admissions or court-ordered admission to developmentally disabled program); § 43–1–3(I) (definition of evaluation facility includes state-funded and state-operated facilities); § 43–1–4 (legal representation under Code for all clients); § 43–1–6 (personal rights); § 43–1–7 (right to treatment); § 43–1–8 (right to habilitation); § 43–1–9 (individualized habilitation or treatment plan); § 43–1–10 (emergency police power authority to detain without court order given to private "evaluation facility" upon certification by licensed physician); § 43–1–15 (emergency administration of psychotropic drugs permissible upon certification of licensed physician); § 43–1–23 (client right to seek redress under Tort Claims Act). These statutory provisions cover private facilities delivering state-funded services.

We finally look to the purposes of the Act to demonstrate that the legislature's provision that the department be authorized to use private contractors rather than state-operated facilities reflects a treatment preference rather than an attempt to diminish the legal protections afforded clients of state-funded services as against those in state-operated facilities. Section 28–16–2 states:

> It is the purpose of the legislature in enacting the Developmental Disabilities Community Services Act [28–16–1 to 28–16–12 NMSA 1978] to authorize the health and environment department to plan and coordinate developmental disabilities community services in the state and to declare that priority shall be given to the development and implementation of community-based services for developmentally disabled minors and adults, which will enable and encourage such individuals to achieve their greatest potential for independent and productive living, which will enable them to live in their own homes and apartments or in facilities located within their own communities and which will assist clients to be diverted or be removed from unnecessary institutional placements.

From this statement of intent it is clear that the state coordinates all community service delivery with the intention of avoiding institutional placements and of encouraging community-based services. *Accord* § 23–7–1. Conversely, we note that there is no expression of intent that the statutory and constitutional rights of clients receiving the community-based services should receive less protection than those in state-operated institutions. The legislature intended that community-based services be provided, and in doing so, did not intend to insulate private service providers from state-action scrutiny. *Accord* § 28–16–11.

To avoid the procedural constraints imposed by the Fourteenth Amendment defendants rely primarily on the cases of *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), and *Rendell–Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), to establish that the challenged discharge decision in this case is not sufficiently linked to AARC's "delegated authority" under its state contract to constitute state action.

In *Blum,* the plaintiffs objected to patient-transfer decisions initiated without certain procedural safeguards. The United States Supreme Court addressed whether private nursing homes were state actors when determining whether or not patients were receiving the medically necessary level of care. In *Blum,* the consequence of a determination that a patient was receiving more care than medically necessary was that the state refused to pay for the higher level of care and mandated that the patient be transferred to a lower-care level.

Finding that the challenged decision was not among those controlled by the state's regulatory oversight, the Court rejected the state-action assertion. The Court focused on the "gravamen of the plaintiff's complaint" to determine exactly what conduct was challenged and the evidence in the record demonstrating that the challenged conduct was compelled by the state. *Id.* at 1003, 102 S.Ct. at 2785. The Court found the challenged decision was made by a medical professional according to rules of conduct not promulgated by the state. This rendered the decision of the state to transfer the affected patients to lower care levels simply a response to the physician's decision and not an action compelled by the state. *Id.* at 1005, 102 S.Ct. at 2786. *Blum* is unavailing to defendants in this case because the state has reserved by statute the exclusive right to set the contours of discharge decisions. *See* § 43–1–9(C)(6) (discharge statutory part of habilitation); § 43–1–9(E) (notice and comment required before major amendment of habilitation plan; decision involves non-medical persons); *see also Lombard v. Eunice Kennedy Shriver Ctr. for Mental Retardation, Inc.,* 556 F.Supp. 677, 680 (D.Mass. 1983) (where function is exclusive province of state, general rule that act of private party must be compelled by rule of state to constitute state action held inapplicable).

In *Rendell–Baker,* the United States Supreme Court considered whether an employment decision, apparently unrelated to

the well-being of the students, made by a private school that received most of its funding from public sources and was subject to state regulation in several respects was state action. The Court considered the factors it had found to be significant in *Blum* and similarly concluded that the school's decision to discharge employees was not state action. It first determined that the school's receipt of public funds for student tuition did not make the school a state actor for the purpose of making employment decisions because "the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students." 457 U.S. at 840–41, 102 S.Ct. at 2770–71. The Court also found that the state's extensive regulation of the school did not make it a state actor because:

> Here, the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters.

Id. at 841, 102 S.Ct. at 2771.

The Court also rejected the argument that the school was performing a public function, and thus was a state actor, because there was no indication the state legislature intended to make the education of maladjusted high-school students the exclusive province of the state. *Id.* at 842, 102 S.Ct. at 2772. The Court also determined that there was no symbiotic relationship between the state and the school because there was no showing that the state profited from the private party's discriminatory conduct. *Id.* at 842–43, 102 S.Ct. at 2772–73.

We consider *Rendell–Baker* distinguishable from the situation in the appeal before us. We are dealing with the decision by a private contractor providing state services to discharge a patient entitled to receive those services, a situation that would be more analogous to a decision by the private school in *Rendell–Baker* to discharge a student, rather than an employee. In similar situations, physicians providing medical services pursuant to contracts with the state have been found to be state actors when making decisions regarding patients. *West v. Atkins.*

Moreover, in contrast to the finding in *Yaretsky* that the challenged decision was essentially a medical one made according to medical decision-making parameters, the statutory language used by our legislature relating to discharge decisions stands in stark contrast to those sections where the legislature intended that a physician could be the sole decision-maker. *See* § 43–1–10(A)(4) (delegation of police power to licensed physician in emergency); § 43–1–10(E) (same); § 43–1–11(A) (delegation of *parens patriae* authority to licensed physicians to seek commitment for treatment and evaluation); § 43–1–12(A) (physician may seek extended commitment); § 43–1–14(C) (physician may seek involuntary commitment); cf. *Armijo v. Dep't of Health and Env't* (for TCA purposes challenged decision medical in nature.).

Moreover, careful analysis of these two cases indicates that the funding of a private entity to perform under public contract duties statutorily imposed on the state by act of the legislature may be a sufficient indicator of state involvement to implicate the state-action doctrine where the contours of duties attendant to the receipt of such funds affect the decision-making process being challenged to the extent that the decision arises out of the attendant constraints and can therefore be said to be fairly attributable to the state. *See* § 28–16–7 (standards for services); *see also West v. Atkins* (private physician under contract to the state to provide health care services to prison inmates acts under color of state law while treating inmates because his agenda is the state's agenda); *South Dakota v. Dole,* 483 U.S. 203, 213, 107 S.Ct. 2793, 2799, 97 L.Ed.2d 171 (1987) (O'Connor, J., dissenting) (Congress may condition receipt of federal funds if condition relates to purpose for which the funds are expended); *State ex rel. Coll v. Carruthers,* 107 N.M. 439, 444, 759 P.2d 1380, 1385 (1988) (legislature may properly condition use of funds); *State ex rel. Sego v.*

Kirkpatrick, 86 N.M. 359, 366, 524 P.2d 975, 982 (1974) (state legislature appropriates state funds and may impose conditions and limits); N.M. AG Op. No. 80–40 (1980).

In sum, if the state provides developmental disability services by delegating those responsibilities to a private entity, while retaining the right to determine discharge terms and the responsibility to protect patients' constitutional and statutory rights, a sufficient nexus between the private entity's decision and the state has been demonstrated so that the private entity's discharge decision will be considered state action for purposes of maintaining a Section 1983 suit. *See Carnes v. Parker,* 922 F.2d 1506 (10th Cir.1991); *Society for Good Will to Retarded Children, Inc. v. Cuomo,* 737 F.2d 1239 (2d Cir.1984) (discharge of employee); *McAdams v. Salem Children's Home,* 701 F.Supp. 630, 635 (N.D.Ill.1988) (rejecting argument that private contractor providing juvenile care not state actor); *Fialkowski v. Greenwich Home for Children, Inc.,* 683 F.Supp. 103, 105 (E.D.Pa.1987); *Davenport v. Saint Mary Hospital,* 633 F.Supp. 1228, 1234 (E.D.Pa.1986); *Lombard v. Eunice Kennedy Shriver Ctr. for Mental Retardation, Inc.,* 556 F.Supp. at 680; *Kentucky Ass'n for Retarded Citizens v. Conn,* 510 F.Supp. 1233, 1250 (W.D.Ky.1980) (rejecting private mental hospital contractor's argument that it is not subject to suit under Section 1983 for want of state action), *aff'd,* 674 F.2d 582 (6th Cir.), *cert. denied sub nom. Bruington v. Conn,* 459 U.S. 1041, 103 S.Ct. 457, 74 L.Ed.2d 609 (1982); *Ruffler v. Phelps Memorial Hosp.,* 453 F.Supp. 1062 (S.D.N.Y.1978).

D. *Section 1985 Action*

Plaintiffs' claim in count IV alleging deprivation of equal protection under 42 U.S.C.A. Section 1985(3) (West 1981) requires a showing of state-action which is the result of a racial or other class-based invidious and discriminatory purpose. *See Williams v. St. Joseph Hosp.,* 629 F.2d 448 (7th Cir.1980). We are not required to address the correctness of the trial court's decision with respect to this claim because plaintiffs have not presented any arguments or authority to support a contention that the trial court erred in finding that plaintiffs failed to present evidence to substantiate this claim. *See Wilburn v. Stewart,* 110 N.M. 268, 794 P.2d 1197 (1990) (issues raised only in passing and without citation to authority not considered on appeal).

E. *Procedural Due Process Requirements in This Case*

The record reveals plaintiffs had at a maximum, four days to respond to the discharge decision. Because the trial court concluded AARC did not act under color of state law, it is unclear if the court considered the application of cases holding state actors must provide some meaningful pretermination due process prior to depriving a person of any significant protected interest. *See Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (cases cited therein). However, failure to comply with all state statutory and regulatory provisions may not necessarily constitute a deprivation of due process protections guaranteed by the 14th Amendment sufficient to maintain a Section 1983 action. *Garcia v. Las Vegas Med. Ctr.,* 112 N.M. 441, 816 P.2d 510 (Ct.App.1991). It is clear, however, that in the context of this case four days is inadequate. *See In re Bunnell,* 100 N.M. 242, 245, 668 P.2d 1119, 1122 (Ct.App.1983) (in issues involving civil commitment protection of client's rights requires adequate preparation time).

Moreover, AARC admitted in its brief filed with this court that by the time of the March 26, 1987 meeting, AARC had *already determined that discharge was necessary.* Under these circumstances, with inadequate notice and apparent inadequate opportunity to participate meaningfully in the decision to discharge, the meeting could not satisfy even a minimal pretermination due process requirement. Such predetermination under these facts is inconsistent with minimal federal due process as well as with the Act and the Code's requirements.

1. *Contractual Provisions*

At the time of Joanne's admission to AARC's residential program, plaintiffs entered into a "Consent Agreement" (contract) with AARC. Defendants have argued on appeal that the contract constitutes written consent to Joanne's discharge and actual notice of the discharge. This contention is without merit.

The contract contains provisions permitting discharge at the request of the guardian, upon proper notice and a determination, presumably by AARC, that the discharge does not violate any legal or civil right possessed by the client. AARC may seek to discharge a residential client upon appropriate notice and a determination by AARC that continued residence would not be in the best interest of the client *or* other residents of the facility. The contract also provides that AARC may discharge a residential client without notice if a determination is made that "eminent [sic] harm could result to the resident or other residents" if discharge is not immediately sought.

Of these provisions we merely note that, having determined a constitutionally protected interest exists, the contract terms may not operate so as to frustrate an assertion of rights arising out of federal due process protections for the underlying right. *See Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (government benefit may not be denied if denial infringes a constitutionally protected interest); *Carnes v. Parker.* We particularly note that the contract does not require a determination that a discharge proposed by AARC is consistent with all statutory and constitutional rights of the client and would appear to conflict with Section 28–16–7 which requires *all actions* by private service providers be in such compliance. *See United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (failure to adhere to properly promulgated regulations can constitute due process violation); *Arzanipour v. I.N.S.,* 866 F.2d 743 (5th Cir.) (per se denial of due process may arise only where regulation is required by statute or constitution), *cert. denied,* 493 U.S. 814, 110 S.Ct. 63, 107 L.Ed.2d 30 (1989).

III. CONCLUSION

Because of the trial court's greater familiarity with the record and the controlling regulations we think it appropriate that the trial court determine in the first instance the application of the legal opinions expressed herein to the facts of this case. Accordingly, we vacate the order denying the application for preliminary injunction. We reinstate the Section 1983 action and order a stay of any discharge procedures until such time as there is a review on the merits of plaintiffs' Section 1983 action consistent with this opinion.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

850 P.2d 1028

STATE of New Mexico, Plaintiff–Appellee,

v.

Daniel PACHECO, Defendant–Appellant.

No. 13662.

Court of Appeals of New Mexico.

March 11, 1993.

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

Don Klein, Jr., Socorro, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals the trial court order disqualifying his counsel. We hold that this order is not a final, appealable order, and dismiss the appeal.

Defendant was one of a number of defendants who were charged with false voting in November 1990. Eleven of these defendants were represented by attorney Don Klein. When a hearing was called in November 1991, neither counsel nor all but one of his clients was present. The district attorney argued to the court that defense counsel should be disqualified because he was causing delays in the cases. Counsel eventually arrived, eight minutes after the hearing commenced, and was asked for an explanation. Counsel argued only that he had difficulty in calendaring these matters. The trial court disqualified counsel from representing all the defendants in these cases. The court found that the delay in the cases was the fault of defendants through counsel. Defendant appealed the order disqualifying his counsel.

Every aggrieved party has the right to one appeal; however, appellate jurisdiction shall be exercised as provided by law. N.M. Const. art. VI, §§ 2, 29 (Repl.Pamp.1992). The phrase "provided by law" means " 'provided by statutes.' " *State v. Watson*, 82 N.M. 769, 772, 487 P.2d 197, 200 (Ct.App.1971). A criminal defendant has the right of appeal "from the entry of any final judgment." NMSA 1978, § 39-3-3(A)(1) (Repl.Pamp.1991). "An order is final if all issues of law and fact necessary to be determined have been determined, and the case has been completely disposed of to the extent that the court has power to dispose of it." *State v. Webb*, 111 N.M. 78, 79, 801 P.2d 660, 661 (Ct.App.), *cert. quashed*, 111 N.M. 164, 803 P.2d 253 (1990). Contrary to Defendant's assertion, finality is an important prerequisite to the right to appeal in New Mexico. There are important policy considerations underlying the finality rule, including avoiding piecemeal appeals and facilitating speedy and orderly disposition of cases. *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 240, 824 P.2d 1033, 1042 (1992). This second consideration is particularly important in criminal cases. *See Flanagan v. United States*, 465 U.S. 259, 264-65, 104 S.Ct. 1051, 1054, 79 L.Ed.2d 288 (1984).

In determining whether a judgment is final, this Court must look to its substance and not its form. *See Kelly Inn No. 102*, 113 N.M. at 236, 824 P.2d at 1038. A key in determining finality is the effect the judgment has upon the rights of the parties. *Id.* We do not believe that the disqualification of counsel is a final order. *Flanagan v. United States.* It does nothing but order that counsel may no longer represent the client in a particular case. The disqualification does not conclude the rights of the parties. In fact, the matters between the parties continue.

The fact that disqualification of counsel implicates Defendant's constitutional right to counsel does not make the order final and, thus, appealable. Defen-

dant does not have an absolute constitutional right to counsel of his choice; he has the constitutional right to be effectively represented by counsel. *State v. Maes,* 100 N.M. 78, 82, 665 P.2d 1169, 1173 (Ct.App. 1983). Here, there is no indication that Defendant was denied his right to counsel. Therefore, we cannot say at this time that the disqualification had any effect on the rights of Defendant. We think a disqualification of counsel is no different than the denial of a motion to suppress evidence, which also may implicate a defendant's constitutional rights. The denial of a motion to suppress evidence is not appealable. *State v. Garcia,* 91 N.M. 131, 571 P.2d 123 (Ct.App.1977). Likewise, the denial of a motion to dismiss on the grounds of double jeopardy is not appealable as a final order. *State v. Mestas,* 93 N.M. 765, 767, 605 P.2d 1164, 1166 (Ct.App.1980). More particularly, the United States Supreme Court has held that orders disqualifying counsel are not immediately appealable under the collateral-order exception to the final judgment rule. *Flanagan,* 465 U.S. at 270, 104 S.Ct. at 1057.

The order disqualifying counsel is not a final, appealable order. Therefore, this Court has no jurisdiction to hear the appeal and the appeal is dismissed.

IT IS SO ORDERED.

APODACA, J., concurs.

DONNELLY, J., specially concurring.

DONNELLY, Judge (specially concurring).

I concur in the result reached by the majority determining that an order of the trial court disqualifying Defendant's retained counsel in a criminal proceeding does not constitute a final appealable order within the contemplation of NMSA 1978, Section 39–3–3(A)(1) (Repl.Pamp.1991), and SCRA 1986, 12–201 (Repl.1992). I write separately, however, to point out that although our decision here is grounded upon the rationale applied by the United States Supreme Court in *Flanagan v. United States,* 465 U.S. 259, 268–69, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), determining that an order disqualifying counsel is a collateral order which fails to qualify as a final appealable order, nevertheless, in New Mexico, by constitutional provision, statute, and Supreme Court rule, a party may seek immediate review of such order by extraordinary writ or writ of error. *See* N.M. Const. art. VI, § 3 (Repl.Pamp.1992); NMSA 1978, § 39–3–5 (Repl.Pamp.1991); SCRA 1986, 12–503, –504 (Repl.1992).

In *Carrillo v. Rostro,* 114 N.M. 607, 616–17 n. 8, 845 P.2d 130, 139–40 n. 8 (1992), our Supreme Court, citing *Flanagan,* noted that an order disqualifying counsel in a criminal case may be reviewable, in an appropriate case, under the collateral order doctrine by a writ of error. *See also State ex rel. Anaya v. Scarborough,* 75 N.M. 702, 706, 410 P.2d 732, 734–35 (1966) (writ of prohibition may issue in criminal proceeding); *State v. Roy,* 40 N.M. 397, 420–22, 60 P.2d 646, 661–62 (1936) (discussing authority of Supreme Court to issue writ of superintending control).

Although the basis for dismissal of Defendant's appeal here does not reach Defendant's challenge to the propriety of the order of disqualification, an order disqualifying Defendant's counsel of choice is a drastic remedy which should be employed only after the trial court weighs the rights and interests involved and when less severe sanctions or alternatives are found to be inadequate. *See Alexander v. Superior Court,* 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984) (en banc); *In re Ellis,* 822 S.W.2d 602, 605 (Tenn.Ct.App.1991); *Ussery v. Gray,* 804 S.W.2d 232, 236 (Tex.Ct. App.1991); *see also United States v. Diozzi,* 807 F.2d 10, 16 (1st Cir.1986) (burden is on prosecution to demonstrate that infringement on the defendant's choice of counsel is justified); *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 244, 629 P.2d 231, 320 (1980) (even violation of professional ethics will not automatically result in disqualification of counsel), *cert. denied,* 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981); *Zepeda v. Superior Court,* 7 Cal.App.4th 829, 9 Cal.Rptr.2d 261, 263 (1992) (court's power to disrupt

relationship between attorney and client is narrow); *Anaya v. People,* 764 P.2d 779, 781–83 (Colo.1988) (en banc) (declining to adopt harmless error standard of review where order of disqualification of counsel is found to have been erroneously entered).

Since the right to be represented in a criminal case is of constitutional dimension, *United States v. Mendoza–Salgado,* 964 F.2d 993, 1015 (10th Cir.1992), prior to disqualifying an attorney, the trial court must balance a defendant's interest in being represented by counsel of his choosing, the public interest in the effective administration of justice, and the basic concepts of fundamental fairness. *See United States v. Agosto,* 675 F.2d 965, 970 (8th Cir.1982), *modified on other grounds by Flanagan,* 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288; *United States v. Rogers,* 471 F.Supp. 847, 853 (E.D.N.Y.1979); *People v. Brady,* 275 Cal.App.2d 984, 80 Cal.Rptr. 418, 423 (1969).

In the instant case, the order of disqualification which is challenged on appeal does not constitute a final appealable order, nor does it satisfy the criteria of a valid interlocutory appeal, and Defendant did not seek to test the propriety of the trial court's order by applying for an extraordinary writ or writ of error.

850 P.2d 1031

Lou Ann ALVAREZ, Claimant–Appellant,

v.

COUNTY OF BERNALILLO, Respondent–Appellee.

No. 14014.

Court of Appeals of New Mexico.

March 12, 1993.

Certiorari Denied April 27, 1993.

Robert G. Marcotte, Albuquerque, for claimant-appellant.

Thomas L. Kalm, Albuquerque, for respondent-appellee.

OPINION

HARTZ, Judge.

Few words in the legal lexicon are as mischievous as the word "void." The absolute victory that it promises often proves illusory. A comfortable word to use to describe certain action in one context, it may be a wholly inappropriate word to describe the same action in another context. This is a case in point.

Worker is pursuing her second appeal to this Court. In the first appeal we rejected her challenge to a compensation order issued by the Workers' Compensation Divi-

sion (WCD).[1] She then moved the WCD to set aside the compensation order on the ground that it was void. Her second appeal challenges the denial of that motion. We affirm.

Our starting point is the use of the word "void" in *Wineman v. Kelly's Restaurant,* 113 N.M. 184, 824 P.2d 324 (Ct.App.1991). Wineman had appealed from an adverse decision of the WCD on the ground that the workers' compensation judge (WCJ) had improperly rejected her peremptory challenge of him. We held that the challenge complied with the WCJ's rules, the WCJ should have excused himself from the case, and "[a]ll actions taken by [the WCJ] subsequent to the challenge, therefore, are void." *Id.* at 186, 824 P.2d at 326; *accord Rodriguez v. El Paso Elec. Co.,* 113 N.M. 672, 831 P.2d 608 (Ct.App.1992).

Worker contends that the WCJ here similarly erred in rejecting her peremptory challenge. In contrast to Wineman, however, Worker did not raise this contention in a direct appeal from the compensation order. In her first appeal Worker did not claim error with respect to the failure of the WCJ to recuse himself from hearing the case. We affirmed the compensation order in an unpublished opinion dated July 11, 1991. Four months later we decided *Wineman.* Shortly after *Wineman* appeared in the State Bar Bulletin, Worker moved pursuant to NMSA 1978, Section 52–5–9 (Repl.Pamp.1991), to set aside the compensation order. The WCJ ruled that the motion was barred by the doctrines of res judicata and law of the case. We rely on res judicata.

Section 52–5–9(B) is the counterpart in our workers' compensation law to New Mexico Rule of Civil Procedure 1–060(B), which is virtually identical to Federal Rule of Civil Procedure 60(b). *See Lucero v. Yellow Freight Sys.,* 112 N.M. 662, 664, 818 P.2d 863, 865 (Ct.App.1991). The language of Section 52–5–9(B) pertinent to this case is the following: "A review [of a compensation order] may be obtained upon application of a party in interest filed with the director [of the WCD] ... upon the following grounds: ... (6) the compensation order is void[.]" The comparable language in SCRA 1986, 1–060(B)(4) and Federal Rule of Civil Procedure 60(b)(4) permits a district court to set aside a judgment on the ground that "the judgment is void." We are guided by judicial decisions and authoritative commentary construing these rules of judicial procedure. *See Lucero,* 112 N.M. at 666, 818 P.2d at 867.

We also are guided by the provisions regarding relief from judgments in Restatement (Second) of Judgments (1980) (the Restatement). The propositions and commentary of the Restatement derive from and contribute to the best legal thinking concerning the proper application of Federal Rule of Civil Procedure 60(b). *See* Restatement, ch. 1, Introduction at 6 ("One of the chief tasks of this Restatement is to state the law of res judicata in terms coordinate with the legislative systems of procedure now in general use, i.e., the Federal Rules and state systems closely similar to them."); *id.* ch. 5, introductory note (noting relationship of chapter to Federal Rule 60(b)). Although the Restatement "[i]n the interest of clarity" avoids the terms "void" and "voidable," *id.* § ch. 5, introductory note c. at 144, it is persuasive authority in determining when a judgment is "void" under Rule 60(b)(4). *See Hodge v. Hodge,* 621 F.2d 590, 592–93 (3d Cir.1980).

The question presented is whether the compensation order denying benefits to Worker was "void" within the meaning of Section 52–5–9(B)(6) because the WCJ rejected Worker's peremptory challenge, even though Worker did not challenge the rejection in her appeal from the compensation order. *Wineman* did not decide that issue. In describing the actions taken by the WCJ in that case as "void," we were holding only that all actions taken by the WCJ subsequent to the peremptory challenge would be set aside on direct appeal.

1. At various times the administering agency of the Workers' Compensation Act has been the Workers' Compensation Administration. *See* NMSA 1978, § 52–5–1 (Cum.Supp.1986); § 52–5–1 (Repl.Pamp.1992) (effective January 1, 1991). For convenience we will refer to both entities as the WCD.

When a party does not appeal a rejection of a peremptory challenge, res judicata doctrine comes into play. The law's regard for the finality of judgments and its disfavor of relitigating issues foreclose the relief sought by Worker.

We have found no case directly in point. We find support, however, in (1) the development of the law in California regarding peremptory disqualification of judges and (2) the law regarding challenges to personal jurisdiction.

California courts at one time referred to the actions of a peremptorily disqualified judge as "void," *see, e.g., In re Robert P.*, 121 Cal.App.3d 36, 175 Cal.Rptr. 252, 257 (1981), although the question of the validity of the actions of a peremptorily disqualified judge did not arise in a challenge to a final judgment other than by direct appeal. Subsequent decisions retreated from the earlier terminology, stating that "the actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party." *In re Christian J.*, 155 Cal.App.3d 276, 202 Cal.Rptr. 54, 56 (1984); *accord Stebbins v. White*, 190 Cal.App.3d 769, 235 Cal.Rptr. 656, 665 (1987). The opinion in *In re Christian J.* cited with approval a discussion in 1 B.E. Witkin, *California Procedure*, Courts § 61(a), at 339–40 (2d ed. 1970), which expressed several reasons for rejecting the proposition that a judgment of a disqualified judge is void for lack of subject matter jurisdiction. One reason was that "to hold that jurisdiction of the subject matter is lacking would mean that all such judgments would be open to *collateral attack* at any time, a highly undesirable result." *Id.* at 340. This view would certainly argue for affirmance in the case before us. We should note, however, that our ruling in this case does not mean that we necessarily endorse all of California law regarding the review of denials of peremptory disqualifications.[2]

The second source of support, the law regarding challenges to personal jurisdiction, provides a compelling analogy to the situation in this case. Courts commonly state that a judgment entered against a party over whom the court lacks personal jurisdiction is a "void" judgment. *See, e.g., In re Estate of Baca*, 95 N.M. 294, 296, 621 P.2d 511, 513 (1980). Nevertheless, we are confident that the New Mexico Supreme Court would follow the Restatement in prohibiting a party from twice litigating the question of whether a court had jurisdiction over it. Rather than using the term "personal jurisdiction," the Restatement speaks of the requirements of territorial jurisdiction and adequacy of notice. Restatement Section 10(2) states:

> A determination of an objection to notice or territorial jurisdiction precludes the party who asserted it from litigating either contention in subsequent litigation.

The comment to the section includes the following illustration 4:

> P sues D for $25,000, serving D by delivery of summons to a person at D's summer cottage. By appropriate procedure, D moves to dismiss the action on the ground that the cottage was not his "dwelling house" within the meaning of the applicable rule governing the mode of serving summons. D's objection is overruled. Upon D's failure further to defend the action, judgment is rendered for P. Except by means of appeal from the judgment, D may not subsequently attack the judgment on the ground that notice of the action was inadequate or that the court lacked territorial jurisdiction.

Id. at 104. When the Restatement uses the term "subsequent litigation," it includes motions for relief from a final judgment in the court rendering the judgment. *See id.*

2. For example, California law is apparently inconsistent with *Wineman*. In *Stebbins*, 235 Cal. Rptr. at 666–67 n. 9, the court wrote that "a judgment will be set aside on appeal on the ground of an erroneous rejection of a peremptory challenge of the trial judge only where there is a showing of actual prejudice." Review has been restricted still further by the California legislature. A prompt petition for a writ of mandate is now the exclusive means of challenging the denial of a peremptory disqualification. *See People v. Hull*, 1 Cal.4th 266, 2 Cal. Rptr.2d 526, 820 P.2d 1036 (1991) (en banc).

cmt. f; ch. 5, introductory note at 140–43; and § 78. Adopting this same view, the discussion of Federal Rule 60(b)(4) in 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* Section 2862 at 201 (1973), states: "[I]f defendant has challenged the court's jurisdiction over his person and this issue has been resolved against him by a final judgment, that judgment is not void, but is res judicata on the issue of jurisdiction." *Accord Springfield Credit Union v. Johnson,* 123 Ariz. 319, 322, 599 P.2d 772, 775 (1979) (motion under the Arizona equivalent of Federal Rule 60(b)(4)).

This doctrine will, of course, on occasion perpetuate error. A trial court that finds that it has personal jurisdiction over a party may be wrong, palpably wrong. But if the wronged party has a fair opportunity to litigate the issue and does not pursue an appeal, the interest in repose prevails over the interest of the party in relitigating the issue, under Rule 1–060(B) or otherwise. This result is not remarkable. Res judicata in general prohibits repeated litigation of the same issue. *See* Restatement ch. 1, Introduction at 10–12.

We see no reason to dilute the application of res judicata doctrine when the issue is the WCJ's failure to honor a peremptory challenge. The right to make a peremptory challenge is like the right to contest personal jurisdiction in that both are matters of personal privilege that a party need not assert. Just as a party who has not been properly served can agree to proceed in the plaintiff's chosen forum, *see* SCRA 1986, 1–012(H) (Repl.Pamp.1992) (defense of lack of personal jurisdiction is waived if not promptly asserted), a party in a workers' compensation proceeding need not exercise a peremptory challenge to a WCJ even though the party has that right. One can view the failure of a party to appeal a refusal to honor a peremptory challenge as a waiver of that personal privilege. *Cf. State v. Latham,* 83 N.M. 530, 494 P.2d 192 (Ct.App.1972) (party may waive disqualification of judge by taking actions inconsistent with disqualification in the course of litigation).

We conclude that a compensation order rendered by a WCJ who improperly failed to honor a peremptory challenge is not a "void" compensation order that may be set aside pursuant to Section 52–5–9(B)(6) after the order has been unsuccessfully appealed on other grounds. Principles of res judicata bar such subsequent litigation. Because of our holding on this question, we need not determine whether in fact the WCJ erred in refusing to honor Worker's peremptory challenge.

We affirm the order denying Worker's motion to set aside the compensation order. We deny the County's motion to dismiss the appeal.

IT IS SO ORDERED.

MINZNER, C.J., and PICKARD, J., concur.

850 P.2d 1034

Johnny Y. FOSTER, a/k/a Johnny Foster, Plaintiff–Appellee,

v.

Bill LUCE and Sylvia Luce, Individually, and d/b/a Bill Luce Livestock, Defendants–Appellants.

No. 13126.

Court of Appeals of New Mexico.

March 16, 1993.

F. Douglas Moeller, Farmington, for defendants-appellants.

John R. Westerman, Law Offices of John R. Westerman, Chartered, Farmington, for plaintiff-appellee.

OPINION

DONNELLY, Judge.

Defendants appeal from a judgment awarding Plaintiff compensatory and punitive damages in a tort action which grew out of their purchase of cattle on the Navajo Indian Reservation. We discuss: (1) whether the district court had jurisdiction over a tort claim filed by Plaintiff, a Navajo Indian, against Defendants for alleged wrongful acts which occurred, in part, on the Navajo Indian Reservation; (2) whether the district court erred in ruling that Defendants waived their right to a jury trial; and (3) whether the district court erred in awarding Plaintiff prejudgment interest. Other issues raised in the docketing statement but not briefed are waived. We affirm the judgment entered below.

Defendants, who are non-Indians, purchased cattle from Plaintiff's brother on the Navajo Indian Reservation. The cattle were owned by Plaintiff, who resides off the reservation. Plaintiff filed suit in the San Juan County District Court for damages, alleging that Defendants, in purchasing the cattle and disposing of them, "knew or should have known [the cattle] were stolen."

Defendants filed an answer but failed to make a timely demand for a jury trial, and the district court denied their subsequent request for trial by jury. At the conclusion of the trial, the court awarded Plaintiff $6,093.77 compensatory damages, punitive damages in the amount of $2,135, and prejudgment interest on the compensatory damage award, together with costs.

I. *JURISDICTIONAL ISSUE*

Defendants contest the jurisdiction of the district court to adjudicate Plaintiff's tort claim involving the alleged wrongful taking of livestock owned by Plaintiff where the facts demonstrated that the

property was acquired by Defendants on the Navajo Indian Reservation. Relying in part upon *Chino v. Chino,* 90 N.M. 203, 561 P.2d 476 (1977), Defendants argue that the state court here was without jurisdiction to adjudicate Plaintiff's claim alleging wrongful conduct on the part of Defendants, because the acts in question occurred on the Navajo Indian Reservation, the exercise of jurisdiction by the state court impermissibly infringes upon tribal sovereignty, and that the acts in question are controlled by tribal law.

Did the district court lack jurisdiction in the present case? We are unpersuaded by Defendants' jurisdictional challenge. In *Chino* our Supreme Court reiterated its recognition of the "infringement test" in order to determine whether a state court has jurisdiction to adjudicate claims involving property held by Indians. The *Chino* Court stated:

> In considering [the infringement] test it is helpful to summarize certain criteria to determine whether or not the application of state law would infringe upon the self-government of the Indians. These are the following: (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) what is the nature of the interest to be protected.

Id. at 206, 561 P.2d at 479.

Applying the test set forth in *Chino* to the facts herein, it is clear that Plaintiff's complaint sought to recover damages for loss of his personal property resulting from Defendants' alleged improper conduct. Nothing in the record before us shows that litigation of this claim in the state court impermissibly infringes upon Navajo tribal sovereignty. *See Three Affiliated Tribes v. Wold Eng'g, P.C.,* 467 U.S. 138, 148, 104 S.Ct. 2267, 2274, 81 L.Ed.2d 113 (1984); *Paiz v. Hughes,* 76 N.M. 562, 564–65, 417 P.2d 51, 52–53 (1966); *Whiting v. Hoffine,* 294 N.W.2d 921, 923–24 (S.D.1980); *see also McCrea v. Busch,* 164 Mont. 442, 524 P.2d 781, 782 (1974) (upholding right of Indian to bring a reservation-based wrongful death action against non-Indian in state court); *Bonnet v. Seekins,* 126 Mont. 24, 243 P.2d 317, 319 (1952) (state court invested with jurisdiction to resolve claim by Indian for lease payments and damages to trust land located on Blackfoot Reservation).

In *Three Affiliated Tribes,* the United States Supreme Court upheld the right of a federally-recognized Indian Tribe to pursue a civil action in state court against a non-Indian for a claim which arose from an injury that occurred on an Indian Reservation. The Court held that the exercise of state jurisdiction was not inconsistent with federal law or tribal interests, and:

> Despite respondent's arguments, we fail to see how the exercise of state-court jurisdiction in this case would interfere with the right of tribal Indians to govern themselves under their own laws.... This Court ... repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country. See *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. [164], at 173 [93 S.Ct. 1257, at 1262, 36 L.Ed.2d 129] [(1973)] (dictum); *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 [88 S.Ct. 982, 19 L.Ed.2d 1238] (1968); *Williams v. Lee,* 358 U.S. [217], at 219 [79 S.Ct. 269, at 270, 3 L.Ed.2d 251] [(1959)] (dictum); *United States v. Candelaria,* 271 U.S. 432, 444 [46 S.Ct. 561, 563, 70 L.Ed. 1023] (1926); *Felix v. Patrick,* 145 U.S. 317, 332 [12 S.Ct. 862, 867, 36 L.Ed. 719] (1892); *Fellows v. Blacksmith,* [60 U.S. (19 How.) 366, 15 L.Ed. 684] (1857).

Three Affiliated Tribes, 467 U.S. at 148, 104 S.Ct. at 2274.

Consistent with the above authorities, we conclude that the district court in the instant case was invested with jurisdiction over the subject matter to adjudicate Plaintiff's claims.

II. *RIGHT TO JURY TRIAL*

Defendants contend that the district court erred in finding that they were not entitled to a jury trial in the instant case. We disagree. As shown by the record, Defendants failed to file a timely request

for a jury trial. Under SCRA 1986, 1–038(A) (Repl.1992), a party may file a demand for trial by jury upon any issue properly triable by jury, "by serving upon the other parties a demand therefor in writing after the commencement of the action and not later than ten (10) days after service of the last pleading directed to such issue."

Plaintiff's complaint was filed on February 8, 1990, and Defendants' answer was filed on February 13, 1990; however, their demand for a jury trial was not filed until April 4, 1990, more than ten days after the filing of their answer. Defendants argue, however, that their failure to exercise a demand for a jury trial resulted from the lack of clarity in Plaintiff's complaint as to the nature of the action, and that the complaint failed to give fair notice that Plaintiff's complaint sounded in tort. Specifically, Defendants contend that Plaintiff's references in the complaint to "[Sections] 77–9–1 et seq. N.M.S.A.1978 Ann.", led them to assume that the action filed by Plaintiff was a special statutory cause of action. Defendants also assert that it was only after the time for requesting a jury had elapsed, and Plaintiff responded to their motion for summary judgment, that they became aware that Plaintiff's complaint purported to set forth an action in tort.

Plaintiff's complaint contains the heading, "COMPLAINT FOR MONEY DAMAGES," and alleges that Defendants "purchased 17 head of cattle from Timothy Foster"; that the "cattle were owned by Plaintiff and carried his brand"; that the cattle were not owned by the seller and "this fact was known by Defendants or should have been known by them in [the] exercise of due care"; and that "the actions of Defendants in purchasing cattle that they knew or should have known were stolen was done recklessly, intentionally and wantonly and contrary to [Sections] 77–9–1 et seq. N.M.S.A.1978 Ann." Article 9 of Chapter 77, entitled "Brands, Ownership, Transportation and Sale of Animals," does not provide for a private cause of action.

Although the complaint did not specifically utilize words stating that Defendants' conduct constituted a wrongful conversion of Plaintiff's cattle, we think the language of Plaintiff's complaint was sufficient to fairly give notice to Defendants that the action against them sounded in tort and alleged matters which, if factually proven, would establish the tortious conversion of Plaintiff's property. *Cf. Lewis v. Ehrlich,* 20 Ariz.App. 363, 365, 513 P.2d 153, 155 (1973) (wrongful sale of horse belonging to another may constitute conversion).

III. *AWARD OF PREJUDGMENT INTEREST*

Defendants' final argument asserts that, although prejudgment interest may be awarded in the discretion of the court, *see* NMSA 1978, § 56–8–4(B) (Repl.1986), the district court erred in awarding Plaintiff prejudgment interest here, because the complaint failed to specifically contain a request for such relief, although both parties addressed the matter in their requested findings and conclusions.

The issue of whether prejudgment interest may be awarded to a prevailing party, absent a specific request for such relief having been set forth in the pleadings, has not been decided by the appellate courts in New Mexico. Courts in other jurisdictions which have considered this question have reached conflicting results. *See, e.g., Civil Rights Div. v. Superior Court,* 146 Ariz. 419, 426, 706 P.2d 745, 752 (Ariz.Ct.App. 1985) (under Rule of Civil Procedure 54(d), a party is entitled to recover prejudgment interest "even though not specifically requested in its complaint"); *Fitzgerald v. Critchfield,* 744 P.2d 301, 304 (Utah Ct. App.1987) (successful plaintiff was entitled to recover prejudgment interest notwithstanding failure to specifically plead such request). *But see Crowd Management Servs., Inc. v. Finley,* 99 Or.App. 688, 784 P.2d 104, 107 (1989) (party seeking award of prejudgment interest must plead entitlement to such relief).

SCRA 1986, 1–054(D) (Repl.1992), provides:

> **Demand for judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except

> as to a party against whom a judgment is entered by default, *every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.* [Emphasis added.]

Our SCRA 1–054(D) is identical to Rule 54(c) of the Federal Rules of Civil Procedure.

As observed by 10 Charles A. Wright et al., *Federal Practice and Procedure: Civil 2d* Section 2664, at 162–63 (1983): "Rule 54(c) functions to permit the court to award prejudgment interest, as provided under the otherwise applicable law, even when not explicitly sought in the complaint. [Although there is authority holding otherwise], the weight of authority is to the contrary and seems sounder." (Footnote omitted.)

Consistent with the majority rule interpreting this rule, we conclude that the district court may grant an award of prejudgment interest even if the party entitled to recover has not included a demand for such relief in his pleadings. *See State ex rel. Newsome v. Alarid,* 90 N.M. 790, 798–99, 568 P.2d 1236, 1244–45 (1977) ("New Mexico . . . clearly allows any appropriate relief to be granted in a case regardless of what is specifically requested in the pleadings.").

CONCLUSION

The judgment of the district court is affirmed.

IT IS SO ORDERED.

HARTZ and FLORES, JJ., concur.

850 P.2d 1038

Guadalupe P. COX, Claimant–Appellant,

v.

CHINO MINES/PHELPS DODGE, Respondent–Appellee.

No. 13470.

Court of Appeals of New Mexico.

March 16, 1993.

Anthony F. Avallone, Thomas R. Figart, Law Systems of Las Cruces, P.A., Las Cruces, for claimant-appellant.

James C. Ritchie, Edward Ricco, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for respondent-appellee.

OPINION

FLORES, Judge.

Claimant appeals from a judgment entered by the Workers' Compensation Judge (WCJ) denying her compensation benefits and dismissing her claim with prejudice. Claimant raises several issues on appeal; however, Employer contests only the issue of whether Claimant sustained an injury "arising out of" her employment as a result of incidents of sexual harassment occurring in the workplace. Accordingly, we address only this issue and affirm.

FACTS

Claimant was hired by Employer in 1979. Claimant complained of several instances of sexual harassment toward her by two fellow employees and one supervisor occurring at the workplace in the period between October 1988 and October 1990. In turn, the WCJ found three instances of sexual harassment occurring in October and December of 1988 and in June of 1989.

Regarding the October and December 1988 incidents, Claimant was accosted on the job by co-worker Patrick Feeley (Feeley), who attempted to hug and kiss her and stated that he wanted to take her to bed. Claimant resisted Feeley's advances and reported both incidents to her immediate foreman. Feeley was confronted by his supervisor after the December 1988 incident and was threatened with discharge if he continued to violate company policy. Such incidents did not reoccur.

Regarding the June 1989 incident, Claimant was at the workplace together with several other co-employees when a fellow employee commented on whether another employee had "got [sic] his job because he sucked cock." Claimant reported this incident to a co-employee at the Industrial Relations Office.

On August 14, 1989, Claimant saw Dr. Campbell, a psychiatrist. At that time she complained of anxiety, gastric pain, depression, sleeplessness, lack of energy, crying spells, and feelings of despair, all due to the incidents of sexual harassment at the workplace. Dr. Campbell continued to treat Claimant and eventually recommended that she take time off work. Claimant was off work from June 20 to July 30, 1990. On August 14, 1990, Claimant filed a claim alleging psychological and physical injuries, as a result of sexual harassment on the job. She sought disability and medical benefits. Claimant was again off work from October 16, 1990, to March 1, 1991. At the time of the hearing on July 1, 1991, Claimant was still working with Employer basically performing the same job duties she was performing in December 1988 and June 1989.

During all material times Employer had a written policy, known to all employees, prohibiting sexual harassment in the workplace. The policy, in pertinent part, provided as follows:

> that all employees should work in an environment free of sexual harassment. ... [S]exually harassing conduct in the work place, whether physical or verbal, committed by supervisors or non-supervisory personnel is ... prohibited and will not be tolerated. This includes, but is not limited to, offensive flirtation, advances, propositions, ... sexually degrading words to describe an individual ..., [or] telling of offensive jokes.

In dismissing Claimant's action, the WCJ concluded that (1) Claimant did not sustain an accident "arising out of" her employment with Employer; and (2) sexual harassment was not a practice permitted at Employer's workplace and went against the customs of the employment environ-

ment. Accordingly, the workers' compensation claim was dismissed. It is from this dismissal of her claim that Claimant appeals.

DISCUSSION

In order to be entitled to compensation under the Workers' Compensation Act, a claimant must have suffered an injury "arising out of" the claimant's employment. NMSA 1978, § 52-1-28(A) (Repl. Pamp.1987); *Montoya v. Leavell-Brennand Constr. Co.*, 81 N.M. 616, 471 P.2d 186 (Ct.App.1970). To establish that an injury arises out of employment, "it is not sufficient that the injury occurs at work; the disability must have resulted from a 'risk incident to [the] work itself' or 'increased by the circumstances of the employment.'" *Candelaria v. General Elec. Co.*, 105 N.M. 167, 173, 730 P.2d 470, 476 (Ct.App.), *cert. quashed*, 105 N.M. 111, 729 P.2d 1365 (1986) (quoting *Kern v. Ideal Basic Indus.*, 101 N.M. 801, 802, 689 P.2d 1272, 1273 (Ct.App.), *cert. denied*, 102 N.M. 7, 690 P.2d 450 (1984)); *see also City of Richmond v. Braxton*, 230 Va. 161, 335 S.E.2d 259, 261-62 (1985) (for a claimant's injury to arise out of his or her employment, "[i]t is not sufficient to find that the employment is what brought the parties into close proximity[;] ... there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury").

The question of whether a claimant's injury arises out of his or her employment is a question to be determined by the trier of fact. *See Gutierrez v. Artesia Pub. Schools*, 92 N.M. 112, 115, 583 P.2d 476, 479 (Ct.App.1978) (quoting *In re McNicol*, 215 Mass. 497, 102 N.E. 697 (1913)). However, where the historical facts of the case are undisputed, as in this case, the question of whether the accident arose out of the employment is a question of law. *Edens v. New Mexico Health & Social Servs. Dep't*, 89 N.M. 60, 62, 547 P.2d 65, 67 (1976). Here, Employer concedes that Claimant sustained an injury caused by three instances of sexual harassment found by the WCJ to have occurred in the workplace. Whether the facts found by the WCJ establish an injury "arising out of" Claimant's employment is therefore a question of law. *See id.*

Claimant, citing *Board of Education v. Jennings*, 98 N.M. 602, 651 P.2d 1037 (Ct. App.1982), argues that an injury on the job as a result of the unsatisfactory work performance of a co-employee is a risk inherent in an employment context. We further understand Claimant to be arguing that Employer's written policy prohibiting sexual harassment established a condition of employment whereby employees must forbear committing acts of sexual harassment on the job as a condition of employment. She therefore submits that one who is injured by a violation of that condition has been injured by an incident related to employment. We disagree for two reasons. First, such an analysis is inconsistent with our recently decided case of *Woods v. Asplundh Tree Expert Co.*, 114 N.M. 162, 836 P.2d 81 (Ct.App.), *cert. denied*, 113 N.M. 744, 832 P.2d 1223 (1992). Second, such an analysis ignores the applicable law on the "arising out of" requirement.

Both Claimant and Employer cite out-of-state cases to support their positions that Claimant's injury either did or did not arise out of her employment. We need not list all of the cases and their holdings here. Most of them are collected in Eliot J. Katz, Annotation, *Workers' Compensation: Sexual Assaults as Compensable*, 52 A.L.R. 4th 731 (1987). We reject the cases cited by Claimant as poorly reasoned or inconsistent with established New Mexico law on the "arising out of" requirement. *E.g., Lui v. Intercontinental Hotels Corp. (Hawaii)*, 634 F.Supp. 684 (D.Haw.1986); *Brown v. Alos Micrographics Corp.*, 150 A.D.2d 888, 540 N.Y.S.2d 911 (1989).

We find Employer's cited cases to be more in line with New Mexico law. However, while some of its cases contain persuasive language that appears to be consistent with our own cases' interpretation of the "arising out of" requirement, we question whether those cases' application of that language is consistent with what we would do. *E.g., City of Richmond v. Braxton.* Thus, our citation of these cases

does not mean that we approve of them in their entirety.

Nonetheless, it appears to us that much of the language of *Murphy v. ARA Services, Inc.*, 164 Ga.App. 859, 298 S.E.2d 528 (1982), *cert. denied* (1983), and *Carr v. U S West Direct Co.*, 98 Or.App. 30, 779 P.2d 154, *review denied*, 308 Or. 608, 784 P.2d 1101 (1989), is instructive in determining whether an episode of sexual harassment arises out of the employment. In particular, *Murphy* states that the fact that the employment caused the claimant to be exposed to the assailant is not dispositive. *Murphy*, 298 S.E.2d at 531. *Carr* states that there must be some evidence about the nature of the job or job environment that created or enhanced the risk of assault. *Carr*, 779 P.2d at 156–57. Also, in *Arnold v. State*, 94 N.M. 278, 609 P.2d 725 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980), we upheld, as arising out of the employment, an assault and rape by a mentally retarded student who lived at the state facility at which the claimant was living when the assault and rape occurred because the claimant was living in housing provided by the employer on the premises.

The out-of-state cases are also consistent with our own case of *Woods*, in which we outlined the rules about injuries caused by horseplay. Under the New York rule, a worker could recover for injuries caused by horseplay if horseplay was a regular incident of employment. Under the course of employment test, a worker could recover as long as the horseplay was not a substantial deviation from employment, which the judge would find after considering the extent of the deviation, the completeness of the deviation, the extent to which horseplay was an accepted part of the employment, and the extent to which the nature of the employment may include some horseplay.

Here, the incidents involving Claimant were isolated and were not part of the conditions of employment. While we do not believe that the rules concerning horseplay should be superimposed onto sexual harassment situations, we note that under either of the *Woods* rules, Claimant's claim fails because sexual harassment was not a regular incident of the employment and Employer had specific policies in place prohibiting sexual harassment. In this regard, Feeley, the employee who accosted Claimant, was warned to stop his conduct or he would be discharged. Thereafter, the sexual harassment incidents stopped. Thus, sexual harassment was not a peculiar risk at this workplace. In fact, Claimant admits in her testimony that she had experienced no incidents of sexual harassment in approximately nine years of previous employment with Employer and that she was unaware of any other female employee who had previously been sexually harassed at this workplace.

By virtue of the Employer's written policy on sexual harassment and its action in reprimanding its employee, Feeley, it is clear that Employer neither authorized nor tolerated the sexual harassment incidents. Thus, although Claimant's injury may have been causally related to her employment, we hold that on the facts in this case, the WCJ properly concluded, as a matter of law, that Claimant did not sustain an accident arising out of her employment.

Lastly, Claimant argues that her injury stemming from sexual harassment on the job should be compensable under New Mexico workers' compensation law as a matter of public policy. She contends that, as a matter of public policy, both New Mexico and federal laws, through the New Mexico Human Rights Act, NMSA 1978, §§ 28–1–1 to –7, 28–1–9 to –14 (Repl.Pamp.1991) and the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5 (1988), respectively, provide remedies for sexual harassment in the workplace. She further argues that providing similar remedies under the New Mexico Workers' Compensation Act would be consistent with such public policies. We are not convinced that Claimant is correct. We are more persuaded by Employer's arguments that the concerns addressed by these statutes are quite different from those addressed by the workers' compensation laws and that the way to maintain public policies against sexual harassment on the job is to pursue the common-law or statutory remedies avail-

able to promote these policies and not to engraft those policies on to a very different legislative scheme such as the Workers' Compensation Act.

Based on the foregoing, we affirm the WCJ's judgment.

IT IS SO ORDERED.

CHAVEZ and PICKARD, JJ., concur.

850 P.2d 1042

STATE of New Mexico, Plaintiff–Appellee,

v.

Robert S. WARE, Defendant–Appellant.

No. 13671.

Court of Appeals of New Mexico.

March 19, 1993.

Certiorari Denied March 24, 1993.

Tom Udall, Atty. Gen., Bill Primm, 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

MINZNER, Chief Judge.

Defendant appeals his conviction for aggravated battery with a deadly weapon and aggravated battery causing great bodily harm. He raises the following issues on appeal: (1) whether the trial court erred in refusing to honor his peremptory challenge; (2) whether he could be convicted of both crimes; (3) whether his statements to police should have been suppressed; (4) whether the trial court erred in allowing the State to introduce evidence of prior bad acts toward his girlfriend; (5) whether the court erred in restricting his cross-examination of a State's witness; (6) whether his right to speedy trial was violated; and (7) ineffective assistance of counsel. We hold that the trial court erred in refusing to honor Defendant's peremptory challenge, and therefore reverse and remand for a new trial. Because we determine that the trial court's actions subsequent to the disqualification were void, we do not address Defendant's remaining issues.

FACTS

Defendant was indicted in Bernalillo County Cause No. CR–90–2284 on December 18, 1990, for aggravated battery and tampering with evidence. The charges arose out of an incident on May 5, 1990, in which Defendant allegedly shot another man. The case was assigned to Judge Murdoch. Defendant filed several pretrial motions, including a motion to suppress his statements to the police. The trial court granted the suppression motion in part and denied it in part. After the hearing on the motion to suppress, Defendant filed a motion to quash the indictment on the basis of grand jury irregularities. The State filed a nolle prosequi on August 22, 1991, representing that the case would be immediately re-presented to the grand jury.

On August 23, the grand jury returned a second indictment, virtually identical to the first, in Bernalillo County Cause No. CR–91–1518. The assistant district attorney also filed a "statement of reindictment" in the new case. The case was again assigned to Judge Murdoch. An arrest warrant was issued and arraignment was set. Defendant filed a notice of peremptory disqualification against Judge Murdoch on August 27. The clerk's office reassigned the case to Judge Smith on August 28. Upon learning of his disqualification, Judge Murdoch set the matter for hearing and subsequently struck Defendant's peremptory challenge, noting that a number of similar cases were being handled in the same way. While there was no testimony on the matter, the judge indicated that all of these cases were reassigned to the same judge to avoid the necessity of redoing work already done.

Defendant was convicted of aggravated battery with a deadly weapon, and the alternative offense, aggravated battery with great bodily harm. He was acquitted of the tampering with evidence charge.

DISCUSSION

Defendant contends that the trial court erred in refusing to honor his peremptory challenge. He argues that the nolle prosequi ended the old case, and the new indictment began a new case with all procedural rights reattaching. Defendant maintains that his peremptory challenge, filed within ten days after the second indictment, was timely. *See* NMSA 1978, § 38–3–9 (Repl.Pamp.1987); SCRA 1986, 5–106(C) (Repl.1992).

The State argues that the new indictment was only a "technical restarting" of the case, citing the unique circumstances of this case. That the indictments in this case

were nearly identical and that the cases were assigned to the same judge does not persuade us that the two cases were the same. Nor does the fact that the two cases had different docket numbers persuade us that the two cases were different. Instead, we look at the function of a nolle prosequi.

In essence, the State argues that a nolle prosequi is unlike other dismissals, and as such it did not nullify the original indictment filed in this case. The State points out that this Court has held that a nolle prosequi may not necessarily require the six-month rule to restart. *See State v. Lucero,* 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct.App.), *cert. denied,* 108 N.M. 433, 773 P.2d 1240, *and writ quashed,* 108 N.M. 582, 775 P.2d 1299 (1989); *see also* SCRA 1986, 5–604(B) (Repl.1992) (six-month rule).

A nolle prosequi is a dismissal of criminal charges filed by the prosecutor, usually without prejudice. SCRA 1986, 7–506(A) (Repl.1990); *Black's Law Dictionary* 1048 (6th ed. 1990). The State has wide discretion to dismiss criminal charges, and absent an abuse of that discretion, the trial court will not exercise its control over the movements of a given case. *See State v. Ericksen,* 94 N.M. 128, 130–31, 607 P.2d 666, 668–69 (Ct.App.1980). A trial court will prevent a district attorney from using a nolle prosequi to circumvent the Rules of Criminal Procedure. *See Lucero,* 108 N.M. at 550, 775 P.2d at 752 (generally a new indictment supersedes the original; however, where a nolle prosequi is used to circumvent the six-month rule, refiling of an indictment will not act to toll the original six-month period); *Ericksen,* 94 N.M. at 130–31, 607 P.2d at 668–69 (prosecutor may not utilize nolle prosequi to achieve a barred result).

Allowing the same six-month time period to apply after a nolle prosequi is filed does not cut against the argument that the original case has ended; rather, it is a trial court's method of preventing the prosecution from abusing its wide discretion in dismissing charges. *See State ex rel. Delgado v. Stanley,* 83 N.M. 626, 627, 495 P.2d 1073, 1074 (1972); *Lucero,* 108 N.M. at 550, 775 P.2d at 752. In other words, a nolle prosequi is as final as any other dismissal with or without prejudice.

Other New Mexico law is consistent with the above analysis. For example, holding that a nolle prosequi voids a previous indictment and allows a case to start anew is consistent with the way a grand jury is charged. A grand jury is not allowed to inquire into a crime for which a valid indictment has previously been filed. NMSA 1978, § 31–6–9 (Repl.Pamp.1984). However, Section 31–6–9 does not prevent a district attorney from reindicting a suspect where there is a flaw in the original indictment. *State v. Edwards,* 97 N.M. 141, 143, 637 P.2d 572, 574 (Ct.App.), *cert. denied,* 97 N.M. 621, 642 P.2d 607 (1981). It makes sense, therefore, to treat an indictment filed before a nolle prosequi as void. *See State v. Montoya,* 95 N.M. 433, 434–35, 622 P.2d 1053, 1054–55 (Ct.App.) (second indictment valid because nolle prosequi invalidates the first indictment), *writ quashed,* 95 N.M. 426, 622 P.2d 1046 (1981). Because a criminal prosecution can only begin by filing an information, indictment, or complaint, SCRA 1986, 5–201 (Repl.1992), once an indictment is deemed void, a new case against a suspect may only begin with the refiling of charges.

The State asks us to hold that the second indictment was simply a reinstatement or continuation of the first. Our Supreme Court has previously rejected a similar argument. *See Delgado,* 83 N.M. at 627–28, 495 P.2d at 1074–75 (denying writ of prohibition where petitioners argued that a second prosecution, filed after the first prosecution was dismissed by nolle prosequi, was merely a continuation of the first). Further, our Rules of Criminal Procedure simply do not provide for the "reinstatement" or "continuation" of a dismissed indictment, even in the interests of judicial economy. *Compare Morgan v. State,* 673 P.2d 897, 901 (Alaska Ct.App. 1983) (Alaska rule of criminal procedure permits relaxation of rules to prevent injustice) *with Williams v. State,* 494 So.2d 819, 822–23 (Ala.Crim.App.) (Alabama rule of procedure expressly permitted reinstate-

ment), *cert. denied,* 494 So.2d 819 (1986). Nor has the State cited anything in our Rules of Criminal Procedure or case law directly supporting the proposition that a new indictment can simply be viewed as a reinstatement or continuation of an old one. To the contrary, once the State has filed a nolle prosequi, the charge cannot be reinstated, since there is nothing pending to reinstate. *People v. DeBlieck,* 181 Ill. App.3d 600, 130 Ill.Dec. 321, 325, 537 N.E.2d 388, 392 (1989); *compare Morgan,* 673 P.2d at 901 (trial court could allow reinstatement of dismissed indictment under aforementioned rule of criminal procedure; trial court wanted to spare rape victim trauma of testifying before grand jury again) *with Williams,* 494 So.2d at 824 (recognized reinstatement of an indictment that has been unconditionally nolle prossed during same term of court).

The State cautions this Court that Defendant's argument places form over substance and encourages forum shopping. We are mindful of our duty to interpret the Rules of Criminal Procedure with logic and common sense to avoid absurd results. *See State v. Portillo,* 110 N.M. 135, 137, 793 P.2d 265, 267 (1990); *see also* SCRA 1986, 5–101(B) (Repl.1992). Nor may a party manipulate the rules in order to obtain a favorable judge. *See Ericksen,* 94 N.M. at 130, 607 P.2d at 668. New Mexico courts have declared that they will "look past the form to the substance" when considering the effects of a nolle prosequi on the six-month rule. *See, e.g., Delgado,* 83 N.M. at 627–28, 495 P.2d at 1074–75; *Ericksen,* 94 N.M. at 130–31, 607 P.2d at 668–69. Those courts have said that they will not allow the filing of a nolle prosequi to control the resolution of a six-month rule issue. Thus, they have not been willing to treat every nolle prosequi as starting the six-month clock anew.

Nevertheless, holding that the nolle prosequi in this case did not end the prior criminal proceeding would require us to redefine when a new case began. Prosecutors, who have the power to dismiss charges at their will, can take into consideration the fact that the defendant may have renewed procedural rights when deciding whether to dismiss a case without prejudice. The accused, on the other hand, would be powerless without court intervention to prevent prosecutors from bringing the same charges again and again. We believe the true substance of this issue lies with the requirement of a valid indictment. *See* U.S. Const. amend. V; N.M. Const. art. II, § 14 (Repl.Pamp.1992). We do not wish to send the State the message that invalid grand jury indictments are merely technical, easily fixed by "reinstating" or "continuing" the indictment. We therefore cannot agree that the first case was dismissed on "technical" grounds, and that the second indictment was merely a continuation of the first.

The State maintains that Defendant waived his right to disqualify Judge Murdoch in two ways. It first argues that Defendant's disqualification was untimely because Defendant had already invoked the discretion of the trial court. *See Smith v. Martinez,* 96 N.M. 440, 442, 631 P.2d 1308, 1310 (1981) (disqualification barred after party invokes court's discretion). A party's right to disqualify a judge may be waived if it is not timely asserted. *State v. Garcia,* 47 N.M. 319, 322, 142 P.2d 552, 554 (1943); *see also* SCRA 5–106(C). We reject the State's contention that Defendant's challenge of Judge Murdoch was untimely in light of our conclusion that the second indictment began a new case. The dismissal of the first indictment nullified all prior orders and proceedings in that case and terminated the jurisdiction of the trial court. *See State v. Heigele,* 14 Kan.App.2d 286, 789 P.2d 218, 219–20 (1990); *Board of Educ., Penasco Indep. Sch. Dist. v. Rodriguez,* 79 N.M. 570, 571, 446 P.2d 218, 219 (1968). This being the case, the second indictment commenced a new proceeding, with all procedural rights inuring to the parties.

■ The State also contends that Defendant waived his right to disqualify Judge Murdoch by agreeing that the judge's rulings in the first case would continue in effect in the second case. At the hearing concerning the peremptory challenge, Judge Murdoch asked whether the point of

reassigning this case to the same judge was to avoid having to redo work already done. Defense counsel responded that he did not think that work on the suppression motion had to be redone. He said he thought that both parties might be collaterally estopped by the finding of fact, but that he believed the present proceeding was a new prosecution for purposes of determining what procedural rights attach.

We do not believe that the foregoing admission constituted a waiver of Defendant's right to disqualify. Defense counsel consistently maintained his objection to Judge Murdoch's remaining in the case. At the hearing on the peremptory challenge, defense counsel said that he thought the case might be appropriate for a writ. As noted above, he also argued that the second indictment was a new prosecution in terms of procedural rights. Defendant repeated his objection to Judge Murdoch at jury selection. Defendant also requested a writ of prohibition and an emergency stay of proceedings from the Supreme Court. *See Ware v. Murdoch,* S.Ct. No. 20,065. The right to disqualify may be waived either expressly or by implication. *Garcia,* 47 N.M. at 322, 142 P.2d at 554. Defendant made clear his opposition to Judge Murdoch's remaining on the case at every stage of the proceeding. Defendant's acknowledgement of the continuing effectiveness of Judge Murdoch's rulings was a realistic response to the trial court's refusal to honor the challenge. Defendant was also concerned about the collateral estoppel effect of the judge's ruling in the first case. *But see Heigele,* 789 P.2d at 220 (new judge had discretion and duty to reconsider suppression issue when state refiled charges); *City of Farmington v. Stansbury,* 113 N.M. 100, 102, 823 P.2d 342, 344 (Ct.App.1991) (collateral estoppel requires valid final judgment). At most, Defendant agreed that the suppression motion would not have to be reheard, an issue not before us in this appeal. He did not agree to waive his objections to Judge Murdoch. We conclude that Defendant did not waive his right to disqualify Judge Murdoch.

The State also implies that the Supreme Court's denial of Defendant's petition for a writ of prohibition and an emergency stay was a determination that Judge Murdoch properly struck the affidavit of disqualification. We disagree. The denial of a writ of prohibition does not necessarily mean that the Supreme Court reached the merits of the issue argued in support of the writ, especially where there exists an adequate remedy at law. *In re Adoption of Baby Child,* 102 N.M. 735, 737, 700 P.2d 198, 200 (Ct.App.1985). Defendant has an adequate remedy by way of appeal in this case. The Supreme Court's denial of Defendant's petition without comment does not preclude our review of this issue.

We hold that Defendant's right to disqualify attached upon the filing of the second indictment. Judge Murdoch's actions subsequent to the proper peremptory challenge were void. *Rodriguez v. El Paso Elec. Co.,* 113 N.M. 672, 674, 831 P.2d 608, 610 (Ct.App.1992); *see also Latham,* 83 N.M. 530, 532, 494 P.2d 192, 194 (judge disqualified effective upon filing of affidavit, and thereafter has no jurisdiction to act in the case); *cf. Alvarez v. County of Bernalillo,* 115 N.M. 328, 850 P.2d 1031 (Ct. App.1993) (No. 14,014) (compensation order rendered by a workers' compensation judge who improperly failed to honor a peremptory challenge may not be set aside pursuant to NMSA 1978, Section 52–5–9(B)(6) (Repl. Pamp.1991) after the order has been unsuccessfully appealed on other grounds).

CONCLUSION

Defendant timely filed an affidavit of disqualification of the judge in Cause No. CR–91–1518. Judge Murdoch's actions subsequent to the filing of the affidavit were void. The trial court's judgment and sentence are reversed. This matter is remanded to the trial court with instructions to reassign this matter to another judge and for further proceedings. Because of our disposition, we do not address Defendant's remaining issues.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

851 P.2d 466

Donald DUNCAN, Petitioner–Appellee,

v.

Dareld KERBY, Respondent–Appellant.

No. 20,055.

Supreme Court of New Mexico.

Feb. 23, 1993.

Rehearing Denied March 30, 1993.

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

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, Gary C. Mitchell, Ruidoso, for petitioner-appellee.

OPINION

FROST, Justice.

The State of New Mexico appeals from the district court's grant of a writ of habeas corpus to prisoner Donald Duncan. This appeal raises two issues: (1) whether the doctrine of res judicata bars a defendant's postconviction claim of ineffective assistance of counsel when the same claim has been denied on the merits in a direct appeal, and (2) whether the trial court erred in granting petitioner's writ of habeas corpus on the grounds of ineffective assistance of counsel. We hold that the doctrine of res judicata does not apply in this particular case, and affirm the trial court's grant of habeas corpus relief on the grounds of ineffective assistance of counsel.

Donald Duncan was convicted on six counts of criminal sexual penetration and incest in 1985. On direct appeal with a new attorney, Duncan argued that his conviction should be reversed because he did not receive effective assistance of counsel at trial. The Court of Appeals assessed and rejected the ineffective counsel claim on the merits and affirmed the conviction. Duncan then petitioned the district court for a writ of habeas corpus, requesting postconviction relief on the grounds of ineffective assistance of counsel. After holding an evidentiary hearing on the issue of

counsel's effectiveness, District Judge William J. Schnedar, who also had presided over Duncan's jury trial, determined that Duncan had not received effective assistance of counsel at trial, granted the writ of habeas corpus, set aside Duncan's conviction, and ordered a new trial. The judge found that material lapses in the trial attorney's performance leading to a conclusion of incompetent representation included the failure to construct an available and crucial alibi defense, to call key witnesses, and to move to sever offenses.

I. RES JUDICATA IN HABEAS CORPUS PROCEEDINGS

The State argues that Duncan's ineffective assistance of counsel claim is barred by the doctrine of res judicata in this postconviction action because the same claim was raised and rejected on direct appeal. We have held that New Mexico postconviction procedures are not a substitute for direct appeal and that our statutes do not require collateral review of issues when the facts submitted were known or available to the petitioner at the time of his trial. *See State v. Gillihan,* 86 N.M. 439, 440, 524 P.2d 1335, 1336 (1974). When a defendant should have raised an issue on direct appeal, but failed to do so, he or she may be precluded from raising the issue in habeas corpus proceedings. *Id.* at 440, 524 P.2d at 1336.[1] A habeas corpus petitioner will not be precluded, however, from raising issues in habeas corpus proceedings that could have been raised on direct appeal either when fundamental error has occurred, *Gillihan,* 86 N.M. at 440, 524 P.2d at 1336, or when an adequate record to address the claim properly was not available on direct appeal, *State v. Gomez,* 112 N.M. 313, 314–15, 815 P.2d 166, 167–68 (Ct.App.), *cert. denied,* 112 N.M. 279, 814 P.2d 457 (1991). Our habeas corpus cases applying preclusion have not involved instances in which a defendant could not make an evidentiary case for himself on direct appeal because facts supporting his claim were not part of the record. *Id.* at 314, 815 P.2d at 167. The proper exception to the application of the doctrine of res judicata in such circumstances has been described as follows:

> If an application [for a writ of habeas corpus] is grounded in facts beyond the record previously presented on appeal, and if the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges, there should be no issue preclusion.... When a post-conviction application makes a substantial showing that due process or another fundamental right has been abridged—and the application is supported by facts ill-suited for development in the original trial—it should be addressed on its merits. Res judicata does not apply.

State v. Darbin, 109 Idaho 516, 526, 708 P.2d 921, 931 (Idaho Ct.App.1985) (Burnett, J., specially concurring). We adopt this rationale.

Two New Mexico cases endorse SCRA 1986, 5–802 habeas corpus proceedings as the preferred avenue for adjudicating ineffective assistance of counsel claims. *See State v. Powers,* 111 N.M. 10, 12, 800 P.2d 1067, 1069 (Ct.App.), *cert. denied,* 111 N.M. 16, 801 P.2d 86 (1990) (stating that Court of Appeals cannot assess validity of ineffective assistance of counsel claim without the benefit of an evidentiary hearing on the issue, and that postconviction proceedings are recommended for such fact-finding); *State v. Stenz,* 109 N.M. 536, 539, 787 P.2d 455, 458 (Ct.App.), *cert. denied,* 109 N.M. 562, 787 P.2d 842 (1990) (same). The rationale is that even assuming that a criminal defendant has a new attorney to handle his direct appeal, the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness be-

1. Postconviction relief based upon an ineffective assistance of counsel claim was previously obtained under SCRA 1986, 1–093 for motions filed before September 1, 1975, and NMSA 1978, Crim.P.R. 57 (Repl.Pamp.1985) for motions filed after September 1, 1975. Relief is now available under SCRA 1986, 5–802 (Repl.Pamp.1992), New Mexico Rules of Criminal Procedure for the District Courts. Rule 1–093 was withdrawn effective August 1, 1989, and Rule 57 was superseded by Rule 5–802 for petitions filed after March 1, 1986.

cause conviction proceedings focus on the defendant's misconduct rather than that of his attorney. Consequently, an evidentiary hearing on the issue of trial counsel's effectiveness may be necessary. While this may be done through a remand to the trial court during direct appeal when unusual circumstances exist, habeas corpus is specifically designed to address such postconviction constitutional claims and is the procedure of choice in this situation. It would be inconsistent to recommend habeas corpus for ineffective assistance of counsel claims and then to deny a convicted defendant the ability to use habeas procedure because he was fortunate enough to obtain new counsel on direct appeal and raise the issue at that time. By expressly recommending habeas corpus for claims of ineffective counsel, *Powers* and *Stenz* imply that res judicata will not bar such action.

The State calls our attention to *Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989), as part of its argument that Duncan is precluded from relitigating his ineffective assistance of counsel claim in habeas corpus proceedings. *Manlove* observed that when a petitioner brings successive petitions for habeas relief, "collateral estoppel principles may, at the discretion of a subsequent habeas corpus court, prevent relitigation of issues argued and decided on a previous habeas corpus petition...." *Id.* at 475, 775 P.2d at 241. Clearly, *Manlove* is procedurally and theoretically distinguishable from this case because it deals with the preclusive effect of issues raised in successive petitions for writs of habeas corpus rather than with the preclusive effect of issues raised initially on direct appeal. The successive-writ petitioner has already enjoyed the opportunity to fully explore his constitutional claims in the postconviction setting, whereas the petitioner who makes his initial claim on direct appeal has not, and consequently, the successive-writ petitioner is in a weaker position to argue that equity confers yet another postconviction opportunity to make his claim.

Our view of the nature of res judicata in the habeas corpus setting as an equitable, discretionary, and flexible judicial doctrine leads us to conclude that the decision to give preclusive effect to an ineffective assistance of counsel claim rejected on direct appeal but raised again in habeas corpus proceedings is within the sound discretion of the reviewing court. Courts reviewing habeas corpus petitions should decide whether particular claims are res judicata based on relevant facts and circumstances, including whether or not a full evidentiary hearing on counsel's effectiveness was previously conducted when that claim is at issue. *See* SCRA 5–802(E)(3) (Repl.Pamp.1992). While redundant claims may be precluded, courts should not impede postconviction litigation that will provide necessary fuller or fairer procedural opportunities to examine alleged constitutional defects when consideration of an issue on direct appeal is based upon facts which could not, or customarily would not, be developed at trial. While the doctrine of res judicata or claim preclusion may apply in other postconviction circumstances, applying the doctrine in this habeas corpus action would be inconsistent with New Mexico precedent, and it would deprive the habeas corpus petitioner of the opportunity to meaningfully litigate his constitutional claim, thereby thwarting an essential purpose of habeas corpus procedure.

II. STANDARD OF REVIEW

When this Court addresses the propriety of a lower court's grant or denial of a writ of habeas corpus based on ineffective assistance of counsel, findings of fact of the trial court concerning the habeas petition are reviewed to determine if substantial evidence supports the court's findings. *Cf. State v. Goss,* 111 N.M. 530, 533–34, 807 P.2d 228, 231–32 (Ct.App.) (stating that the factual determination of whether a search and seizure is reasonable is reviewed on appeal for support by substantial evidence, and implying that although the existence of probable cause is a legal question, it is for the trial court to resolve disputed factual issues prior to that determination), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991). Questions of law or questions of mixed fact and law, however, including the assessment of effective assis-

tance of counsel, are reviewed de novo. This approach conforms to our past approach in the evaluation of ineffective assistance of counsel claims in habeas corpus proceedings, *see Manlove v. Sullivan,* 108 N.M. 471, 475, 775 P.2d 237, 241 (1989) (deciding petition for writ of habeas corpus de novo on the merits, including claim of ineffective assistance of counsel), and parallels federal habeas corpus appellate review practice, *see United States v. Owens,* 882 F.2d 1493, 1501–02 n. 16 (10th Cir.1989) (stating that in federal habeas corpus cases, findings of fact are reviewed under the clearly erroneous standard, and application of the *Strickland* test is reviewed de novo).[2] Such an approach provides logical deference to the trial court fact-finder as first-hand observer, while assuring that higher courts perform their sanctioned role as arbiter of the law.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Duncan's claim of ineffective assistance of counsel was first presented on his direct appeal. Although the grounds alleged in support of Duncan's ineffective assistance of counsel argument were basically the same on direct appeal and in the habeas corpus proceedings, the evidence available in the two proceedings was dramatically different. Duncan's principal contention was that his trial counsel was ineffective because he did not investigate or adequately present Duncan's alibi defense. Reviewing the record to evaluate this argument, the Court of Appeals found on direct appeal that, "the record does not contain any indication whether counsel did or did not investigate this [alibi] defense. It only indicates that counsel chose not to corroborate the defense through witnesses other than defendant." *State v. Duncan,* No. 9218, slip op. at 3 (N.M.Ct.App. Dec. 2, 1986).

The evidence available concerning counsel's effectiveness was significantly more extensive at the three-day habeas corpus hearing than at Duncan's direct appeal. Evidence presented at the habeas corpus hearing supporting Duncan's claim included the following: Mr. Arnold Miller, Duncan's trial attorney, did not call five credible and available alibi witnesses; these five witnesses were known to Miller and were prepared to testify that Duncan was with them when the crimes allegedly occurred; Miller did not call other witnesses who would have impeached key prosecution witnesses, especially the victims; and several of the defense witnesses who were not called were standing outside the courtroom during Duncan's trial, waiting to be called. The State's evidence at the habeas hearing consisted of Miller's testimony, which attempted to rationalize his alleged failures.

Substantial evidence supports the lower court's conclusion that Duncan did not receive effective assistance of counsel at trial. To succeed on a constitutional claim of ineffective assistance of counsel, the defendant or habeas corpus petitioner must prove that defense counsel did not exercise the skill of a reasonably competent attorney and that such incompetent representation prejudiced his case, rendering the trial court's result unreliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Taylor,* 107 N.M. 66, 72–73, 752 P.2d 781, 787–88 (1988), *overruled on other grounds, Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 731, 779 P.2d 99, 108 (1989). In considering an ineffectiveness claim, the evaluation should focus on whether an attorney exercised "the skill, judgment and diligence of a reasonably competent defense attorney" in light of the entire proceeding allegedly tainted by incompetent representation. *State v. Orona,* 97 N.M. 232, 233, 638 P.2d 1077, 1078 (1982). Be-

2. Federal appellate courts review findings of fact under the clearly erroneous standard of review. Fed.R.Civ.P. 52(a). The New Mexico parallel provision and habeas corpus statute do not adopt the "clearly erroneous" language. *See* SCRA 1986, 1–052 (Repl.Pamp.1992); SCRA 1986, 5–802 (Repl.Pamp.1992). Thus, although we review the habeas trial court's findings of fact with deference similar to the federal model, our degree of deference is more accurately termed a review for support by substantial evidence as that standard is applied in New Mexico.

cause substantial evidence supports the district court's findings of fact, we presume these findings to be correct, and undertake de novo review of counsel's effectiveness.

Duncan's trial attorney did not represent him competently. Based on the evidentiary hearing at the trial level of this habeas corpus action, Judge Schnedar found that Miller inexcusably failed to give notice of the alibi defense or call alibi witnesses crucial to Duncan's defense. Miller also did not investigate possible attacks on the credibility of State's witnesses or move to sever counts as related to each victim. Miller's trial preparation was not adequate, and his intentional failure to disclose his mistake of not giving notice of alibi defense compounded his shortcomings, breaching his duty of loyalty to the defendant. We disagree with the State's characterization of these failures as reasonable litigation tactics and find that such a performance falls below an objective level of competent legal representation.

We further agree with the district court that Duncan's incompetent representation prejudiced his case such that but for counsel's error, there is a reasonable probability that the result of the conviction proceedings would have been different. Although the State contends that the district court did not find prejudice as required by the New Mexico standard for ineffective assistance of counsel, the finding of prejudice is clearly implicit in the lower court's findings. The trial court found that "Miller's conduct undermined the proper function of the adversarial procedure and it cannot be relied upon as having produced a just result." It further found that had Duncan received competent representation, his trial "could have resulted in a prosecution verdict, a defense verdict or a hung jury." These findings sufficiently express the concept that but for counsel's incompetence, the result of the trial probably would have been different. Consequently, the district court did find prejudice, and we will not elevate form above substance by accepting the State's contention that prejudice was not found. Our own review of the trial court's findings enforces our belief that Duncan's defense was prejudiced by his counsel's performance and that his conviction, therefore, cannot stand.

For the foregoing reasons, the decision of the district court granting habeas relief is affirmed.

IT IS SO ORDERED.

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

851 P.2d 471

Nora SEGAL, Plaintiff–Appellee and Cross–Appellant,

v.

Len GOODMAN, Defendant–Appellant and Cross–Appellee.

No. 20505.

Supreme Court of New Mexico.

March 31, 1993.

Sutin, Thayer & Browne, Saul Cohen, Santa Fe, for defendant-appellant.

Rose, Kohl & Davenport, Ltd., Bruce R. Kohl, Sue A. Herrman, Santa Fe, for plaintiff-appellee.

OPINION

MONTGOMERY, Justice.

Defendant-appellant Len Goodman appeals from a judgment awarded to plaintiff-appellee Nora Segal, holding that Goodman was liable for damages suffered by Segal as a result of an investment in an unregistered security. Segal cross-appeals from the court's order granting Goodman a stay of execution of the judgment. We affirm the judgment on the ground that

substantial evidence supports the trial court's finding that Goodman was a salesman or agent of a seller of an unregistered security, affirm the court's stay of execution on the ground that the court did not abuse its discretion in ordering it, and remand for reconsideration of the duration of the stay.

I.

In 1984 Segal sold an apartment building she owned in New York. In the late summer or early fall of that year, Segal discussed with her friend Gerald Goodman, Len Goodman's father, her desire to shelter the income, for tax purposes, from the sale of the building. Shortly thereafter, Gerald Goodman introduced Segal and Goodman in the hope that Goodman could advise Segal on how to reduce her tax burden.

At Segal's behest, but without any promise of compensation or remuneration, Goodman acquired materials on various tax shelters, which he presented to Segal. When Segal expressed interest in a brochure shown to her by Goodman for a particular tax shelter, the Schultz Individual Cattle Feeding Program ("the Program") offered by Schultz Cattle Company, Incorporated ("SCCI"), Goodman contacted SCCI for further information. He then met with Segal and gave her information on what the representatives of SCCI had said about the Program and how it could be used as a tax deferral plan. Segal eventually decided to invest in the Program and in December 1984 completed all the documents necessary for her investment.

As a participant in the Program, Segal entered into a contract with the Schultz Feedyard and SCCI for purchasing, boarding, and feeding five hundred head of cattle, and another contract requiring SCCI to provide consulting services on future purchases and sale of cattle and on "hedging" practices appropriate in the cattle feeding industry. Segal agreed to pay SCCI for consulting services at the rate of $25.00 per head of cattle purchased, thereby incurring expenses in 1984 that could be used to offset her tax liability in that year. Funding for the Program was supplied by Segal's $20,000 initial payment and a revolving recourse note in the amount of $400,000 arranged by SCCI and funded by the Anadarko Bank and Trust Company ("Anadarko") of Anadarko, Oklahoma. The recourse note was collateralized by a $70,000 letter of credit from Banquest/First National Bank of Santa Fe, New Mexico ("Banquest").

Goodman introduced Segal to commercial lending officers at Banquest so that she could obtain the letter of credit necessary for her investment in the Program. Goodman helped Segal fill out a financial statement to present to the Banquest officers and then returned with Segal to Banquest a second time to present information he had acquired from SCCI explaining exactly what was needed to effectuate the investment. At the closing near the end of December 1984, Banquest requested that Segal pledge, as collateral for the letter of credit, securities held by her stockbroker in Florida. When the broker expressed reluctance to provide the securities, Goodman interceded and explained the purpose for pledging the securities. The broker then acquiesced in the transaction.

Goodman was Segal's sole contact with SCCI during the course of negotiations in November and December 1984. During that time, Goodman had between four and six phone conversations with SCCI representatives. During the second of these conversations, Goodman was told that he would receive $5.00 per head of cattle sold for any referrals to SCCI's consulting service. Before the closing of Segal's investment in the Program, Goodman entered into a written agreement with SCCI confirming that he would receive a referral fee of $5.00 per head of cattle sold to any investor he referred to SCCI. A few months after Segal contracted to invest in the Program, SCCI paid Goodman $2,500 for the sale to Segal of her interest in five hundred cattle. Goodman testified at trial that he had been concerned that if he were paid by SCCI he would owe them an obligation and that he therefore had encouraged Segal to pay him an hourly fee so that he could advise her "in good conscience."

Segal, however, never provided Goodman any compensation for his services.

The price of slaughter-weight cattle dropped precipitously in 1985, and Segal lost her $20,000 initial investment plus an additional $53,078.43 forwarded to Schultz Feedyard by Anadarko for the loss resulting from the sale of cattle in the Program.

On September 22, 1987, Segal commenced this action against SCCI, Schultz Corporation, Schultz Feedyard, their officers and directors (collectively, "the Schultz defendants"), and Goodman. The complaint alleged violations of the Securities Act of New Mexico, NMSA 1978, §§ 58–13–1 to –46 (Repl.Pamp.1984, repealed by N.M.Laws 1986, ch. 7, §§ 1 to 56, effective July 1, 1986) ("the Securities Act"), violations of the Unfair Practices Act, NMSA 1978, §§ 57–12–1 to –21 (Repl.Pamp.1984), common law fraud, and intentional and negligent misrepresentation. Segal moved for partial summary judgment against all defendants in March 1991, requesting an adjudication that her interest in the Program was a security under the Securities Act, that the sale of the security to her violated the Securities Act, and that Segal was entitled to rescind her contract and recover damages. Partial summary judgment was entered on these grounds in July 1991 against all defendants except Goodman.

The remaining counts against the Schultz defendants, the damages to which Segal might be entitled, and all counts against Goodman were tried to the court in October 1991. At the conclusion of the trial, the court found that Goodman had acted as a salesman and agent for a seller of an unregistered security and as an unregistered investment adviser in violation of Sections 58–13–42 and 58–13–23 of the Securities Act. The court also found that Goodman had been negligent and that his negligence was a proximate cause of the damage caused to Segal. In the court's judgment, entered December 4, 1991, Segal was awarded damages against Goodman for $73,078.43, plus prejudgment interest, costs, and attorney's fees. Judgment was also entered against the Schultz defendants for violations of the Securities Act, the Unfair Practices Act, common law fraud, and misrepresentation in the amount of $219,235.39 (representing treble damages under Section 57–12–10(B) of the Unfair Practices Act for willful participation in unconscionable trade practices), plus prejudgment interest, costs, and attorney's fees.

After announcing its findings from the bench, the court requested the parties to file memoranda on the court's power to stay execution of the judgment. On December 10, 1991, Goodman filed a motion for new trial, for relief from judgment, to alter or amend the judgment, and for a stay of enforcement of the judgment. A hearing was held on these motions on January 7, 1992. The trial court issued an order denying the motions for a new trial and for relief from judgment on January 22, but issued a second order on that date granting Goodman's motion for a stay of enforcement. Goodman filed his notice of appeal from the judgment on February 14, 1992.

As ordered, the stay of enforcement was effective for a period of six months, in order to permit Segal to attempt to collect the judgment from the Schultz defendants. The order of stay provided that Goodman could petition for an extension of the stay after the initial six-month period had expired. The order stated that should Segal show at that time that she had made a good-faith effort to collect the judgment from the Schultz defendants, no further stay of enforcement would be granted. Goodman was not required, as a condition of the stay, to post a bond or any other security to ensure enforcement of the judgment. Segal filed a motion in this Court on March 2, 1992, to vacate or modify the stay; the motion was denied on April 29, 1992.

The court's grant of stay expired on July 7, 1992. On August 20, 1992, the court heard a motion by Goodman to extend the stay. The court ruled on September 30, 1992, that Goodman was to submit to a deposition to aid the court in determining whether to terminate or continue the stay, by establishing, inter alia, whether Good-

man had concealed or transferred assets, and ordered that the stay was to continue until further order of the court.

Goodman seeks to reverse the trial court's judgment, arguing that there is no substantial evidence to support the court's findings that: (1) Goodman was a salesman or agent of SCCI; (2) Goodman was an unregistered investment adviser; and (3) Goodman was negligent and his negligence proximately caused Segal's damages. We find it necessary to decide only the first issue in disposing of Goodman's appeal.

Segal cross-appeals, seeking to set aside the stay of enforcement of the judgment. Segal asserts that the court abused its discretion in granting the stay absent a showing by Goodman of objective factors providing a factual basis for the stay, and erred as a matter of law in granting the stay without requiring a bond or other security for payment of the judgment.

II.

We first address the issue of whether Goodman acted as a salesman or agent of SCCI in the sale of an unregistered security. We believe that the determination of Goodman's status as a salesman or agent is a question of fact. As we have said countless times, facts found by the trial court will not be disturbed by an appellate court if those factual findings are supported by substantial evidence, *e.g., Getz v. Equitable Life Assurance Society,* 90 N.M. 195, 198, 561 P.2d 468, 471, *cert. denied,* 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977)—that is, such evidence as a reasonable mind might accept as adequate support for a conclusion, *e.g., Ortega v. Montoya,* 97 N.M. 159, 161, 637 P.2d 841, 843 (1981). And, of course, "[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." *Smith v. FDC Corp.,* 109 N.M. 514, 519, 787 P.2d 433, 438 (1990).

These statements are not mere slogans, to be mouthed by an appellate court whenever it wants to affirm but has no other reason for doing so. They relate importantly to the allocation of function between a trial court and an appellate court in resolving a dispute such as this one. The trial court determines the facts; the appellate court decides questions of law. *See, e.g., Mascarenas v. Jaramillo,* 111 N.M. 410, 412, 806 P.2d 59, 61 (1991) (trier of facts weighs testimony, determines credibility of witnesses, reconciles inconsistent or contradictory testimony, and decides where truth lies); *C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 510, 817 P.2d 238, 244 (1991) (appellate court need not defer to trial court's conclusions of law and may reach conclusion different from trial court's).

Goodman entreats us to set aside the court's judgment as not resting on substantial evidence. He claims that his only role in the transaction was assisting his father and his father's girlfriend in helping her find a suitable tax shelter for her income from the sale of the New York apartment building. At bottom, his plea boils down to the contention that it is simply unfair to impose on him the financial consequences, in excess of $100,000, of Segal's unfortunate investment, when he was not in the business of effecting sales for SCCI or anyone else and was only attempting to help Segal and his father find a tax shelter on this one occasion.

As for fairness in an overall perspective, the legislature decreed in Section 58–13–42 that "[t]he person making such sale or contract for sale [of an unregistered security], and every director, officer, salesman or agent of or for such seller who participated or aided in any way in making such sale, shall be jointly and severally liable to such purchaser in any action at law in any court." "Salesman" and "agent" were each defined as "any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities...." Section 58–13–2(G). The legislature, in other words, declared in a general sense what is "fair" in connection with a decision on where the loss should fall in a transaction involving an unregistered security.

Insofar as fairness in the particular circumstances of this case is concerned, the trial court determined that it was fairer for Goodman—an individual with considerable financial experience and one who had previously acted as a broker and consultant in the sale of businesses—to bear the loss, rather than Segal—a person who Goodman himself acknowledged was completely inexperienced and unsophisticated in financial affairs. In discharging our function as an appellate court, we cannot say that this determination was unsupported by substantial evidence.

As an appellate court, we *can* point out that under state and federal securities laws it seems to be generally accepted that an agent or representative of a seller of an unregistered security can be held liable to the purchaser even if the agent participates in effecting only one such transaction. *See, e.g., Scheve v. Clark,* 596 F.Supp. 592 (E.D.Mo.1984); *Quick v. Woody,* 295 Ark. 168, 747 S.W.2d 108 (1988). Likewise, there is considerable authority for the proposition that one who participates in or facilitates a transaction in an unregistered security, provided he or she meets the statutory definition of a seller's "agent," can be held liable to the purchaser, even though the agent may also be acting on behalf of the purchaser. *See, e.g., Treider v. Doherty,* 86 N.M. 735, 737, 527 P.2d 498, 500 (Ct.App.) (broker liable under Securities Act whether acting as agent for seller or in a dual capacity for both parties), *cert. denied,* 86 N.M. 730, 527 P.2d 493 (1974); *see also Lawler v. Gilliam,* 569 F.2d 1283, 1288 (4th Cir.1978); *Cady v. Murphy,* 113 F.2d 988, 991 (1st Cir.), *cert. denied,* 311 U.S. 705, 61 S.Ct. 175, 85 L.Ed. 458 (1940).

In finding that Goodman was a salesman or agent of SCCI, the court considered evidence that Goodman had introduced Segal to the Program and that Goodman had been Segal's sole contact with SCCI during the course of their negotiations. The evidence showed that Goodman facilitated Segal's investment with SCCI by helping her obtain and complete the necessary documentation, as well as by aiding her attempts to arrange financing for her participation in the Program. Of critical importance, there was evidence that Goodman had signed an agreement with SCCI to receive compensation for referrals to the Program and that he did in fact receive $2,500 for referring Segal. Finally, Goodman testified that he had been concerned that his remuneration by SCCI obligated him to represent the interests of SCCI instead of the interests of Segal.

We thus hold that there is substantial evidence in the record to support the trial court's finding that Goodman was a salesman or agent of SCCI. Therefore, we need not address whether he was an investment adviser or whether he was negligent.

III.

The more interesting and potentially more significant issue in this case arises in connection with Segal's cross-appeal, in which she contends that the trial court abused its discretion in granting Goodman a stay of enforcement of the judgment. Segal initially asserts that the court failed to consider any objective factors that would have established a factual basis for the stay and then argues that the court erred as a matter of law in granting a stay without requiring a bond or other security for payment of the judgment. We discuss these issues together, in the general context of the trial court's authority to issue a stay of enforcement of a judgment.

Ordinarily, execution of a judgment issues as a matter of course following its entry. SCRA 1986, 1–062(A) (Repl.Pamp.1992); NMSA 1978, § 39–1–4 (Repl.Pamp.1991).[1] We note, however, that this Court has construed NMSA 1978, Section 39–3–22 (Repl.Pamp.1991),[2] as in effect

1. Rule 1–062(A) provides in part: "Except as stated herein, execution may issue upon a judgment and proceedings may be taken for its enforcement upon the entry thereof unless otherwise ordered by the court."

Section 39–1–4 reads: "Judgment shall be entered and execution may be issued thereon unless a motion for a new trial is made within the time provided by law, and granted or continued during the term at which the case is tried."

2. Section 39–3–22(A) provides in part:

creating an automatic sixty-day stay of execution pending perfection of appeal. *See Devlin v. State ex rel. New Mexico State Police Dep't,* 108 N.M. 72, 75, 766 P.2d 916, 919 (1988). It may be appropriate for the trial court to delay its decision on an application for a stay of execution until near the expiration of this sixty-day period to see if an appeal has been or is going to be taken. We say this because once an appeal has been taken from a money judgment, a stay of execution of the judgment generally must be conditioned upon the filing of an appropriate bond. Rule 1–062(D); [3] Section 39–3–22(A); *Quintana v. Knowles,* 113 N.M. 382, 383, 827 P.2d 97, 98 (1992). The purpose of the bond is to provide

> 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.

Quintana, 113 N.M. at 383, 827 P.2d at 98.

Under certain circumstances, the requirement of a bond for a stay pending appeal is dispensed with. For example, NMSA 1978, Section 39–3–23 (Repl.Pamp.1991), declares that when the appellant is the state, a county, or a municipal corporation, the taking of an appeal operates to stay execution of the judgment without a bond. Another exception was found by this Court in *In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars and No Cents ($2,730.00) in Cash,* 111 N.M. 746, 749–50, 809 P.2d 1274, 1277–78 (1991), in which we held that an indigent litigant's failure to post a supersedeas bond in a forfeiture action does not extinguish his or her right to a stay pending appeal.

We disagree with Segal's contention that a supersedeas bond is mandatory in all cases before a stay of execution on a money judgment can be granted. If an appeal is taken, the appellant must post a proper bond before receiving a stay, except as noted above. When an appeal is perfected and a supersedeas bond is posted as required by Rule 1–062(D), stay of enforcement of the judgment pending review is a matter of right. *See American Mfrs. Mut. Ins. Co. v. American Broadcasting–Paramount Theaters, Inc.,* 87 S.Ct. 1, 3, 17 L.Ed.2d 37 (1966); 7 James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 62.06 (2d ed. 1992) (discussing Fed.R.Civ.P. 62(d)). Neither this Court's Rules of Appellate Procedure nor this state's statutes, however, impose any requirement for security when an application for a stay of execution is made and there has been no notice of appeal or motion to vacate.

In some circumstances, when necessary to promote the interests of justice, the trial court may order a stay of execution of its judgment, even when that decision is not under review. Rule 1–062(A) provides: "Except as stated herein, execution may issue upon a judgment and proceedings may be taken for its enforcement upon entry thereof *unless otherwise ordered by the court.*" (Emphasis added.) We read Rule 1–062(A) as an affirmation of the trial court's inherent power to stay execution of a judgment temporarily in order to prevent injustice. *See Goodlatte v. Liberty Mut. Ins. Co.,* 27 Conn.Supp. 382, 239 A.2d 546, 548 (1967) ("While a court ordinarily will not interfere with the right of a judgment creditor to collect his debt, courts have a general supervising control over the processes of execution, and for the purpose of preventing injustice, an execution is within

> 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* ... unless the appellant ... within sixty days from the entry of 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....

(Emphasis added.)

3. Rule 1–062(D) provides in part: "When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in Paragraphs A and C of this rule.... The stay is effective when the supersedeas bond is approved by the district court."

the inherent, equitable control of the court."); 33 C.J.S. *Executions* § 139(b)(1) ("[A]ll courts of law, under statutes or under their general supervisory powers over their process, have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice."). Subsumed within the trial court's discretionary authority to issue a stay of execution of a judgment when the judgment itself has not been challenged by appeal is the authority, should a party apply for a stay of execution without taking an appeal, to grant a stay even in the absence of the party's posting a supersedeas bond.[4]

Federal courts have recognized that, under certain limited circumstances, it may be appropriate to grant a stay of execution on a money judgment in the absence of a supersedeas bond. Factors the courts consider in determining whether to waive the bond include the complexity of the collection process, the apparent ability of the defendant to pay the judgment, the court's confidence that funds will be available to satisfy the judgment, and whether other creditors of the defendant will be adversely affected by the requirement that a bond be posted. *See Dillon v. Chicago,* 866 F.2d 902, 904–05 (7th Cir.1988). We commend these factors, as a nonexclusive list, to the trial court in the present case—and to any other trial court in similar circumstances—for consideration on remand, along with the other factors mentioned in this opinion.

■ Segal suggests that the trial court should be required to address a set of objective factors—such as those established in *Tenneco Oil Co. v. New Mexico Water Quality Control Commission,* 105 N.M. 708, 736 P.2d 986 (Ct.App.1986), for the exercise of discretion in granting or denying a stay from an order or regulation of administrative agency[5]—in assessing the propriety of a stay of execution of a money judgment. Although parts of the *Tenneco* test may be helpful in evaluating requests to stay execution of money judgments, we choose to rely instead on a more flexible balancing of the parties' respective interests. To properly evaluate requests for stays of execution of money judgments, the court must consider the circumstances of each individual case, *see Alpers v. Alpers,* 111 N.M. 467, 469, 806 P.2d 1057, 1059 (Ct.App.1990); and this entails a weighing of the interests of the judgment creditor and the judgment debtor. *See, e.g., Landis v. North American Co.,* 299 U.S. 248, 254–55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936); *Kronz v. Kronz,* 393 Pa.Super. 227, 574 A.2d 91, 94 (1990).

■ The trial court found that Goodman's relative lack of culpability in causing Segal's losses outweighed Segal's interest in prompt execution of her judgment and ordered a stay of execution for six months while Segal sought to collect her judgment from the more culpable parties, the Schultz defendants. Under similar facts, this Court might weigh the parties' interests differently. The issue before us, however, is whether the trial court abused its discretion in ordering the stay. That is, did the court choose a course of action that no reasonable person would select? *See Ro-*

4. However, the willingness and ability of the applicant for a stay to post a supersedeas bond are important factors for the court to consider in exercising its discretion in deciding whether to grant or deny the application. *See infra* note 7.

5. The *Tenneco* test involves consideration of whether there has been a showing of: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay. *Tenneco Oil,* 105 N.M. at 710, 736 P.2d at 988. This test, first articulated in *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C.Cir.1958), has been widely used for evaluating motions to grant preliminary injunctions or to stay court and administrative orders. *See e.g., Ohio ex rel. Celebrezze v. NRC,* 812 F.2d 288, 290 (6th Cir.1987); *Arthur Guinness & Sons v. Sterling Publishing Co.,* 732 F.2d 1095, 1099 (2d Cir.1984); *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir.1981) (en banc); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C.Cir. 1977); *Sierra Club v. Hickel,* 433 F.2d 24, 33 (9th Cir.1970), *aff'd sub nom. Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Associated Sec. Corp. v. SEC,* 283 F.2d 773, 774–75 (10th Cir.1960).

selli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 512, 787 P.2d 428, 431 (1990) ("A trial court abuses its discretion when its decision is contrary to logic and reason." [6]) If the trial court did not act unreasonably in granting the stay, then we should affirm, even if the court reached a decision that one or more of the members of this Court would not ourselves have reached.

We find no abuse of discretion by the trial court in granting a stay of execution of judgment to Goodman for a period of six months while Segal sought recovery from the Schultz defendants to satisfy her judgment. Though the grant of stay did not require Goodman to post a bond or other security, a supersedeas bond is not mandatory where there is no appeal pending at the time the stay is granted. The desirability of protecting the interests of the judgment creditor by means of a bond is simply a factor for the court to consider in its balancing, albeit an important—in some cases a *very* important—factor.[7] The court reasonably found that the equities in the balance were in Goodman's favor, and we therefore affirm the order of January 22, 1992, granting Goodman a stay of execution of judgment.

IV.

Pursuant to SCRA 1986, 12-209(D) (Repl.Pamp.1992), we have obtained the trial court's order of September 30, 1992, requiring Goodman to be deposed so that the court could determine whether to terminate or extend the stay. We note that although the deposition was taken and filed with the court on November 4, 1992, the stay remains in place—over a year after Segal's award of judgment. It is obvious that the stay, though proper initially, cannot operate indefinitely.

As a matter of law, a stay of execution of a money judgment should not be indefinite in duration. An indefinite stay destroys the rights of the judgment creditor and may not properly be contemplated as part of the balancing process. *See United States v. Denver & Rio Grande W.R.R.*, 223 F.2d 126, 127 (10th Cir.1955) (holding that neither the Federal Rules of Civil Procedure nor the Utah Rules of Civil Procedure authorize the permanent suspension of a final judgment); *Taylor Nat'l, Inc. v. Jensen Bros. Constr. Co.*, 641 P.2d 150, 154 (Utah 1982) (Utah Rule of Civil Procedure 62(a) does not permit indefinite stay of execution of judgment); *Cutler Assoc., Inc. v. Merrill Trust Co.*, 395 A.2d 453, 456 (Me.1978) (trial court may only stay execution of its judgment temporarily). At some point a stay of lengthy duration will unreasonably impair the interests of the judgment creditor. We are content to leave determination of that point to the discretion of the trial court—subject to review for possible abuse—since we are confident that the trial court, being aware of all the facts, will in the majority of cases reach a fair, just, and common-sense result consistent with the court's duty to cause its

6. We read "contrary to logic" and "contrary to reason" as synonymous—*i.e.*, as synonymous with "unreasonable." *See also Wolf & Klar Cos. v. Garner*, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984) ("exceed[ing] the bounds of reason"); *Zamora v. CDK Contracting Co.*, 106 N.M. 309, 314, 742 P.2d 521, 526 (Ct.App.) ("against the logic and effect of the facts and circumstances"), *cert. quashed*, 106 N.M. 353, 742 P.2d 1058 (1987). These latter formulations too are synonymous with "unreasonable."

7. In this connection, we note that:

> A judgment creditor holds a general, unsecured debt. It is different from other unsecured debt only to the extent the judgment creditor also has a right to immediate execution [although, if the judgment debtor owns real property, the creditor can obtain a lien on the property by recording a transcript of the judgment]. The function of a supersedeas bond is to protect the judgment creditor's position from erosion ... that could occur if the [debtor's] financial position takes a turn for the worse or the [debtor] puts assets beyond the [creditor's] reach.... [During the pendency of the stay,] the judgment creditor's claim may slip behind the claims of other creditors.

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 800 (7th Cir.1986) (Easterbrook, J., concurring). Thus, properly balancing the rights of the judgment creditor and judgment debtor might require a bond or other security to protect the position of the judgment creditor from possible deterioration or even elimination.

judgment to be carried into effect. *See* NMSA 1978, § 39–1–5 (Repl.Pamp.1991) ("It shall be the duty of the judge of any court to cause judgment, sentence or decree of the court to be carried into effect, according to law.").

We affirm the trial court's decisions awarding Segal judgment against Goodman and staying enforcement of that judgment. We remand the case to the trial court for reevaluation of the current stay consistently with this opinion, with instructions to consider whether the stay has now served its purpose and should be lifted or, at the least, whether a supersedeas bond should be required if the stay is to remain in effect.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

851 P.2d 482

Garrett QUINTANA, Plaintiff–Appellee,

v.

Kim KNOWLES, Jane Knowles, James T. Jackson and Sheila Cooper, Defendants–Appellants.

No. 13044.

Court of Appeals of New Mexico.

Feb. 16, 1993.

Certiorari Denied March 31, 1993.

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

John S. Catron, Fletcher R. Catron, Catron, Catron & Sawtell, P.A., Santa Fe, for defendants-appellants.

OPINION

MINZNER, Chief Judge.

Defendants appeal from a district court judgment (1) declaring a certain road a public highway pursuant to Act of July 26, 1866, chapter 262, Section 8, 14 Stat. 251, 253 (codified at 43 U.S.C. Section 932) (repealed 1976) (hereinafter 43 U.S.C. Section 932) and (2) extending the width of the road to sixty feet pursuant to NMSA 1978, Section 67–5–2 without compensating them for the extension. We affirm in part, reverse in part, and remand for further proceedings.

The district court found that the road prior to 1931 "paralleled and meandered back and forth along the common section line between Sections 8 and 9," and that "over time, [the road has] been straightened, so that it now runs parallel to and with its west boundary being the common line between [Sections 8 and 9]". The district court also found that the road was a public road pursuant to 43 U.S.C. Section 932. 43 U.S.C. Section 932 provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The district court construed this statute as an offer by the federal government "to dedicate unreserved federal land for use as public highways." The court explained that public use of a road is deemed acceptance of the federal offer. Having found that the road was used by the public when the land on which it ran was owned by the federal government, the court concluded that the road was a public road.

On appeal, Defendants argue (1) that the district court erred in finding that the road in question is a public highway pursuant to 43 U.S.C. Section 932 because (a) the road was not on public land as required by 43 U.S.C. Section 932; and, in any event, (b) the general public did not accept the federal offer to dedicate the road as required by 43 U.S.C. Section 932. They also claim that the district court erred when it (2) recognized the legal width of the public road as sixty feet by applying Section 67–5–2, and (3) found the width of the actual usage to be twenty-five feet. We agree with the district court on the first issue, reverse on the second, and remand for further proceedings on the third.

We note initially that Plaintiff argues that Defendants fail to sufficiently challenge several of the district court's findings. We disagree. Defendants adequately challenged the material findings, and we decide this case on its merits. We first address the public road issue.

I. *WHETHER 43 U.S.C. SECTION 932 APPLIES TO THE ROAD IN QUESTION.*

In order for a road to be considered a public road pursuant to 43 U.S.C. Section 932, it must have existed when the surrounding land was owned by the federal government, in this case before 1931. Defendants contend that the road did not exist before 1931, and that the road shown on Plaintiff's Exhibit 39B is a different road than the road currently in dispute. Defendants argue that the road shown on Plaintiff's Exhibit 39B did not straighten over time, but fell into disuse or was otherwise abandoned, and that a new road [hereinafter the section line road] was established running on the section line common to Sections 8 and 9. It is undisputed that the section line road runs due north and south.

The crux of the dispute, therefore, is whether the section line road is the same road as the road that existed prior to 1931. Put in terms of the district court's findings, the question before this Court is whether there was sufficient evidence to support the district court's finding that "over time, [the pre–1931 road has] been straightened, so that it now runs parallel to and with its west boundary being the common line between [Sections 8 and 9]." A review of the transcript and several of the exhibits indicates that such evidence does exist.

Plaintiff's Exhibits 39B, 40B, and Defendants' Exhibit B show the gradual straightening of the road. Plaintiff's Exhibit 39B,

a 1935 aerial photograph of the area in question, shows that the road began in the northwest quadrant of Section 16 running approximately north-by-northwest into Section 9, first contacting the common section line between Sections 8 and 9 near the railroad tracks. At this point in time, the road, as the district court found, "paralleled and meandered back and forth along the common section line between Sections 8 and 9." Plaintiff's Exhibit 40B, a 1948 aerial photograph of the area in question, shows the road first contacting the section line approximately at the point common to Sections 8, 9, 16, and 17. Although portions of the road still wind along the section line, much of the road now runs due north and south. Finally, Defendants' Exhibit B, a 1951 aerial photograph of the area, shows the road running due north and south for much of its length. We hold that these exhibits sufficiently support the district court's finding that the pre–1931 road and the section line road are identical.

Defendants next contend that the public did not accept the federal government's offer to dedicate the road as it existed in 1931. Defendants therefore directly contest the district court's finding of public use. The district court found that the road had been used by the public "through regular use by J.P. Delgado [the owner of the land just north of the parcel in question] and his family, friends and associates beginning in 1913, and by use by other landowners and members of the public well prior to 1931."

Defendants argue that all the testimony regarding use of the road before 1931 indicates *private* rather than *public* use of the road. Although use that is "merely occasional" or otherwise insubstantial is not sufficient to accept the dedication of a road under 43 U.S.C. Section 932, "the concept of acceptance by public usage is to be applied liberally." *Luchetti v. Bandler,* 108 N.M. 682, 684, 777 P.2d 1326, 1328 (Ct.App.) (holding that substantial evidence supported district court's finding of insufficient public use of a road for purposes of 43 U.S.C. Section 932), *cert. denied,* 108 N.M. 681, 777 P.2d 1325 (1989). Testimony describing pre–1931 traffic on the road shows that families living north of Buckman Road, their guests and relatives, as well as many hobos and occasional passersby used the road. Additionally, there was testimony regarding the length and amount of use the road had before 1935 from an expert who analyzed a 1935 aerial photograph of the road. This evidence supports the district court's finding of sufficient use of the pre–1931 road by the public to establish acceptance of the federal dedication.

Defendants rely on *Herbertson v. Iliff,* 108 N.M. 552, 775 P.2d 754 (Ct.App.), *cert. denied,* 108 N.M. 485, 775 P.2d 251 (1989), for the proposition that evidence of use by tenants, their guests, and invitees is insufficient by itself to establish public use. In *Herbertson* we affirmed the district court's finding of insufficient adverse use to establish a public road. *Id.* at 555, 775 P.2d at 757. *Herbertson,* unlike the case at bar, was concerned with prescriptive rights acquired by adverse use. 43 U.S.C. Section 932 does not require the same amount of use that is necessary to prove prescriptive rights. *Luchetti,* 108 N.M. at 683, 777 P.2d at 1327.

We conclude that substantial evidence supports the relevant findings. Therefore, we affirm the district court's determination that the road in question is a public road.

II. *WHETHER SECTION 67–5–2 APPLIES TO THE SECTION LINE ROAD.*

The district court found that the section line road was a public highway and that the width of the road could be extended to sixty feet. The district court relied on Section 67–5–2, which states that "[a]ll public highways laid out in this state shall be sixty feet in width unless otherwise ordered by the board of county commissioners."

Defendants contend that the section line road was not laid out as required by Section 67–5–2. They argue that Section 67–5–2 does not apply to every public road; rather, it applies only to those roads that have been laid out by an affirmative act by

a board of county commissioners or some other governmental entity. Defendants further contend, citing *State ex rel. Baxter v. Egolf,* 107 N.M. 315, 757 P.2d 371 (Ct. App.1988), that because the section line road was established by public use and was therefore not laid out by a governmental entity, Section 67–5–2 is inapplicable to this case.

Plaintiff argues that, had the legislature wanted to restrict the use of Section 67–5–2, it would have done so clearly. Plaintiff then asks us to treat the term "laid out" in Section 67–5–2 as mere surplusage. This we cannot do. *Weiland v. Vigil,* 90 N.M. 148, 152, 560 P.2d 939, 943 (Ct.App.), *cert. denied,* 90 N.M. 255, 561 P.2d 1348 (1977). Where possible, we must give effect to every part of a statute. *Id.*

Although not specifically construing the term "laid out" as it applies to Section 67–5–2, the *Baxter* court found that Section 67–5–2 does not apply to all New Mexico public highways. In considering the application of Section 67–5–2 to a road established by prescription, the *Baxter* court explained that "[t]he statutory width does not apply because the highway was established by use, not by statutory authority." 107 N.M. at 319, 757 P.2d at 375. *Baxter* held that Section 67–5–2 did not apply to a road that was established by prescriptive use and found the use of the road established its width at eighteen feet rather than sixty feet. *Id.*

The road in *Baxter* was clearly a public highway; in fact, it was State Road 22. *Id.* at 318, 757 P.2d at 374; *see also* NMSA 1978, § 67–2–1 (definition of a public highway). This fact notwithstanding, the *Baxter* court found Section 67–5–2 inapplicable to that road. We believe that *Baxter* stands for the proposition that roads established by use are not laid out as required by Section 67–5–2. The applicability of Section 67–5–2 is dependent upon the laying out of a road by a governmental entity authorized to do so.

We need not determine what acts of a governmental entity are required to lay out a road. In the present case, public use, not governmental authority, has determined the course and width of the section line road from the time of its inception. Plaintiff does not point to action taken by any governmental agency that can be construed as having "laid out" the section line road within the meaning of Section 67–5–2. We therefore hold that Section 67–5–2 does not control the width of the section line road.

III. *WHETHER THE SECTION LINE ROAD IS ACTUALLY TWENTY-FIVE FEET WIDE.*

Because we have decided that Section 67–5–2 does not control the width of the section line road, we must now decide whether the district court correctly found the road's width, if based on actual usage, was twenty-five feet. Defendants argue that there is insufficient evidence to support that finding. Plaintiff points out five pieces of evidence that it contends support the district court's finding.

Plaintiff first argues the fact that the district court judge himself viewed the road sufficiently supports the court's finding. Defendants agree that the judge viewed the road; however, they point out that the judge did not measure the road, and his perception of the road by itself is insufficient to sustain his finding. *Groff v. Circle K. Corp.,* 86 N.M. 531, 533, 525 P.2d 891, 893 (Ct.App.1974). We agree with Defendants and do not find the judge's perception of the road to be sufficient, by itself, to support the district court's finding.

Second, Plaintiff refers to Plaintiff's Exhibit 27, a recent survey of adjacent property, which labels the road as an "existing 30–foot access and utility easement." Defendants, in their reply brief, correctly explain that this exhibit is not a survey of the land which the section line road traverses and that there was no testimony regarding whether the surveyor actually measured the area outside the surveyed plat. Further, the exhibit also labels the road as an "existing access road" but does not give its dimensions absent the utility easement. This exhibit does not make clear the width of either the road or the utility easement. We therefore refuse to rely on Plaintiff's

Exhibit 27 to support the district court's finding.

Third, Plaintiff refers to Plaintiff's Exhibit 14, a 1957 plat of one of Defendants' property. This exhibit indicates two roads: one "Graded Road 20′ wide" west of the section line, and another "15′ deeded Roadway" east of the section line (the road in question). Looking at this evidence, at least part of the road may be twenty feet wide, but it does not support a finding that the road is twenty-five feet wide.

Fourth, Plaintiff points out Plaintiff's Exhibit 18, a 1965 plat. This exhibit also indicates two roads: (1) a "15′ deeded roadway" west of the section line, and (2) a "20′ bladed road" east of the section line (the road in question). This evidence is no more helpful than was Plaintiff's Exhibit 14.

Finally, Plaintiff points out Plaintiff's Exhibit 34, page 75, which is an abstract of title. Although Plaintiff concedes that the "30.0′ easement" referred to is a different easement than the one at issue, he claims that both of these easements are the same width. The face of the exhibit, however, indicates that the two easements are not exactly the same width, i.e., the easement in question is slightly thinner than the labeled thirty-foot wide easement. *See Padilla v. City of Santa Fe,* 107 N.M. 107, 109–10, 753 P.2d 353, 355–56 (Ct.App.1988) (where documentary evidence is concerned, "an appellate court is in as good a position as the trial court to determine the facts and draw its own conclusions"). Although this evidence supports a finding that the road is less than thirty feet wide, we cannot say that it supports a finding that the road is twenty-five feet wide.

Defendants contend that the only competent evidence regarding the width of the road was George Rivera's testimony. According to Rivera, the area between a fence and the section line is twenty-five to twenty-seven feet wide, but the road itself is only twelve to fifteen feet wide. In view of the exhibits, however, the district court was not bound to accept Rivera's explanation. *Luchetti,* 108 N.M. at 684–85, 777 P.2d at 1328–29. We conclude that the actual width of the road was a disputed fact which the findings do not resolve, and that we cannot determine the width of the road on appeal. *See Padilla,* 107 N.M. at 109–10, 753 P.2d at 355–56. Therefore, we remand this question for a determination of the road's actual width.

IV. *CONCLUSION.*

We affirm the district court's finding that the section line road existed prior to 1931, and thus was dedicated for public use. We also affirm the district court's finding that the federal offer of dedication was accepted by public use. We reverse the district court's determination that Section 67–5–2 applies to the section line road. We also reverse the district court's finding that the section line road is twenty-five feet wide and remand for a determination of its actual width. No costs are awarded. Although Defendants requested oral argument, it is the decision of the panel that oral argument is not necessary. *See* SCRA 1986, 12–214(A) (Repl.1992).

IT IS SO ORDERED.

BIVINS and ALARID, JJ., concur.

851 P.2d 486

Russell Lee HAMMONDS,
Claimant–Appellant,

v.

FREYMILLER TRUCKING, INC. and Self–Insured Services Company,
Respondents–Appellees.

No. 13639.

Court of Appeals of New Mexico.

March 3, 1993.

John E. Keithly, Keithly & English, Anthony, for claimant-appellant.

Thomas L. Johnson, Kathleen Robertson Finz, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for respondents-appellees.

OPINION

APODACA, Judge.

Russell L. Hammonds (Worker) appeals the workers' compensation judge's (judge) summary judgment order dismissing his claim against Freymiller Trucking, Inc. and Self-Insured Services Co. (collectively referred to as Employer) under New Mexico's Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (Repl.Pamp.1991) (the Act), for lack of jurisdiction. Worker raises the following issues: (1) whether an out-of-state employer who employs fewer than three workers within the State of New Mexico is subject to liability under the Act, and (2) whether businesses engaged in interstate commerce are exempt from such liability. Because we hold (1) that an out-of-state employer who employs fewer than three workers in New Mexico may be subject to the Act if the employer employs more than three workers in total (i.e., including workers employed outside New Mexico), and (2) that the statutory exemption for employers involved in interstate commerce does not apply in this case, we reverse and remand to the Workers' Compensation Administration.

BACKGROUND

Worker sustained a work-related injury in New Mexico in September 1990. At the time of the injury, Worker was a resident of New Mexico and was employed by Employer as an interstate truck driver. Employer's main offices are located in California. It maintains no facilities and employs no other workers in New Mexico. Employer's workers' compensation claims agent is

located in Indiana. Worker formally signed his employment documents in Indiana, but the parties disagree over whether Worker entered into his employment contract in Indiana or in New Mexico.

To receive workers' compensation benefits, Worker signed an "Agreement to Compensation" form provided by Employer's agent and printed by the State of Indiana. This form states that "compensation shall be payable weekly until terminated in accordance with the provisions of the Indiana Workers' Compensation/Occupational Disease Acts." Worker received benefits pursuant to Indiana's workers' compensation law.

Worker filed a claim for workers' compensation benefits in New Mexico in January 1991. The judge granted Employer's motion for summary judgment on the basis that, under Section 52–1–66 (effective until January 1, 1991), New Mexico lacked jurisdiction to consider the claim and dismissed Worker's claim.

DISCUSSION

1. *Employer's Liability under the Act.*

Generally, this Court reviews orders granting summary judgment by considering the whole record to ascertain whether there is any issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Roth v. Thompson,* 113 N.M. 331, 334–35, 825 P.2d 1241, 1244–45 (1992). Although Worker asserts that there are certain material factual disputes, the dispositive issue here is whether the judge properly applied Section 52–1–66(A) to the undisputed facts when he determined that he lacked jurisdiction to consider Worker's claim. We thus limit our inquiry to whether Employer was entitled to summary judgment as a matter of law. *See Koenig v. Perez,* 104 N.M. 664, 666, 726 P.2d 341, 343 (1986) (summary judgment proper if issue is legal effect of undisputed facts).

Employer contends that Section 52–1–66(A) exempts employers not domiciled in New Mexico that employ fewer than three workers in New Mexico from application of the Act. Worker, on the other hand, essentially contends that the statute simply relieves such employers of certain administrative and filing obligations. We agree with Worker.

We do not agree that the judge lacked jurisdiction to hear the claim. *See* NMSA 1978, §§ 52–5–4, –5, –6, & –7 (Repl.Pamp.1991) (granting the Workers' Compensation Administration authority to adopt regulations to effect the purposes of the Act and to hear claims arising under the Act). Rather, the issue is whether Employer can be held liable for benefits, *see* § 52–1–2, or is exempted from the Act. *See* § 52–1–6(A). We thus approach the issue as one of statutory construction to determine whether the legislature intended nondomiciled employers who employ fewer than three workers within New Mexico to be liable under the Act.

When interpreting a statute, our central concern is to determine the legislature's intent. *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Legislative intent is determined primarily from the language of the statute, and this Court will give those words their ordinary meaning unless a different intent is clearly indicated. *Schmick v. State Farm Mut. Auto. Ins. Co.,* 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). We must "read the act in its entirety and construe each part in connection with every other part to produce a harmonious whole." *Klineline,* 106 N.M. at 735, 749 P.2d at 1114. Additionally, our goal is to read the statutes so as to facilitate their operation and to achieve their goals. *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).

The proper analysis begins with a determination of the Act's scope. Sections 52–1–2 and –6(A) together describe an employer's liability for workers' compensation benefits under the Act. *Garcia v. Watson Tile Works, Inc.,* 111 N.M. 209, 210, 803 P.2d 1114, 1115 (Ct.App.1990). Section 52–1–2 states which employers come within the Act:

> [E]very private person, firm or corporation engaged in carrying on for the purpose of business or trade within this state, and which employs four or more workers, except as provided in Section 52-1-6 NMSA 1978, shall become liable to and shall pay to any such worker injured by accident arising out of and in the course of his employment ... compensation in the manner and amount at the times herein required.

Id.; see also § 52-1-6(A) (stating "[e]very employer of four or more workers shall be subject to the provisions of the Workers' Compensation Act."). Neither section refers to out-of-state workers or employers or limits the applicability of the Act to employers that employ four or more workers *within the state.*

The general rule in determining the scope of applicability of workers' compensation statutes is that all of an employer's workers, including out-of-state workers, will be counted in determining whether the employer employs the minimum number of workers necessary to be within the scope of such statutes. *Martin v. Furman Lumber Co.,* 134 Vt. 1, 346 A.2d 640, 642 (1975); *see also* 1C Arthur Larson, *The Law of Workmen's Compensation* § 52.-34, at 9-207 (1992); 82 Am.Jur.2d *Workers' Compensation* § 120, at 115-16 (1992). This Court has not previously addressed this specific issue. However, in *Clark v. Electronic City,* 90 N.M. 477, 565 P.2d 348 (Ct.App.), *cert. denied sub nom., Capo v. Clark,* 90 N.M. 636, 567 P.2d 485 (1977), we held that an employer who cumulatively employed four or more workers at multiple sole proprietorships was subject to the Act, even though the particular business for which the claimant worked did not employ four or more workers. *Clark* rejected adding language to the predecessor to Section 52-1-2 so that only workers at each establishment were included because, we said, adding such language "is a function of the legislature, not the courts." *Id.,* 90 N.M. at 479, 565 P.2d at 350.

We similarly decline to add limiting language to the statutes here. If the legislature had intended to limit the broad language of Sections 52-1-2 and -6(A) to employers that employed four or more persons *within New Mexico,* it would have so stated. We therefore conclude that, under Section 52-1-2, all workers employed by a private employer "engaged in carrying on for the purpose of business or trade within this state," § 52-1-2, wherever employed, must be considered in determining whether the employer is subject to the Act. *See Martin,* 346 A.2d at 641-42; *cf. Clark,* 90 N.M. at 479, 565 P.2d at 350.

Having determined that Employer is not exempt from New Mexico's Act simply because Employer employed only one worker within New Mexico, we next consider whether Employer is exempted under Section 52-1-66(A), which provides:

> Every employer not domiciled in the state that employs three or more workers within the state, whether that employment is permanent, temporary or transitory and whether the workers are residents or nonresidents of the state, shall comply with the provisions of Section 52-1-4 NMSA 1978 and, unless self-insured, shall obtain a worker's compensation insurance policy or an endorsement to an existing policy, issued in accordance with the provisions of Section 59A-17-10.1 NMSA 1978. An employer who does not comply with the foregoing requirement shall be barred from recovery by legal action for labor or materials furnished during any period of time in which he was not in compliance with the requirements of this section and, if the noncomplying employment is in an activity for which the employer is licensed under the provisions of the Construction Industries [Licensing] Act, then the employer's license is subject to revocation or suspension for the violation.

Section 52-1-4(A) (effective until January 1, 1991), expressly referred to in the above-noted statutory language, requires "[e]very employer subject to the Workers' Compensation Act" to have filed with the Workers' Compensation Administration a certificate of insurance coverage or to have otherwise demonstrated to the administration that insurance coverage is unnecessary.

Employer argues that, because Section 52–1–66(A) exempts it from having to comply with Section 52–1–4(A), it must be exempt from having to obtain workers' compensation insurance coverage in New Mexico and therefore be exempt from liability under the Act. We disagree. Although Section 52–1–4(A) states that it applies to "[e]very employer" subject to the Act, the statute itself creates only an affirmative duty for employers to file appropriate proof of either insurance or that insurance is unnecessary; the statute does not address an employer's *liability* for workers' compensation benefits under the Act.

Similarly, Section 52–1–66(A) does not address whether a particular employer can be liable for benefits; rather, it relieves certain nondomiciled employers from the administrative burden of obtaining a separate workers' compensation insurance policy that complies with New Mexico requirements, *see* NMSA 1978, § 59A–17–10.1 (Repl.Pamp.1992), and of filing documentation with the New Mexico Workers' Compensation Administration under Section 52–1–4(A). Nondomiciled employers who are required to comply with these administrative provisions and who fail to do so are not relieved of potential liability under the Act. Rather, the statute provides that the employer cannot recover for materials or labor furnished if the employer has failed to comply with those provisions. Section 52–1–66(A). We thus hold that Section 52–1–66(A) does not exempt nondomiciled employers employing fewer than three workers in New Mexico from liability under the Act.

Employer also argues that public policy considerations require New Mexico to refrain from exercising jurisdiction. Specifically, Employer claims that complying with the differing workers' compensation laws of the various states "would constitute a costly administrative nightmare" and that there is "no sound policy reason" for this state to exercise jurisdiction. Without citation to authority, Employer also claims that asserting jurisdiction could impose unconstitutional burdens on Employer. We disagree.

The legislature has attempted to minimize the administrative burdens on employers who have fewer than three workers within New Mexico by exempting them from certain administrative requirements. However, in our view, relief from administrative burdens does not indicate a legislative intent to relieve those employers of liability under the Act. Besides, the purpose of the Act is to provide recovery and ensure prompt compensation to a worker. *Gambrel v. Marriott Hotel*, 112 N.M. 668, 670, 818 P.2d 869, 871 (Ct.App.1991); *see also* NMSA 1978, § 52–5–1 (Repl.Pamp.1991). At the same time, the employer receives the benefit of having only limited liability under the Act's exclusivity provisions. *See* § 52–1–6(D).

We also note that New Mexico's legislature has recognized that several states may assert jurisdiction over a single workers' compensation claim and has thus allowed for such multiplicity by enacting Section 52–1–65. That statute provides that the payment or award of benefits under the workers' compensation law of another state to a worker entitled to benefits under New Mexico's Act is not a bar to a claim for benefits under the Act, but the employer is entitled to a credit for any benefits paid under the other state's law. *Id.* The enactment of these provisions indicates to us that the legislature has already sought to protect nondomiciled employers from the risk of multiple payments.

As noted by Worker, one constitutional limitation upon New Mexico's assertion of jurisdiction is the Full Faith and Credit Clause of the United States Constitution. U.S. Const. art. IV, § 1. There are several factors that, if occurring within the state asserting jurisdiction, will give rise to an interest sufficient for a state to assert jurisdiction over a workers' compensation claim without violating its duty to give full faith and credit to the workers' compensation laws of other states also having an interest in the injury. These factors are: (1) where the injury occurred; (2) where the employment contract was formed; (3) where the employment occurred; (4) where the industry was localized; (5) where the

worker resided; and (6) which state's statute the parties have expressly adopted by contract. 4 Larson, *supra*, §§ 86–86.10, at 16–48. Not all of these factors need to be present for a state to assert jurisdiction. *See Martin*, 346 A.2d at 644 (stating that "[b]asically, modern delineations conclude that the state of injury and residence has sufficient interest in the controversy to apply its own provisions in lieu of the employer's state or the law of the state in which the contract [of employment] was made."). Under the facts of this appeal, Worker was a resident of New Mexico, the employment occurred in part in New Mexico, and the injury undisputedly occurred in New Mexico.

Additionally, in *Webb v. Arizona Public Service Co.*, 95 N.M. 603, 624 P.2d 545 (Ct.App.), *cert. denied*, 95 N.M. 669, 625 P.2d 1186 (1981), this Court held that New Mexico could exercise jurisdiction over a workers' compensation claim even though a judgment had been rendered in Arizona. We stated that:

> Our compensation act was passed in the interest of the general welfare of the people of New Mexico. It is extremely doubtful whether Arizona has the power by any legal device to preclude New Mexico from granting to its own residents, employed within its own borders, that measure of compensation for occupational injuries which it deems advisable. To hold otherwise is to grant Arizona the power to nullify a New Mexico statute which gives the beneficial protection of workmen's compensation to an injured workman who is a resident of New Mexico and employed here. The Full Faith and Credit Clause does not give sanction to such control by one state of the internal affairs of another.

Id., 95 N.M. at 609, 624 P.2d at 551. Thus, New Mexico has a strong interest in ensuring that its citizens receive the full benefit to which they are entitled under New Mexico law. We thus conclude that New Mexico may assert jurisdiction over this workers' compensation claim without violating the Full Faith and Credit Clause of the United States Constitution, especially since Worker did not initially select Indiana as the forum, the Indiana proceedings were initiated informally, and Worker did not have the aid of counsel. *See id.*

2. *Interstate Commerce Exemption.*

Employer argues that it is exempted from application of New Mexico's workers' compensation law under Section 52–1–14 because it is involved in interstate commerce. Section 52–1–14 states that "[t]his act shall not be construed to apply to business or pursuits or employments which according to law are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged."

Contrary to Employer's apparent assertion, Section 52–1–14 does not exempt every business involved in interstate commerce from the application of New Mexico's workers' compensation law. Rather, the statute is significantly more limiting—it exempts only those employers that "according to law are so engaged in interstate commerce as to be not subject to the legislative power of the [State of New Mexico]." Employer cites no law indicating that interstate trucking is exempt from the legislative power of the state; on the contrary, this Court has previously held that a nonresident employee of an interstate trucking firm who was injured in New Mexico while en route to California could receive workers' compensation benefits under New Mexico law. *Burns v. Transcon Lines*, 92 N.M. 791, 595 P.2d 761 (Ct.App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979). Employer argues that *Burns* is inapplicable because it did not consider whether Section 52–1–14 exempts non-resident employers involved in interstate commerce from application of New Mexico's Act. We disagree. Although the facts of *Burns* are distinguishable from those of this appeal in that the worker in that case had not received any benefits under any other state's law, the central issue was whether New Mexico law should be applied. *Id.*, 92 N.M. at 791, 595 P.2d at 761. We see no principled reason why a nonresident involved in interstate trucking who is injured in New Mexico should receive the benefits of the Act while a resident similarly situated

should not. Also, in *Burns*, this Court rejected the argument now made by Employer. *See id.* at 793–95, 595 P.2d at 763–65 (Sutin, J., dissenting).

We have examined the authorities relied upon by Employer and find them unpersuasive insofar as they purport to apply to the issue here. *Mitchell v. Clowser*, 153 W.Va. 552, 170 S.E.2d 753 (1969), did not address the precise issue before us, nor did it address the language of the statute at issue in this appeal. Unlike Section 52–1–14, the statute at issue in *Birson v. Decatur Transfer & Storage, Inc.*, 271 Ala. 240, 122 So.2d 917 (1960), expressly exempted a "common carrier" doing interstate business and employees of a "common carrier" while engaged in interstate commerce from application of Alabama's workers' compensation law. *Id.*, 122 So.2d at 918. *Spohn v. Industrial Commission*, 138 Ohio St. 42, 19 O.O. 511, 32 N.E.2d 554 (1941), denied workers' compensation benefits under Ohio law to an Ohio resident who was employed as an interstate truck driver by a Michigan corporation and injured while driving in Ohio. However, that decision was limited soon after by *Holly v. Industrial Commission*, 142 Ohio St. 79, 26 O.O. 261, 50 N.E.2d 152 (1943), which held that, even though the worker was injured while working in interstate commerce, the worker could receive Ohio workers' compensation benefits because of certain intrastate aspects of the worker's work. *Id.*, 50 N.E.2d at 156. We therefore decline to adopt the holdings of those cases.

We believe the better view is that, in the absence of a clear statement from the legislature that it intended to exempt a certain category of employers from application of the Act, or proof that federal legislation governs the rights and liabilities of the parties if an employee engaged in interstate commerce is injured while so employed, we should apply the liability provisions under the Act. *See Collins v. American Buslines, Inc.*, 350 U.S. 528, 531, 76 S.Ct. 582, 584, 100 L.Ed. 672 (1956) (holding that widow and child of interstate bus driver killed while driving bus through Arizona could receive benefits under Arizona's workers' compensation law; a state's power of affording remedies for injuries committed within its boundaries "is not dislodged so long as the Federal Government has not taken over the field of remedies for injuries of employees on interstate buses as it has done in the case of employees of interstate railroad carriers"); *see also* 82 Am.Jur.2d *Workers' Compensation* §§ 33–35, at 47–50; *cf.* § 52–1–6(A) (excepting employers of private domestic servants and farm and ranch laborers from the Act). Reading the plain language of Section 52–1–14, we think it is clear that the legislature intended that the Act apply except where federal law regulating interstate commerce expressly preempts the provisions of our Act. This is not the case here. *See Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077, 1083 (1937). As observed in 99 C.J.S. *Workmen's Compensation* Section 26(b) (1968):

> [I]n so far as congress has not already occupied the same field it is conceded that the states, under the police power reserved to them, have power to legislate with respect to the rights of employees engaged in interstate ... commerce to compensation for injuries sustained in the course of their employment.... [Footnotes omitted.]

Employer has not cited any authority, and we know of none, indicating the existence of federal legislation preempting coverage under the Act for injuries sustained by employees of interstate trucking firms. We thus conclude that there is none. Consequently, we hold that Employer is not a business "so engaged in interstate commerce as to be not subject to the legislative power of the state" and is thus not exempted from application of the Act under Section 52–1–14.

3. *Worker's Claims of Disputed Fact.*

Worker alleges that summary judgment was improper because there are two issues of material fact: (1) whether Worker waived his claim for benefits under the Act by accepting benefits under Indiana law, and (2) whether the employment contract was formed in New Mexico or Indiana. Because the judge based his grant of summary judgment on Section 52–1–66, and we find our interpretation of that statute to be

dispositive of the issues in this appeal, we do not reach the merits of these arguments and express no opinion regarding them.

4. *Attorney Fees.*

Worker requests attorney fees for the prosecution of this appeal. This request is premature because no compensation award has yet been made. *See* NMSA 1978, § 52-1-54(F) (Repl.Pamp.1991) (in determining reasonable attorney fees for a claimant, judge shall consider only those benefits attorney is responsible for securing); *Ortiz v. Ortiz & Torres Dri-Wall Co.*, 83 N.M. 452, 455, 493 P.2d 418, 421 (Ct.App.1972) (denying request for attorney fees for successful appeal in workers' compensation case because no award of compensation has yet been made). We thus decline to award Worker attorney fees for this appeal at this time. However, if any award of compensation is made to Worker on remand, we direct the judge to award Worker attorney fees for this appeal in addition to any other fees awarded, in light of the final award of compensation. *See Nelson v. Nelson Chem. Corp.*, 105 N.M. 493, 497, 734 P.2d 273, 277 (Ct.App.1987).

CONCLUSION

We hold that the legislature intended for out-of-state employers employing fewer than three workers in the State of New Mexico to be exempt only from the administrative burden of obtaining and filing proof of workers' compensation insurance complying with New Mexico's statutory requirements, but not from liability for payment of benefits under the Act if they are otherwise subject to New Mexico's workers' compensation law. Consequently, we conclude that Worker's claim should not have been dismissed. We thus reverse and remand to the Workers' Compensation Administration for further proceedings consistent with this opinion.

IT IS SO ORDERED.

MINZNER, C.J., and DONNELLY, J., concur.

851 P.2d 494

STATE of New Mexico, Plaintiff-Appellee,

v.

Douglas PENNINGTON, Jr., Defendant-Appellant.

No. 13263.

Court of Appeals of New Mexico.

March 16, 1993.

Certiorari Denied April 27, 1993.

[redacted]

[redacted]

[redacted]

Tom Udall, Atty. Gen., Max Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

HARTZ, Judge.

Defendant appeals his conviction of child abuse resulting in death. He contends: (1) the district court should have disqualified the district attorney's office from prosecuting the case because of a conflict of interest; (2) the prosecutor's closing argument was improper; (3) an autopsy photograph should not have been admitted; (4) the evidence was insufficient to support the conviction; and (5) the trial court should have granted his request for a continuance. We affirm, although we agree with Defendant's claim that some of the prosecutor's comments during closing argument constituted improper vouching for a witness.

BACKGROUND

Defendant was indicted on one count of child abuse not resulting in great bodily harm and one count of child abuse resulting in death. The victim of the alleged abuse was Devon Candelaria, the six-month-old son of Frances Candelaria, Defendant's girlfriend. Both charges stemmed from injuries Devon suffered while Defendant was baby-sitting him. On August 28, 1989, Devon suffered a skull fracture. On September 24, 1989, Devon lapsed into a coma caused by a head injury; he died on September 27, 1989.

Defendant's first trial ended in a mistrial when the jury could not reach a unanimous verdict on either charge. At his second trial (nine and one-half months later) the jury convicted Defendant of the charge of child abuse resulting in death and acquitted him of the other charge.

I. Conflict of Interest.

We first consider Defendant's contention that the Third Judicial District Attorney's Office should have been disqualified from prosecuting him. About four months after the first trial Tim Kling, a private investigator who had worked on the case for Defendant, joined the district attorney's office. The district attorney instituted procedures to screen Kling from the prosecution of cases he had worked on for defense attorneys. One month later Defendant filed a motion to disqualify the entire district attorney's office from participating in prosecuting him. At a hearing on the motion Defendant testified that he had recently called Kling to obtain copies of various documents and that Kling then asked him several questions about the upcoming trial, including what his strategy would be, before Kling informed him that he now was working for the district attorney. Kling acknowledged having a conversation with Defendant but testified that he received no confidential information and that he immediately informed Defendant that he was working for the district attorney. Finding the evidence on the matter to be "evenly balanced," the district court held that Defendant had not met his burden to prove that Kling obtained confidential information after going to work for the district attorney. The district attorney did not dispute that Kling had obtained confidential information about Defendant's case when he worked for Defendant. The district court denied the motion to disqualify the office, however, because of the screening procedure established by the district attorney.

Defendant claims that the district court erred in two respects: first, in not applying a per se rule of disqualification that would prohibit the district attorney's office from handling the prosecution after the hiring of Kling; second, in assigning him the burden of proving that Kling acquired confidential information after he joined the district attorney's staff.

A. Per Se Disqualification of District Attorney's Office.

We first consider whether an entire district attorney's staff should always be disqualified from prosecuting a defendant when one member of the staff before joining the office was involved in representing the defendant on the charges being prosecuted. In arguing for a per se rule of disqualification Defendant relies on *State v. Chambers,* 86 N.M. 383, 524 P.2d 999 (Ct.App.), *cert. denied,* 86 N.M. 372, 524 P.2d 988 (1974). In that case a district attorney's office was disqualified when one staff attorney had a conflict of interest because he had previously represented the defendant. *Id.,* 86 N.M. at 384, 524 P.2d at 1000. *Chambers* focused on the appearance of impropriety created when former defense counsel joined the district attorney's staff. *Id.* In reversing the district court's refusal to disqualify the office, *Chambers* held that the facts of the case compelled disqualification to ensure "the fair and impartial administration of justice." *Id.* at 388, 524 P.2d at 1004. The Court wrote:

> What must a defendant and his family and friends think when his attorney leaves his case and goes to work in the very office that is prosecuting him? Even though there is no revelation by the attorney to his new colleagues, the defendant will never believe that. Justice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety. Like Caesar's wife, they must be above reproach.

Id. at 384–85, 524 P.2d at 1000–01 (quoting *State v. Latigue,* 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (1972) (en banc)).

A year later, however, this Court ruled that in some cases a showing at an evidentiary hearing can overcome the appearance of unfairness. *State v. Mata,* 88 N.M. 560, 543 P.2d 1188 (Ct.App.1975). As in *Chambers* the defendant's former attorney had joined the district attorney's office. But an evidentiary hearing established that the defendant's former attorney had totally divorced himself from any involvement in the prosecution. Although *Mata* involved a "stale" claim—the issue was first raised in a motion for post-conviction relief—the opinion did not explicitly restrict its holding to motions for post-conviction relief.

In evaluating what, if any, of the *Chambers* holding remains good law, we look to other jurisdictions for guidance. Opinions in eight other jurisdictions have disqualified an entire prosecutor's office without requiring a showing that the employee who had assisted the defendant before joining the staff had participated in the prosecution or conveyed information to a person participating in the prosecution. *State v. Latigue; People v. Stevens,* 642 P.2d 39 (Colo.Ct.App.1981); *State v. Tippecanoe County Court,* 432 N.E.2d 1377 (Ind.1982); *State v. Ross,* 829 S.W.2d 948 (Mo.1992) (en banc); *Fitzsimmons v. State,* 116 Neb. 440, 218 N.W. 83 (1928); *People v. Shinkle,* 51 N.Y.2d 417, 434 N.Y.S.2d 918, 415 N.E.2d 909 (1980); *State v. Cooper,* 63 Ohio Misc. 1, 409 N.E.2d 1070 (1980); *State v. Stenger,* 111 Wash.2d 516, 760 P.2d 357 (1988) (en banc). *Cf. Love v. Superior Court,* 111 Cal.App.3d 367, 168 Cal.Rptr. 577 (1980) (disqualifying the six attorneys in the major crimes section of the district attorney's office). The principal concerns expressed in these cases, as in *Chambers,* are the appearance of impropriety and the potential for an undiscoverable breach of confidence when a defendant's former confidante joins the enemy camp.

Even in the above jurisdictions, however, it is not clear that the courts would always require disqualification of an entire district attorney's office on the ground that one employee had worked for the defendant on a related matter. Most of the cases involved special circumstances. In two of the cases the attorney causing the disqualification was a part-time prosecutor whose private firm continued to represent the defendant in related civil litigation. *State v. Ross; Fitzsimmons v. State.* In four of the cases the attorney who had worked for the defendant had become the district attorney or chief assistant. *State v. Latigue; State v. Tippecanoe County Court; People v. Shinkle; State v. Stenger. Tippecanoe,* 432 N.E.2d at 1379 and *Stenger,* 760

P.2d at 360–61, explicitly stated that the entire office need not be disqualified just because a deputy in the office had represented the accused in the same matter. Although *Latigue* emphasized that the decision did not rest "on the fact that the attorney involved here is the County Attorney's chief deputy," *id.* at 1342, a later decision in that jurisdiction has suggested that whether to disqualify an entire office will depend on the specifics of the case, *Turbin v. Superior Court,* 165 Ariz. 195, 797 P.2d 734 (Ct.App.1990). In the remaining two cases the decisions were by a two-to-one majority, *People v. Stevens,* and by a single-judge trial court, *State v. Cooper.*

The great majority of jurisdictions have refused to apply a per se rule disqualifying the entire prosecutor's staff solely on the basis that one member of the staff had been involved in the representation of the defendant in a related matter. In their view the entire staff ordinarily need not be disqualified from prosecuting the defendant if the staff member who had previously worked for the defendant is isolated from any participation in the prosecution of the defendant. *United States v. Caggiano,* 660 F.2d 184 (6th Cir.1981); *United States v. Goot,* 894 F.2d 231 (7th Cir.1990); *Jackson v. State,* 502 So.2d 858 (Ala.Crim. App.1986); *Upton v. State,* 257 Ark. 424, 516 S.W.2d 904 (1974); *People v. Lopez,* 155 Cal.App.3d 813, 202 Cal.Rptr. 333 (1984) (applying new state statute); *State v. Bunkley,* 202 Conn. 629, 522 A.2d 795 (1987); *State v. Fitzpatrick,* 464 So.2d 1185 (Fla.1985); *Frazier v. State,* 257 Ga. 690, 362 S.E.2d 351 (1987); *State v. Dambrell,* 120 Idaho 532, 817 P.2d 646 (1991); *State v. McKibben,* 239 Kan. 574, 722 P.2d 518 (1986); *Summit v. Mudd,* 679 S.W.2d 225 (Ky.1984); *State v. Bell,* 346 So.2d 1090 (La.1977); *Young v. State,* 297 Md. 286, 465 A.2d 1149 (1983); *Pisa v. Commonwealth,* 378 Mass. 724, 393 N.E.2d 386 (1979); *Collier v. Legakes,* 98 Nev. 307, 646 P.2d 1219 (1982); *State v. Camacho,* 329 N.C. 589, 406 S.E.2d 868 (1991); *Commonwealth v. Harris,* 501 Pa. 178, 460 A.2d 747 (1983); *State v. Cline,* 122 R.I. 297, 405 A.2d 1192 (1979); *State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982); *Mattress v. State,* 564 S.W.2d 678 (Tenn.Crim.App. 1977); *State ex rel. Eidson v. Edwards,* 793 S.W.2d 1 (Tex.Crim.App.1990) (en banc); *State v. Miner,* 128 Vt. 55, 258 A.2d 815 (1969); *see generally* Annotation, T.J. Griffin, *Disqualification of Prosecuting Attorney on Account of Relationship with Accused,* 31 A.L.R.3d 953 (1970 & Supp.1992).

We join that majority in rejecting a per se rule of disqualification of the entire prosecutorial staff when the disqualified member of the staff is isolated from the prosecution of the defendant. Instead we leave to the sound discretion of the district court whether the circumstances of the specific case require disqualification of the entire staff.

There are several reasons for rejecting a per se rule. First, if a district attorney has issued directives to isolate a member of the staff from the prosecution of a particular case, one should not presume that secret violations of the directives will occur. A prosecutor's sole duty is to do justice. A prosecuting attorney has no financial incentive to obtain prohibited information. Of course, prosecuting attorneys make mistakes, even mistakes that violate ethical rules of conduct. But the sort of misconduct one must presume to justify a per se rule is that prosecutors would violate a clear mandate (that the disqualified employee be isolated from all involvement in the prosecution) and then lie about such violation. We have no reason to presume that such egregious misconduct would occur in the district attorney offices in this state. The possibility of such despicable behavior is too slight to justify a per se rule.

In saying this we are not denigrating the importance of appearances. There may well be circumstances in which concern about the appearance of impropriety would justify disqualification of the entire district attorney's staff. If the prosecution is of such great political importance that the result could affect the political future of a district attorney, one might question whether the pressures on the prosecutorial staff are any less influential than those on

private counsel. Other factors that might suggest a need for disqualification are evidence of bad faith in hiring of the employee who had worked for the defendant, *see United States v. Caggiano,* (district court made finding of good faith in hiring defendant's former attorney), lack of candor by the prosecutor's office in related matters, or simply prior evidence of overzealousness by members of the prosecutor's staff. We can rely on the district courts, in the exercise of their sound discretion, to disqualify an entire office whenever there are substantial reasons to doubt that internal screening procedures will protect the defendant.

A second reason to reject a per se rule of disqualification is that such a rule could seriously impede a district attorney's efforts to acquire the best possible employees. A per se rule could foreclose the hiring of persons with substantial recent local experience in criminal defense work. Under a per se rule, hiring such an attorney would entail the cost of employing a special prosecutor to handle every case in which the new staff member had worked for a defendant. Even if the financial expense were not a major consideration, the district attorney may not be pleased about having important cases prosecuted by people who do not have the criminal-law experience or the knowledge of local culture (including the modes of thinking of the local judiciary and juries) possessed by staff attorneys. The district attorney might find it preferable to hire a less-qualified person than to incur such problems. One court has suggested that this difficulty could be resolved by delaying employment of the new staff member until completion of the prosecution of the defendant for whom the new staff member had worked. *Dambrell,* 817 P.2d at 653. But in practice that would mean that the prospective employee would need to refrain from involvement in any criminal cases for an indefinite period while the district attorney's office completes the prosecution of the prospective employee's former clients. The financial burden this could impose on the prospective employee might deter that person from seeking a position with the district attorney's office. *See State v. Jones,* 180 Conn. 443, 429 A.2d 936, 942–43 (1980) (Per se rule "would result in many unnecessary withdrawals, limit mobility in the legal profession, and restrict the state in the assignment of counsel where no breach of confidentiality has in fact occurred."), *overruled in part on other grounds, State v. Powell,* 186 Conn. 547, 442 A.2d 939, 944 (1982).

The ABA Committee on Professional Ethics relied on the above two reasons in ruling that lawyers in a government office are not necessarily disqualified from handling matters in which another lawyer in the office had participated while in private practice. The committee wrote:

> When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if D.R. 5–105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of D.R. 5–105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe D.R. 5–105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualifi-

> fied by reason of D.R. 4–101, D.R. 5–105, D.R. 9–101(B), or similar disciplinary rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

ABA Comm. on Professional Ethics, Formal Op. 342, 62 A.B.A.J. 517, 521 (1976). The conclusion in this ethics opinion was reaffirmed in the ABA comment to Model Rules of Professional Conduct, Rule 1.11(c)—adopted by the New Mexico Supreme Court as SCRA 1986, 16–111(C) (Repl.Pamp.1991). The comment states that when a lawyer serving as a public employee is disqualified from participating in a matter because of prior participation in the matter while in private practice, other lawyers in the same government agency are not necessarily prohibited from participating in the matter. SCRA 16–111, ABA cmt. We find it significant that neither Formal Opinion 342 nor the comment to Rule 1.11(c) had been published when *Chambers* was decided by this Court.

Moreover, insofar as disqualification of the entire staff of a district attorney is justified solely because of concern for the appearance of unfairness, the appointment of a special prosecutor cannot fully allay that concern. Unless the special prosecutor begins the investigation from scratch, even a special prosecutor of absolute integrity cannot avoid the possibility that material supplied by the district attorney's office or police agencies has been contaminated by disclosures from the disqualified employee. We have found three cases in which the defendant has raised an ethical challenge to the prosecution despite the substantial withdrawal from participation in the prosecution by the government office in which the defendant's former attorney worked. *State v. Miranda,* 100 N.M. 690, 675 P.2d 422 (Ct.App.1983); *State v. Reid,* 104 N.C.App. 334, 410 S.E.2d 67 (1991); *State v. Miner.* We concur in the following observation by the Rhode Island Supreme Court:

> Even in those states where one prosecutor's office has been disqualified, the necessity still exists for representatives of that office, as in *State v. Latigue, supra,* to work closely with a special prosecutor in whose integrity (and that of the former counsel for the accused) reliance must ultimately have been reposed. Thus, we believe that transferring responsibility from one office to another, or the appointment of a special prosecutor, provides a purported remedy which is more cosmetic than substantial.

Cline, 405 A.2d at 1207.

We conclude that the per se rule of disqualification expressed in *Chambers* cannot withstand the great weight of contrary authority and the cogent reasons supporting that authority. We expressly overrule *Chambers* to the extent that it can be read as always requiring disqualification of an entire district attorney's office from prosecuting a defendant solely on the ground that one employee of the office had worked for defendant on the same matter. When the disqualified employee is effectively screened from any participation in the prosecution of the defendant, the district attorney's office may, in general, proceed with the prosecution. We leave to the sound discretion of the district court, however, the determination of whether under the specific facts of a case, substantial concerns about the appearance of fairness require that the district attorney's office be disqualified from prosecuting the defendant despite the adoption by that office of effective measures to screen any disqualified employees.

B. Burden of Proof and Application to This Case.

Before turning to the facts of this case, we attempt to clarify the allocation of the burden of persuasion on the issues governing disqualification. First, the defendant has the burden to establish that a member of the district attorney's staff is disqualified from participation in the prosecution. *See Leon, Ltd. v. Carver,* 104 N.M. 29, 32, 715 P.2d 1080, 1083 (1986) (disqualification of opposing counsel in civil case);

Ulibarri v. Homestake Mining Co., 112 N.M. 389, 395, 815 P.2d 1179, 1185 (Ct.App. 1991) (party alleging the affirmative has burden of persuasion). We note that a defendant can meet this burden by proving, as in this case, that the staff member had previously worked for the defendant on the same matter. When the defendant does not meet this burden, the district court cannot disqualify anyone in the district attorney's office.

Once a defendant has carried this burden, the state has the burden to establish that staff members working on the prosecution have been effectively screened from contact with the disqualified staff member concerning the case. This burden is appropriately on the state because it has unique access to the pertinent information. Imposition of this burden on the state also follows from a presumption that employees of a law office share confidences with respect to matters being handled by the office. *See United States v. Goot*, 894 F.2d at 234–35; *cf. State v. Martinez*, 100 N.M. 532, 535, 673 P.2d 509, 512 (Ct.App.1983) (lawyer seeking to remain in case has burden to show that knowledge of confidential matters is merely imputed, not actual). If the state does not meet this burden, the entire district attorney's office must be disqualified.

When both the defendant and the district attorney have met their respective burdens, the matter rests in the sound discretion of the court. Even if the disqualified employee is effectively screened from the prosecution team, special circumstances may persuade the district court that an appearance of impropriety requires disqualification of the entire office. This decision will depend on a variety of factors, some of which have been alluded to above. The local district court is in a far better position than an appellate court to evaluate and weigh the evidence on the matter. The formal allocation of a burden of persuasion serves no purpose in this exercise of discretion.

In the present case the district court's only reference to the burden of persuasion was in the following Finding No. 10 proposed by the State and adopted by the court:

> The Defendant is the proponent of a request to have this Court find that since the employment of the investigator by the District Attorney's Office, the investigator again acquired confidential information from the Defendant; and as the proponent of that finding carries the burden of proof and the evidence is evenly balanced and the Court declines to find that the investigator acquired confidential information again after he went to work at the Dsitrict [sic] Attorney's Office.

Defendant argues in his appellate brief that this finding implies that the district court thought that Defendant had the burden of proving actual prejudice from Kling's conflict of interest. We do not so read the finding. What the district court appears to be saying is that if the telephone conversation between Defendant and Kling is alleged to be an independent ground for disqualification of Kling, then Defendant had the burden of proving that his version of the telephone conversation was correct. We agree with that view. We note, however, that Kling was disqualified from participation in the prosecution regardless of what the district court found with respect to the telephone conversation. Kling's prior work for Defendant was all that was needed to disqualify him. Also, even if the district court believed Defendant's version of the conversation, the district attorney's office would not necessarily be disqualified from prosecuting Defendant if Kling was adequately screened from those handling the prosecution. In short, the district court's finding with respect to the conversation was not dispositive on the issue of disqualification of the district attorney's office. On the other hand, insofar as the testimony about the telephone conversation may have shown that Kling was untrustworthy and unlikely to comply with screening procedures, it was a proper factor for the district court to weigh in the exercise of its discretionary authority to disqualify the district attorney's office.

Now we turn to the critical finding and conclusion of the district court.

The district court adopted the State's proposed Finding No. 9 and Conclusion No. 5, which state:

Finding No. 9.

The following precautions have been taken by the District Attorney for the Third Judicial District to ensure that Inv. Kling does not share any information which he may have acquired in his capacity as a private investigator and as an investigator with the Public Defender's Office, with the District Attorney and his staff:

a) That issue was discussed during the interview process and that formed the basis for developing the procedural safeguards.

b) All of the files that Inv. Kling worked on for the defense prior to his employment are color coded.

c) There are to be no conversations between the investigator and anyone else regarding this case and any case that Mr. Kling worked on for the defense, and there have been no conversations between the investigator and anyone else on this case.

d) The attorneys are instructed to ask the investigator to leave if they are going to discuss this case.

e) The investigator may not even review any of the State's files on which he worked as an investigator for the defense.

Conclusion No. 5.

[T]he appearance of unfairness as raised under *Chambers* is dissipated upon the Court holding an evidentiary hearing and entering findings as the Court has done in Findings of Fact Nos. 9 and 10.

We hold that the district court's findings and conclusions suffice to establish that Kling was effectively screened from the prosecution of Defendant. *See Jackson,* 502 So.2d at 867–68 (quoting findings made by trial court on remand). Although the hearing on Defendant's disqualification motion was conducted well before trial and there may have been subsequent breaches of the screening procedures, Defendant waived any claim of subsequent breaches by never requesting a further evidentiary hearing. To preserve an issue for appeal, a defendant ordinarily must invoke a ruling on the issue by the trial court. *See State v. Gonzales,* 110 N.M. 218, 227, 794 P.2d 361, 370 (Ct.App.1990), *aff'd,* 111 N.M. 363, 805 P.2d 630 (1991); SCRA 1986, 12–216(A).

Also, we find no abuse of discretion in the district court's determination that any appearance of unfairness was "dissipated." We therefore affirm the district court's refusal to disqualify the district attorney's office.

II. Prosecutorial Misconduct During Final Argument.

According to Defendant, the prosecutor spoke improperly on two occasions during closing argument: first, by improperly shifting the burden of proof; second, by improperly injecting her own credibility and the authority of her office into the case by vouching for the credibility of a State's witness.

A. Shifting the Burden of Proof.

In her closing remarks the prosecutor referred to Defendant's failure to call any medical experts to support his theory of the cause of Devon's brain injury. Defendant twice objected to this line of argument; the trial court sustained the objections and admonished the prosecutor. The statements—that Defendant could have subpoenaed his own medical experts and that jurors should "ask yourselves why he didn't"—did not shift the burden to Defendant to prove his innocence. The statements are comments on Defendant's failure to call witnesses who may have supported his theory. Such comments are permissible. *See State v. Gonzales,* 112 N.M. 544, 550, 817 P.2d 1186, 1192 (1991); *State v. Aaron,* 102 N.M. 187, 192, 692 P.2d 1336, 1341 (Ct.App.1984).

B. Vouching for Witness.

In rebuttal argument, the prosecutor said:

You know, if Frances Candelaria wanted to lie, why didn't she make [Defen-

dant] out to be this horrendous monster? This horrible person? "Yes, he used to pull the baby from me, he used to do this, he used to do that." She didn't. She didn't make him out to be that monster. I mean, that would have made a good story. But she didn't. She said: "I never saw him strike the baby in my presence. I saw some bruises on his bottom once, and I questioned him about it."

And I have a duty here, members of the jury, to present to you as many facts as possible. And I am, I am obligated not to present to you something I know to be a lie, that I know to be a lie. I have a duty to not allow someone to perjure themselves if I have knowledge of that. And I would not do that.

This witness is presented before you, and she mentions to you about the bruises on the bottom. And she tells you how she questioned him about it ... But that's the only incident she sees. That's the only thing that she observes during the time that they're living together, that she actually talks to him about, and he admits having done.

If she wanted to lie, why not make up some more? Why not make him out to be a monster? Because's she not lying. She's telling you as she saw it.

Both defense counsel and the prosecutor have considerable latitude in closing arguments. *State v. Diaz,* 100 N.M. 210, 215, 668 P.2d 326, 331 (Ct.App. 1983); *State v. Pace,* 80 N.M. 364, 371, 456 P.2d 197, 204 (1969). This latitude, however, is not boundless. It does not encompass the practice of vouching for the credibility of a witness, either by invoking the authority and prestige of the prosecutor's office or by suggesting the prosecutor's special knowledge. *See Diaz,* 100 N.M. at 213–14, 668 P.2d at 329–30; SCRA 1986, 16–304(E) (Repl.Pamp.1991) (in trial, an attorney may not "assert personal knowledge of facts in issue ... or state a personal opinion, not supported by the evidence as to the ... credibility of a witness."); *United States v. Wallace,* 848 F.2d 1464, 1473 (9th Cir.1988); ABA Standards for Criminal Justice Standard 4–7.8 (2d ed. 1980). The prohibition against vouching stems from concerns that such comments may lead a jury to rest its decision on the prosecutor's personal integrity or authority and not on the evidence presented. *Diaz,* 100 N.M. at 213, 668 P.2d at 329. When the prosecutor in this case referred to her ethical obligations and then asserted that the witness was not lying, she created such a risk.

Was there any justification for the prosecutor's vouching? New Mexico recognizes the "invited-response" doctrine under which defense counsel's closing argument may "open the door" to comments by the prosecutor that otherwise would be reversible error. *See State v. Cordova,* 100 N.M. 643, 647, 674 P.2d 533, 537 (Ct.App.1983); *State v. Jaramillo,* 88 N.M. 60, 63, 537 P.2d 55, 58 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975). The State argues that the prosecutor's statements were permissible invited responses because defense counsel's closing argument attacked the integrity of the prosecutor and the credibility of a State's witness. In support of this claim the State cites several passages from the closing argument. We quote each statement that the State relies on and then provide the context in which it was made:

(1) Why do they twist things? You know they've done that throughout the course of this thing.... They don't want you to think about the facts.

The prosecutor had asked Frances Candelaria whether Defendant attended Devon's funeral. Defense counsel was arguing that this question was an attempt to mislead the jury because the prosecutor knew that Defendant was under a court order to stay away from the funeral.

(2) Don't be fooled by that, you know, again it's a twist of the evidence here.... Don't be fooled with that.

Defense counsel was reviewing the medical evidence. He appears to be saying that the prosecutor mistakenly argued that Devon's hematoma from the first injury had gone away by the time of the second injury.

(3) We don't know about Ms. Candelaria.... You know, we sure would like to know how well she would do [on a poly-

graph test] because who's the one with all the lies? Who's the one that came up here and told you all the lies?

Defense counsel had discussed at length Defendant's willingness to take lie detector tests. He then accused Frances Candelaria of lying about Defendant's suggesting that she have an abortion and about Defendant's once having spanked Devon hard enough to create bruising.

We reject the application of the invited-response doctrine to justify the prosecutor's statements. Although defense counsel accused the prosecutor of attempting to mislead the jury and accused Frances Candelaria of lying, he did not accuse the prosecutor of suborning perjury by Frances Candelaria. The prosecutor could have responded to the first accusation by explaining how her presentation was not intended to mislead and could have responded to the second accusation by pointing to the evidence supporting the witness's credibility. But the prosecutor's comments went well beyond such a permissible response. An attack on the credibility of a witness cannot justify vouching by the prosecutor. Otherwise, prosecutors could vouch for every witness who provides disputed testimony.

Thus, the invited-response doctrine does not apply here. We should emphasize, however, that even when it does apply it should not be understood "as suggesting judicial approval [—or] encouragement—of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process ... [T]he issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." *United States v. Young,* 470 U.S. 1, 12, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). To put the matter bluntly, even when application of the invited-response doctrine leads to affirmance of a conviction, overreaction by a prosecutor can still justify disciplinary sanctions (as can improper comments by defense counsel).

Having recognized the impropriety of the prosecutor's argument, we next address whether the error requires reversal. Of critical importance is defense counsel's failure to object to the vouching during rebuttal. Instead, after the jury retired for deliberations, counsel moved for a mistrial "just for the record." The district court determined that the rebuttal comments were permissible under the invited-response doctrine and rejected the motion for a mistrial.

The proper procedure would have been to object to the statements at the time the prosecutor made them. *See State v. Hernandez,* 115 N.M. 6, n. 1, 846 P.2d 312, n. 1 (1993); *State v. Victorian,* 84 N.M. 491, 495, 505 P.2d 436, 440 (1973); *State v. Peden,* 85 N.M. 363, 365, 512 P.2d 691, 693 (Ct.App.1973). A timely objection allows the trial court to assess the prejudicial nature of the statements and take curative steps, such as admonishing the prosecutor. *See State v. Clark,* 105 N.M. 10, 17, 727 P.2d 949, 956 (Ct.App.) (error, if any, cured by sustaining of objections and admonitions), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986). Even though the prosecutor made the statements near the end of her rebuttal argument, defense counsel had adequate time to object. An admonition from the district court could have particular impact in curing the type of error committed by the prosecutor here. A judicial dressing down of the prosecutor would undercut her authority and prestige, thereby blunting any possible prejudice arising from the improper invocation of that authority and prestige.

Absent a timely objection, we review prosecutorial comments for fundamental error. *State v. Clark,* 108 N.M. 288, 296, 772 P.2d 322, 330 (1989); *see United States v. Young* (review for "plain error"); *United States v. Caucci,* 635 F.2d 441, 448 (5th Cir. Unit B) (no objection to prosecutor's comments when made; motion for mistrial after conclusion of summation), *cert. denied,* 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 108 (1981); *cf. Peden,* 85 N.M. at 365, 512 P.2d at 693 (motion for mistrial based on improper final argument will not be reviewed on appeal because motion was made after jury retired). Fundamental er-

ror occurs when the defendant's innocence appears indisputable or guilt is so doubtful that allowing the conviction to stand would shock the conscience. *Gonzales,* 112 N.M. at 551, 817 P.2d at 1193; *see United States v. Young,* 470 U.S. at 16, 105 S.Ct. at 1047 (plain error if error "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice").

Thus, we must look to the context in which the statements were made. *See State v. Ramming,* 106 N.M. 42, 738 P.2d 914; *United States v. Young.* Frances Candelaria's credibility was neither the crux of the prosecution's case against Defendant nor the primary focus of either counsel's closing statement. The prosecutor's closing statement consisted primarily of a review of the medical evidence presented during trial and a discussion of how that evidence disputed Defendant's explanation that Devon had simply fallen out of his bassinet. The only bearing Frances Candelaria's testimony had on the events of September 24, 1989, was to establish that Devon was fine when she left him in Defendant's care that morning. Two other witnesses testified to Devon's condition that morning and Defendant did not dispute that testimony. Defense counsel's argument also focused on medical evidence, suggesting that it was consistent with Defendant's version of events. He challenged Frances Candelaria's veracity on only two matters. First, she testified that Defendant had asked her to get an abortion. (She was pregnant at the time of Devon's death.) Yet, she also testified that Defendant soon changed his mind. Second, she testified that Defendant had once admitted spanking Devon too hard. Whatever impact this testimony had on the jury, however, was countered in large part by her testimony that Defendant was "really good" with the baby. Given the nature of the evidence and the final argument in this case, we cannot say that the improper vouching by the prosecutor was likely to have had a significant impact on the jury's deliberations, much less that it undermined the fundamental fairness of the trial. *See Clark,* 105 N.M. at 16–17, 727 P.2d at 955–56.

III. Other Claims.

Defendant contends that the district court erred in admitting an unduly prejudicial autopsy photograph depicting Devon's skull fractures. SCRA 1986, 11–403, permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." We reverse a ruling under SCRA 11–403 only for an abuse of discretion. *See State v. Lopez,* 105 N.M. 538, 544, 734 P.2d 778, 784 (Ct.App.1986); *State v. Ho'o,* 99 N.M. 140, 144, 654 P.2d 1040, 1044 (Ct. App.) (autopsy photographs), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982). The photograph of Devon's skull corroborated the medical testimony and was relevant to the issue of whether Devon's head injuries could have been caused by a fall. We find no abuse of discretion.

Next, Defendant argues that the evidence was insufficient to support a verdict. We disagree. Three witnesses testified that they had seen Devon that morning and that the baby appeared to be fine. Thereafter Defendant had exclusive custody of Devon. When emergency medical technicians arrived at Defendant's apartment in the early afternoon, Devon was unconscious and was not breathing. Devon remained in a coma until he died three days later. Three doctors—Devon's pediatrician, the medical examiner who performed the autopsy, and a neurosurgeon who treated Devon—testified that Devon's injuries were the result of blunt trauma. Devon's pediatrician testified that the injury was inconsistent with a fall from a bassinet. The pediatrician and the neurosurgeon testified that, in all probability, Devon lapsed into a coma shortly after he sustained the trauma. Although the State presented no direct evidence that Defendant was the source of Devon's fatal injuries, a guilty verdict may be based on circumstantial evidence. *See State v. Aguayo,* 114 N.M. 124, 835 P.2d 840 (Ct. App.1992) (child abuse resulting in death); *State v. Sheldon,* 110 N.M. 28, 791 P.2d 479 (Ct.App.) (same), *cert. denied,* 110 N.M. 44, 791 P.2d 798, and 498 U.S. 969, 111

S.Ct. 435, 112 L.Ed.2d 418 (1990). The evidence presented at trial was sufficient for a reasonable person to conclude beyond a reasonable doubt that Defendant caused Devon's death. *See State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984).

Finally, Defendant claims that the district court should have granted a continuance while he waited to see if he should hire another investigator. Yet Defendant has made no suggestion that he was prejudiced in any way by the denial of his motion for a continuance. In the absence of prejudice, there is no ground for reversal. *See State v. Perez,* 95 N.M. 262, 620 P.2d 1287 (1980).

IV. Conclusion.

For the above reasons we affirm the judgment of the district court.

IT IS SO ORDERED.

BIVINS, J., concurs.

CHAVEZ, J., specially concurring.

CHAVEZ, Judge (specially concurring).

I agree with the rule of law pertaining to vicarious disqualification announced in the majority opinion. I also concur in the majority's application of that rule to the facts of Defendant's case. I disagree with the majority's emphasis, however, on factors arising in relation to government employment as a countervailing force to the appearance of impropriety when it comes to questions of disqualification of a prosecuting agency's office.

This Court gave paramount importance to the appearance of impropriety when deciding *Chambers* nineteen years ago. I believe that the principles underlying that public policy consideration are no less important today. It is just as important to ensure that a defendant receives a fair trial and that the public maintains its trust and confidence in the fair and impartial administration of justice. In a criminal prosecution where a defendant's lawyer has had substantial involvement in the ongoing defense and then joins the prosecutor's office, special care should be taken with appearances. The defendant and society should not be left with the impression that the already enormous power of the state is being unfairly bolstered for use against the individual. Such public perception has the potential for fostering cynicism and disrespect for our system of justice.

This is not to say that other policy considerations should be ignored in determining when vicarious disqualification is appropriate. As the majority stresses, the need to attract competent people to government employment and the need of government agencies to perform their functions without undue burdens are certainly important. It is my belief, however, that trial courts should err on the side of preserving citizens' confidence in our criminal justice system when deciding questions of disqualification due to conflict of interest. *See Turbin,* 797 P.2d at 734 (concern for appearance of impropriety outweighed trial court's concern that vicarious disqualification would have impeded movement of attorneys between county offices and 'paralyzed' judicial system of county).

Although I agree with the majority's holding and concur in the result, for the foregoing reasons I would place greater emphasis on the appearance of unfairness as an independent factor justifying vicarious disqualification.

851 P.2d 506

Rex A. HALL, Plaintiff–Appellant,

v.

Elizabeth Jannan HALL, a/k/a Elizabeth Jannan Powell, Defendant–Appellee.

No. 13365.

Court of Appeals of New Mexico.

March 17, 1993.

Rex A. Hall, pro se.

Mary W. Rosner, Albuquerque, for defendant-appellee.

OPINION

HARTZ, Judge.

Plaintiff, the former husband of Defendant, appeals from a district court order setting aside a default judgment and subsequent writ of garnishment that he obtained in a tort suit. We dismiss the appeal because the order of the district court was not a final order.

The governing statute is NMSA 1978, Section 39-3-2 (Repl.Pamp.1991), which reads:

> Within thirty days from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights, in any civil action in the district court, any party aggrieved may appeal therefrom to the supreme court or to the court of appeals, as appellate jurisdiction may be vested by law in these courts.

The district court's order setting aside the default judgment was not a final judgment or decision, nor was it an interlocutory order or decision practically disposing of the merits of the action. Our jurisdiction depends upon whether the order was a "final order after entry of judgment which affects substantial rights."

At one time New Mexico decisions clearly held that an order setting aside a judgment was such a post-judgment order. *See, e.g., Starnes v. Starnes,* 72 N.M. 142, 381 P.2d 423 (1963); *Hoover v. City of Albuquerque,* 56 N.M. 525, 245 P.2d 1038 (1952); *Singleton v. Sanabrea,* 35 N.M. 205, 292 P. 6 (1930).[1] The issue did not generate much analysis. *Singleton* said merely:

> Laws authorizing appeals relate to the remedy, and should be construed liberally in furtherance of the remedy.
>
> The order does affect a substantial right and in that sense is a final order. But for such order, the plaintiff would have been entitled in law to the immediate fruits of his judgments. Of this right the order deprived him.

Singleton, 35 N.M. at 206, 292 P. at 7. *Starnes* said, "No convincing reason for departing from our holdings in those cases [permitting an appeal] has been advanced, and accordingly we adhere to them[.]" *Starnes,* 72 N.M. at 144, 381 P.2d at 424.

Then our Supreme Court decided *Albuquerque Prod. Credit Ass'n v. Martinez,* 91 N.M. 317, 573 P.2d 672 (1978). The heirs of Feliberto Martinez had successfully moved pursuant to New Mexico Rule of Civil Procedure 60(b) (now codified as SCRA 1986, 1-060(B), which is virtually identical to Federal Rule of Civil Procedure 60(b)) to set aside as to the decedent a judgment entered pursuant to a stipulation by all the parties except the decedent. Almost a year later Albuquerque Production Credit Association (APCA) filed a motion to file an amended cross-claim, and after an-

1. Until 1986 the Supreme Court appellate rules specifically provided for appeals from any "final order after entry of judgment which affects substantial rights." New Mexico Rules of Appellate Procedure for Civil Cases, Rule 3(a)(3) (Repl.Pamp.1984). Although older cases often cited to the rule (or its predecessor) rather than the statute, we discern no rationale for distinguishing those decisions on that basis.

other 2½ years APCA filed a response to the motion to set aside the judgment. The district court granted leave to amend the cross-claim. The heirs appealed, contending that APCA "never appealed the order which vacated the judgment, consequently, thirty days later the court was divested of authority to entertain any motion concerning these parties and the same cause of action[.]" *Id.* at 318, 573 P.2d at 673. The Supreme Court rejected the heirs' argument, writing the following:

> Query, what is the effect of the order vacating the 1968 judgment?
>
> "An order granting a motion for relief under 60(b) must be tested by the usual principles of finality; and when so tested will occasionally be final, although probably in most cases it will not be. Thus where the court, in addition to determining that there is a valid ground for relief under 60(b), at the same time makes a redetermination of the merits, its order is final since it leaves nothing more to be adjudged....
>
> On the other hand, and this is probably a common situation, where the order granting relief merely vacates the judgment and leaves the case pending for further determination, *the order is akin to an order granting a new trial and is interlocutory and nonappealable.* (Emphasis added)."

Id. at 318–19, 573 P.2d at 673–74 (quoting 7 Moore's Federal Practice ¶ 60.30[3], at 431 (2d ed. 1975)). *Martinez* did not, however, explicitly overrule earlier New Mexico decisions that were contrary to the federal rule set forth in Moore's treatise. Moreover, our Supreme Court has yet to issue a published opinion dismissing an appeal from an order granting a motion to set aside a judgment under SCRA 1–060(B). Indeed, the Supreme Court has reviewed at least three appeals from such orders, although the opinions do not address jurisdiction to hear the appeal. *Marinchek v. Paige,* 108 N.M. 349, 772 P.2d 879 (1989); *Sunwest Bank v. Roderiguez,* 108 N.M. 211, 770 P.2d 533 (1989); *Rodriguez v. Conant,* 105 N.M. 746, 737 P.2d 527 (1987). Thus, one might question whether the *Singleton* line of cases has been overruled.

Nonetheless, in *Jemez Properties v. Lucero,* 94 N.M. 181, 608 P.2d 157 (Ct.App. 1979), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980), this Court held that *Martinez* implicitly overruled those precedents. The district court in *Jemez Properties* had set aside a judgment pursuant to appellees' motion under what is now SCRA 1–060(B)(6). After further proceedings, judgment was entered in favor of the appellees. The appellants appealed from both the second judgment and the order vacating the original judgment. Appellees contended that the appellants were untimely in appealing from the order vacating the original judgment. They relied on *Hoover* for the proposition that the order setting aside the earlier judgment was final and that an appeal had to be taken within thirty days of the entry of that order. Over a vigorous dissent by Judge Sutin, the majority rejected appellees' argument, stating that *Martinez* "held that an order setting aside an earlier judgment under Rule 60(b) was interlocutory and nonappealable; thus, overruling *Hoover* by implication." *Jemez Properties,* 94 N.M. at 184, 608 P.2d at 160. Three years later *In re Will of Bourne,* 99 N.M. 694, 662 P.2d 1361 (Ct.App.1983), approved *Jemez Properties* in stating that "an order granting a Rule 60(b) motion was not itself an appealable order." *Id.* at 697, 662 P.2d at 1364.

Two recent New Mexico Supreme Court decisions reinforce the position of the majority in *Jemez Properties.* Although the Supreme Court held that the orders at issue were appealable in *Kelly Inn No. 102 v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992) (permitting appeal before determination of attorney's fees), and *Carrillo v. Rostro,* 114 N.M. 607, 845 P.2d 130 (1992) (recognizing collateral-order doctrine), both opinions displayed the Court's general presumption in favor of following federal authority regarding appealability and both opinions emphasized that the Court looks with disfavor upon piecemeal appeals.

Therefore, although the matter is not without doubt, we follow *Jemez Properties* in holding that *Martinez* implicitly overruled the line of cases that includes *Single-*

ton, Hoover, and *Starnes,* and that New Mexico now follows the federal rule that orders granting relief pursuant to SCRA 1–060(B) ordinarily are not appealable. *See* 7 James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 60.30[3] (2d ed. 1993); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2871, at 259–60 (1973).

Because the order in the present case "merely vacates the judgment and leaves the case pending for further determination," *Martinez,* 91 N.M. at 319, 573 P.2d at 674, the order is not appealable and this appeal must be dismissed.

IT IS SO ORDERED.

CHAVEZ and FLORES, JJ., concur.

851 P.2d 509

Thomas JENNINGS and Richard Maloney, Third-party Plaintiffs/Appellants,

v.

Kyle HINKLE and Terrell Tucker, Third-Party Defendants/Appellees.

No. 13183.

Court of Appeals of New Mexico.

March 26, 1993.

Dick A. Blenden, Paine, Blenden & Diamond, Carlsbad, Mary Lynn Bogle, Ernest L. Carroll, Losee, Carson, Haas & Carroll, P.A., Artesia, for third-party plaintiffs/appellants.

Stevan Douglas Looney, Crider, Calvert & Bingham, P.C., Alburquerque, for third-party defendants/appellees.

OPINION

BIVINS, Judge.

This case involves a claim under the Civil Rights Act, 42 U.S.C. § 1983 (1988), against two police officers based on the alleged making of false and misleading affidavits for arrest warrants, and on the alleged giving of false and misleading testimony before a grand jury. Third-party plaintiffs Thomas Jennings and Richard Maloney (Jennings and Maloney) appeal an order granting summary judgment in favor of third-party defendants Kyle Hinkle and Terrell Tucker (Hinkle and Tucker), respectively a Deputy Sheriff and Sheriff of Chaves County at the material times, and dismissing Jennings and Maloney's third-party complaint.

In reviewing the propriety of summary judgment, we determine the existence or non-existence of genuine issues of material fact. *Tapia v. Springer Transfer Co.,* 106 N.M. 461, 462–63, 744 P.2d 1264, 1265–66 (Ct.App.), *cert. quashed,* 106 N.M. 405, 744 P.2d 180 (1987). To make this determination in this case, we must decide whether qualified immunity protects the police officers from Section 1983 liability when it is alleged that they violated the third-party plaintiffs' constitutional rights by presenting a magistrate with false and misleading affidavits, and by providing a grand jury with false and misleading testimony. We hold that the officers did not violate clearly established law and, thus,

had qualified immunity from Section 1983 liability. Accordingly, we affirm.

We first will set forth general background information and procedural history, which the parties do not seem to dispute. We next discuss the law applicable to the claim being made, a matter which has not heretofore been decided by the appellate courts of this state. Then we discuss the parties' showings, and the law as applied to those showings.

1. *Background and Procedural History*

This litigation arose out of an incident on November 14, 1987, involving, among others, Jennings, Maloney, Mike Amador (Amador) and Andy Candelaria (Candelaria). Believing a hunting party consisting of Amador, Candelaria, and others (the Amador party) to be trespassing on private ranch land owned by Jennings' father, Jennings and Maloney stopped the party. An altercation ensued which subsequently led to a civil complaint for damages by members of the party against Jennings, Maloney, and David Alcorn based on alleged assault and battery, false imprisonment, and emotional distress. Alcorn, however, was later dismissed from the suit.

After that lawsuit was filed, Jennings and Maloney filed a third-party complaint. Their complaint alleges that Hinkle, the deputy assigned to investigate the incident of November 14, 1987, secured an arrest warrant based on information which Hinkle knew was false and materially misleading. The third-party complaint also alleges that Hinkle gave false and misleading testimony to the grand jury leading to the indictment of Jennings and Maloney for false imprisonment and two counts of aggravated assault. The third-party complaint alleges that Tucker, as Sheriff, "is responsible for the supervision and the conduct of ... Hinkle." Jennings and Maloney sought monetary relief under Section 1983 based on violation of their civil rights.

2. *Discussion*

(a) *Applicable Law*

An arrest by a state law enforcement official made in violation of constitutional protections will give rise to a cause of action under Section 1983. *See Monroe v. Pape,* 365 U.S. 167, 168–72, 81 S.Ct. 473, 474–76, 5 L.Ed.2d 492 (1961), *overruled on other grounds by Monell v. Department of Social Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, law enforcement officials are qualifiedly immune from suit under Section 1983. They retain the shield of qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see Malley v. Briggs,* 475 U.S. 335, 344–45, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986) (shield of qualified immunity lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." (citation omitted)).

The "clearly established" law at issue here is this: a determination of probable cause cannot stand if it is shown that facts material to that determination were misrepresented or omitted, and that these misrepresentations or omissions were intentional or displayed a reckless disregard for the truth. *See State v. Donaldson,* 100 N.M. 111, 116–17, 666 P.2d 1258, 1263–64 (Ct. App.) (search warrant deemed sufficient because omissions from supporting affidavit were not material), *cert. denied,* 100 N.M. 53, 665 P.2d 809 (1983); *Franks v. Delaware,* 438 U.S. 154, 164–72, 98 S.Ct. 2674, 2680–84, 57 L.Ed.2d 667 (1978) (the defendant entitled to hearing on claim that affidavit supporting search warrant contained false statements, provided he could show deliberate material falsehoods or reckless disregard for truth). Additionally, while *Donaldson* and *Franks* deal with affidavits for search warrants, Jennings and Maloney contend that these cases "apply with equal force to false and misleading grand jury testimony," relying on *Anthony v. Baker,* 767 F.2d 657, 663 (10th Cir.1985) (police officer who gives grand jury testimony is not absolutely immune from Section 1983 liability). *But cf. Briscoe v. La-*

Hue, 460 U.S. 325, 345–46, 103 S.Ct. 1108, 1120–21, 75 L.Ed.2d 96 (1983) (police officers have absolute immunity when testifying at a criminal trial). We assume, without deciding, that this latter contention is correct. *See generally Buzbee v. Donnelly*, 96 N.M. 692, 696, 634 P.2d 1244, 1248 (1981) (one of grand jury's responsibilities is to determine whether there is probable cause that a person committed a crime). In view of our disposition of the issues presented, we find it unnecessary to resolve in this case the applicability of *Franks* and *Donaldson* to grand jury testimony.

Jennings and Maloney argue on appeal that Hinkle (1) violated clearly established law when he (2) deliberately or recklessly omitted information from his affidavits and grand jury testimony that was (3) material to the probable cause determination and, therefore, (4) Hinkle and Tucker are not qualifiedly immune. While they correctly outline the qualified immunity analysis in this case, Jennings and Maloney fail on appeal because they misapply the materiality element of the analysis. They were required to show a substantial probability that the facts omitted from the affidavits, if presented to the magistrate, would have altered the probable cause determination. *Donaldson*, 100 N.M. at 117, 666 P.2d at 1264. In addition, they must have shown that the facts omitted from the grand jury testimony, had the facts been presented, would have caused the grand jury to vote differently. *See State v. Penner*, 100 N.M. 377, 379, 671 P.2d 38, 40 (Ct.App.1983) (indictment will not be defeated unless the defendant shows that missing testimony would have changed grand jury's vote). Jennings and Maloney did not make these showings.

(b) *The Showings Made by the Parties*

The affidavits for arrest warrants for Jennings and Maloney contain a detailed account of Hinkle's investigation, which spanned a period of ten days. The officer interviewed and took taped statements from the principals. Hinkle visited the scene of the affray on at least two occasions, once with members of the Amador party and Ranger Pete Steele of the Bureau of Land Management (BLM); a second time in the company of Steele, Jennings, Maloney, Jennings' brother, and one other person. These trips were to determine whether the incident occurred on private ranch land or public BLM land. Through examination of maps and section markers on the ground, and use of a compass, it was established that the affray took place on public land, thus establishing that the Amador party had a legal right to hunt on the land. Jennings and Maloney do not now dispute that fact. They take the position that when the incident occurred, they, in good faith, believed that Amador and Candelaria were trespassing on private land, and they claim that their belief was substantiated by a BLM map that they had in their possession at the time of the incident.

Hinkle's affidavits disclose that Jennings and Maloney confiscated hunting rifles and wallets from Amador and Candelaria. Amador and Candelaria told Hinkle, according to the affidavits, that sometime between 4:30 and 5:30 p.m. on Saturday, November 14, 1987, as they were heading back to their camp on horseback, Jennings, whom they knew, and two other men arrived in a jeep. One of the unidentified men jumped out of the vehicle with a rifle in hand and told the hunters they were on private land, that they had been previously warned, and that he was going to take their guns. According to the affidavits, based on Amador's and Candelaria's statements, Jennings and his companions removed Amador and Candelaria from their horses, took their wallets and rifles, jumped back in the jeep, and left. The next day, Jennings brought the rifles and wallets to the Sheriff's office.

After being warned of his rights, according to the affidavits, Maloney gave a statement in which he admitted to stopping by the Amador camp on the evening of Friday, November 13, 1987, and telling the hunters they had to move. He also admitted to exiting the jeep the next day with a rifle in his hand and helping to remove Amador's wallet. Alcorn's statement confirmed most of these facts. His statement also added

that Jennings and Maloney "said sharply ... [to Amador and Candelaria] that they were trespassing on private property and ... [that Jennings and Maloney] were making a citizen's arrest." Alcorn also related a scuffle. He said that he removed Amador's and Candelaria's rifles from their saddle scabbards because "it seemed to be a fairly volatile situation." Alcorn said the horseback riders were then released and allowed to leave.

(c) *Application of the Law to These Facts*

Although Jennings and Maloney point out discrepancies between certain statements in the affidavits and statements made by others concerning, for example, who did what to whom, the main thrust of their argument focuses on: (1) Hinkle's failure to inform the magistrate issuing the warrant that Jennings and Maloney had in their possession at the time of the incident a BLM map which showed the Amador party to be on private ranch land, and that Jennings and Maloney in good faith believed that the hunters were trespassing; and (2) Hinkle's failure to include in the affidavits and his grand jury testimony the fact that Candelaria told Hinkle that Maloney never pointed his gun directly at Candelaria or Amador.

Jennings and Maloney base their qualified immunity argument on the claim that Hinkle violated clearly established law when he failed to reveal all his information, favorable or unfavorable, to the magistrate and the grand jury. They rely on law indicating that the purpose of requiring facts to be presented to a magistrate or grand jury is to insert a neutral and detached decision maker between the citizen and the officer, who is engaged in the often competitive business of ferreting out crime. *See State v. Gorsuch,* 87 N.M. 135, 137, 529 P.2d 1256, 1258 (Ct.App.1974); *see also Buzbee,* 96 N.M. at 696, 634 P.2d at 1248 (grand jury serves function of standing between accuser and accused). However, Hinkle was required to reveal only facts that were material to the probable cause determination. *See Donaldson,* 100 N.M. at 116–17, 666 P.2d at 1263–64; *Penner,* 100 N.M. at 379, 671 P.2d at 40; *Buzbee,* 96 N.M. at 696, 634 P.2d at 1248 (grand jury determines probable cause). Moreover, the function of the grand jury is not to decide guilt or innocence; its function is to indict if the prosecution's unexplained, uncontradicted, and unsupported evidence would justify a conviction. *State v. Juarez,* 109 N.M. 764, 768, 790 P.2d 1045, 1049 (Ct. App.), *cert. denied,* 109 N.M. 751, 790 P.2d 1032 (1990).

Based on the facts before us, we do not believe that the failure to include specific reference to Jennings and Maloney's BLM map in Hinkle's affidavits was material to the probable cause determination. Paragraph 4 of the affidavits relates a conversation with Jennings on November 15 in which the latter told Hinkle that "he had ran across two individuals on horseback on a road *on his private posted land.*" (Emphasis added.) Hinkle added in the same paragraph that he "asked Mr. Jennings if he was sure that the land that these individuals were on was his private property and he did advise that this was private land and that the land was posted and that the individuals had been warned the previous night about being on this land." That information, coupled with Hinkle's and other persons' extensive efforts to determine whether the incident occurred on private or public land, which were related in the affidavits, surely made the magistrate aware that Jennings and Maloney thought the incident occurred on private land. We do not believe that Hinkle's failure to mention that Jennings and Maloney had the BLM map would have changed the magistrate's determination of probable cause. Thus, this omitted fact was not material and its omission did not violate clearly established law. *See Donaldson,* 100 N.M. at 117, 666 P.2d at 1264.

We also reject on materiality grounds Jennings and Maloney's claim that Hinkle should have included in the affidavits Candelaria's statement that Maloney did not point the rifle. Aggravated assault requires use of a deadly weapon to instill in the victim a reasonable belief that he or

she is in danger of receiving an immediate battery. *See* NMSA 1978, §§ 30–3–1 to –2 (Repl.Pamp.1984) (crimes of assault and aggravated assault). The fact that Maloney exited the jeep with a rifle in his hand and confronted the hunters, telling them that they were trespassing and that a citizen's arrest was being made, sufficed to establish probable cause. The fact that Maloney did not point the gun does not negate the existence of probable cause.

Jennings and Maloney's claim that Hinkle violated clearly established law in giving his grand jury testimony also must fail. To succeed on this claim, they must show that the facts omitted by Hinkle from his testimony would have changed the grand jury's determination of probable cause and caused them not to indict. *See Penner,* 100 N.M. at 378–79, 671 P.2d at 39–40. They cannot show this because the grand jury, after hearing the omitted information from Jennings and Maloney themselves, still chose to indict.

The cases relied on by Jennings and Maloney to illustrate the type of proof necessary to overcome, or at least raise a fact question as to, qualified immunity either are distinguishable or apply the law incorrectly. For example, in *Stewart v. Donges,* 915 F.2d 572 (10th Cir.1990), a police officer, relying on information that the defendant, who had been staying at the informant's residence, had removed a television set and other items, submitted an affidavit for arrest warrant for the defendant. The officer, however, failed to inform the magistrate that sometime after he received his information, but before the defendant was arrested, the officer was told by another officer that the informant's husband had been bragging that he had caused the defendant trouble by accusing the defendant of taking an item of property, and that the husband had made the false accusation as part of an insurance scam. The Court held that summary judgment in the defendant's subsequent Section 1983 action was properly denied under those circumstances. *Id.* at 583. In that case, the missing information was directly material to the existence of probable cause to arrest because the sole witness had recanted, whereas, in the case before us, the missing information was immaterial. *See id.* ("[W]e can conceive of few omissions which would be more material than the failure to disclose that the main complainant had recanted his testimony and confessed it was a fabrication."); *see also Snell v. Tunnell,* 920 F.2d 673, 698 (10th Cir.1990) (where the sole evidence was false).

Jennings and Maloney also rely on the case of *McGaughey v. City of Chicago,* 664 F.Supp. 1131 (N.D.Ill.1987), in which the district court wrote:

> The determination of whether reasonably competent officers could disagree whether there was probable cause to arrest McGaughey is hopelessly fact-bound. Thus, even after *Malley* it appears that the qualified immunity analysis in a wrongful arrest case necessitates a resolution of factual disputes fundamental to the plaintiff's affirmative case.

Id. at 1139. We decline to follow *McGaughey* because its holding, in our view, does not correctly apply the law, including *Malley.* Clear language in *Malley* indicates that qualified immunity, in order to serve its primary purpose, should usually be decided before trial:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.... The *Harlow* standard [for objectively determining qualified immunity, which *Malley* applies] is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it sufficiently serves this goal.

Malley, 475 U.S. at 341, 106 S.Ct. at 1096 (quoting *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738).

In addition, we note that the district court, in *McGaughey v. City of Chicago,* 690 F.Supp. 707, 708–09 (N.D.Ill.1988) (*McGaughey II*), vacated the part of its first opinion holding that the defendants could not raise qualified immunity again (e.g., in a motion for directed verdict or a motion for judgment notwithstanding the

verdict) in response to *Green v. Carlson,* 826 F.2d 647, 651–52 (7th Cir.1987), which stated that the qualified immunity question is to be treated like any other issue raised in a motion for summary judgment. *McGaughey II* could be interpreted as acknowledging that qualified immunity is *not* "hopelessly fact-bound" and *can* be decided, as a matter of law, by the trial court.

Indeed, the words "qualified immunity" themselves imply the necessity to decide the question before trial: "[t]he entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). If summary judgment is to be denied whenever an arrestee disagrees with an officer's version of what occurred, particularly where the offense is personally observed by the officer, as in *McGaughey,* then police officers will always be at risk of Section 1983 liability, and the primary advantage of qualified immunity—independent, effective government—will be lost. We do not believe that *Malley* mandates that result.

Jennings and Maloney base their claim against Tucker on essentially the same grounds as their claim against Hinkle. They claim that, notwithstanding Tucker's awareness of the omissions from the affidavits, he approved the affidavits. In view of our holding concerning Hinkle, and in view of the fact that Jennings and Maloney have failed to demonstrate any genuine issue of material fact concerning direct personal involvement by Tucker, other than his approval of the affidavits, we find that Tucker also had qualified immunity. *See Gallegos v. State,* 107 N.M. 349, 353–54, 758 P.2d 299, 303–04 (Ct.App.1987) (Section 1983 liability "cannot be based on the doctrine of respondeat superior," and a Section 1983 plaintiff "must show some direct personal involvement by defendants in the violation of plaintiff's rights."), *cert. quashed,* 107 N.M. 314, 757 P.2d 370 (1988).

3. *Conclusion*

In allowing for qualified immunity from Section 1983 claims, the United States Supreme Court attempted to "balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 645 (10th Cir.1988). To say that the omitted facts in this case were material to the probable cause determination by the magistrate and the grand jury would, in our opinion, tilt unfairly toward undue interference in the performance of officers' duties, and would have a chilling effect on effective law enforcement.

We hold that Hinkle's omissions from the affidavits and from his grand jury testimony were not material to the probable cause determination in the sense required by *Harlow* and *Franks* in that they would not have changed that determination. Thus, the omissions did not violate clearly established law, and both Hinkle and Tucker were qualifiedly immune from Section 1983 liability. *See Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738; *see also Snell,* 920 F.2d at 698; *Stewart,* 915 F.2d at 583.

We affirm the summary judgment granted. Hinkle and Tucker request attorney fees and costs on appeal. *See Rubio v. Carlsbad Mun. Sch. Dist.,* 106 N.M. 446, 450–51, 744 P.2d 919, 923–24 (Ct.App.1987) (attorney fees for party defending Section 1983 action allowed only when suit is frivolous, unreasonable, or without foundation). We decline to make an award in this case. The law in this area is complicated, and this is the first time the appellate courts of this state have had occasion to visit the issue raised. Oral argument is deemed unnecessary.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

851 P.2d 516

STATE of New Mexico, Plaintiff–Appellee,

v.

Darrell MANUELITO, Defendant–Appellant.

No. 13913.

Court of Appeals of New Mexico.

March 29, 1993.

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

Sue A. Herrmann, Santa Fe, for defendant-appellant.

OPINION

CHAVEZ, Judge.

Defendant appeals the dismissal of his appeal to district court from his metropolitan court conviction for battery. The dismissal was based on the untimely filing of his appeal in district court. Defendant raises two issues on appeal: (1) whether defense counsel's failure to timely file a notice of appeal raises a conclusive presumption of ineffective assistance of counsel; and (2) whether the district court erred in dismissing the appeal based on a determination that the failure to timely file was not due to ineffective assistance of counsel. We determine that the district court erred in concluding that the untimely notice of appeal was not due to ineffective assistance of counsel and reverse and remand for reinstatement of Defendant's appeal to the district court docket. Because of our ruling, we need not address the first issue raised by Defendant.

Defendant filed a timely motion for oral argument pursuant to SCRA 1986, 12–214(B) (Repl.1992). In the opinion of the Court, oral argument is not necessary and the motion is denied. *See id.* at (A).

Defendant was convicted after a trial in metropolitan court on July 1, 1991. He was sentenced to two days incarceration and fined $20 on November 12, 1991. Notice of appeal was filed in district court on Tuesday, December 3, 1991, twenty-one days after the judgment and sentence were entered. *See* SCRA 1986, 7–703(A) (Repl.Pamp.1990) (Effective September 1, 1990) (aggrieved defendant may appeal to

the district court within fifteen days after entry of the judgment or final order).

The district court held a hearing on the State's motion to dismiss for failure to file a timely notice of appeal. At the hearing, there was testimony that Defendant's counsel told Defendant he would have to sign some papers for the appeal. There is some dispute about when the papers were sent to Defendant, who was in Kansas, and when the papers were returned to Defendant's counsel. It is clear, however, that Defendant's counsel at the trial and his counsel at the sentencing knew of his desire to appeal. At the conclusion of the hearing, the district court found that Defendant failed to prove ineffective assistance of counsel and that Defendant was not as diligent as he should have been.

We note that Defendant argued at the hearing that other alternatives were available to his counsel, including requesting an extension of time to file the notice. Although Defendant did not argue specifically that counsel should have filed a timely notice even if it was not signed by Defendant, we conclude that this issue was preserved by the argument that counsel was obliged to file a timely notice of appeal and had other alternatives to waiting for Defendant to sign the notice.

In order to demonstrate ineffective assistance of counsel, Defendant must prove that counsel's performance fell below the level of a reasonably competent attorney and that he suffered prejudice as a result. *See State v. Powers,* 111 N.M. 10, 11–12, 800 P.2d 1067, 1068–69 (Ct.App.), *cert. denied,* 111 N.M. 16, 801 P.2d 86 (1990). It is undisputed that once aware of Defendant's intent to appeal, counsel has an obligation to safeguard that fundamental right. *See* N.M. Const. art. VI, § 27 (Repl.Pamp.1992); *Evitts v. Lucey,* 469 U.S. 387, 395, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985) (defendant's loss of the right to appeal caused by appellate counsel's failure to follow procedural rules amounts to ineffective assistance of appellate counsel). *United States v. Davis,* 929 F.2d 554, 557 (10th Cir.1991) (defendant is denied effective assistance of counsel if he asks his lawyer to perfect an appeal and his lawyer fails to do so).

The rules for the district court provide that the trial attorney is responsible for filing the notice of appeal or an affidavit from the Defendant waiving the right to appeal. SCRA 1986, 5–702(B) (Repl.1992). No similar provision is contained in the Rules of Criminal Procedure for the Metropolitan Courts. *Cf.* SCRA 1986, 7–702 (Repl.Pamp.1990). Although not explicitly stated, it appears from the testimony and record that the document Defendant's counsel required Defendant to sign was the notice of appeal. We find nothing in the court rules, however, requiring a Defendant to sign a notice of appeal when the defendant is represented by counsel. *See* SCRA 7–703; *see* (Repl.Pamp.1992); SCRA 1986, 9–607 (Cum.Supp.1992) We conclude that, because Defendant's intent to appeal was evident, it became the obligation of his counsel to protect this right. *See Evitts,* 469 U.S. at 392, 105 S.Ct. at 833; *Peralta v. State,* 111 N.M. 667, 668, 808 P.2d 637, 638 (1991) (until a public defender withdraws from a case, he or she has an obligation to protect the interests of his or her client); *cf. Olguin v. County of Bernalillo,* 109 N.M. 13, 780 P.2d 1160 (Ct.App.1989) (party did not open his mail from former counsel informing him that the opposing party had filed a notice of appeal and counsel was withdrawing from the case; cross-appeal dismissed for failure to file a timely notice).

We determine that counsel had an obligation to file a timely notice of appeal in order to preserve his client's right to appeal. *See generally Marquez v. Gomez,* 111 N.M. 14, 15, 801 P.2d 84, 85 (1990) (appeals filed within the time limits shall not be dismissed for technical violations that do not affect the substantive rights of the parties). Therefore, we find that Defendant was denied effective assistance of counsel by counsel's failing to file a timely notice of appeal in district court when counsel was aware of Defendant's intent to appeal the metropolitan court judgment and sentence. We also find Defendant was

prejudiced by this failure by having his appeal dismissed in district court. *See generally Lozada v. Deeds,* 498 U.S. 430, 432, 111 S.Ct. 860, 862, 112 L.Ed.2d 956 (1991) (per curiam); *Abels v. Kaiser,* 913 F.2d 821, 823 (10th Cir.1990) (prejudice from denial of appeal is presumed). In making this determination, we note that Defendant's counsel had only recently been employed with the public defender and had a caseload of approximately fifty cases per week. We also note that the public defender has since instituted new procedures to ensure that appeals are timely filed.

We reverse the district court's order of dismissal and remand to reinstate Defendant's appeal on the district court docket.

IT IS SO ORDERED.

MINZNER, C.J., and DONNELLY, J., concur.

851 P.2d 1064

Gloria TRUJILLO, Petitioner,

v.

HILTON OF SANTA FE and Crawford & Company, Respondents.

No. 21072.

Supreme Court of New Mexico.

March 25, 1993.

Rehearing Denied May 8, 1993.

James A. Burke, Santa Fe, for petitioner.

Stirling & Stepleton, Todd M. Aakhus, Albuquerque, for respondents.

OPINION

RANSOM, Chief Justice.

We issued our writ of certiorari to the Court of Appeals to review its dismissal of an appeal taken by Gloria Trujillo from a compensation order entered by the workers' compensation judge. Dismissal was entered on the ground that notice of appeal was not timely when filed within thirty days of a subsequent order awarding attorney's fees but more than thirty days from the compensation order. *See* SCRA 1986, 12-201(A) (Repl.Pamp.1992) (mandating notice of appeal within thirty days of the filing of final order). The dispositive issue before the Court of Appeals was whether, under *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992), an order awarding compensation and medical benefits but not resolving the issue of attorney's fees is a final order for purposes of appeal. The Court of Appeals held that the order was final and that the worker's time to file her notice of appeal ran from the date of the compensation order, 115 N.M. 398, 851 P.2d 1065. We reverse.

Kelly Inn held that a judgment declaring the rights and liabilities of the parties (ruling that lessors had properly terminated a lease) and awarding attorney's fees, but reserving for future determination the amount of the fees, is final; and that 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. *Kelly Inn* relied on *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), and opinions from the supreme courts of Connecticut, Colorado, and Kansas that "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." *Kelly Inn,* 113 N.M. at 235, 824 P.2d at 1037. Regardless of how a claim for attorney's fees might be justified or raised, *Bu-*

dinich favored " '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.' " *Id.* at 239, 824 P.2d at 1041 (quoting *Budinich,* 486 U.S. at 202, 108 S.Ct. at 1722).

Although the rationale in support of the holding in *Kelly Inn* may apply to other proceedings, the holding is nonetheless limited to attorney's fees. The rationale is that the term "finality" is to be given a practical, rather than a technical, construction to satisfy the policies of facilitating meaningful appellate review and of achieving judicial efficiency. These policies may be served by appeals from judgments declaring the rights and liabilities of the parties to the underlying controversy when resolution of supplemental questions will not alter the judgment or moot or revise decisions embodied therein. Issues "collateral to" and "separate from" the decision on the merits fall within a twilight zone of similarity to proceedings that carry out or give effect to the judgment. The rule that an adjudication of fewer than all the claims of a party is not final without an express determination that there is no just reason for delay, *see* SCRA 1986, 1–054(C)(1) (Repl.Pamp.1992), never has applied when the remaining questions involve proceedings to carry out or give effect to a judgment, such as the disposition and distribution of assets in accordance with an adjudication, ancillary writs to enforce a judgment, or the judicial sale of property following a decree of foreclosure on a mortgage.

In *Kelly Inn,* we specifically recognized that it is impossible to devise a formula to resolve all marginal cases coming within the twilight zone of finality, and we discussed ways that the trial courts can be of significant help to the appellate courts in promoting the policy against piecemeal appeals. What we did not say, and now wish to make clear, is that when the policies of facilitating meaningful appellate review and of achieving judicial efficiency outweigh the policy against piecemeal appeals, and appeal of a "marginal case" would be proper, we would not in the same case refuse the appeal if the aggrieved party were to delay the giving of a timely notice of appeal until resolution of the matters supplemental to the underlying controversy.

We now retreat from language in *Kelly Inn* that suggested a bright-line rule for notices of appeal in cases involving attorney's fees. Rather, we recognize that in the twilight zone a party should be allowed to choose the appropriate time for appeal, guided by considerations in the trial court that impact on meaningful and efficient appellate review. In the twilight of marginal cases, the zone of appeal should be one of practical choice and not one of procedural danger against which a bright-line rule would appear not to serve as a shield. Consequently, we reverse the order of the Court of Appeals that dismissed the appeal taken from the compensation order, and we remand this case to the Court of Appeals for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA, MONTGOMERY, FRANCHINI and FROST, JJ., concur.

851 P.2d 1065

Gloria TRUJILLO, Claimant–Appellant/Cross–Appellee,

v.

HILTON OF SANTA FE and Crawford & Company (Travelers), Respondents–Appellees/Cross–Appellants.

No. 14127.

Court of Appeals of New Mexico.

Jan. 6, 1993.

Rehearing Denied Feb. 1, 1993.

Certiorari Granted March 11, 1993.

James A. Burke, Santa Fe, for claimant-appellant/cross-appellee.

Todd M. Aakhus, Stirling & Stepleton, Albuquerque, for respondents-appellees/cross-appellants.

OPINION

MINZNER, Judge.

Worker appeals from the compensation order entered by the workers' compensation judge (WCJ) awarding compensation benefits and from the subsequent order awarding attorney fees; Respondents cross-appeal from the order awarding attorney fees to Worker. Respondents have moved to dismiss Worker's appeal from the compensation order on the ground that the notice of appeal was not timely filed.

Respondents' motion raises a question of critical importance to injured workers and their attorneys: whether, under *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992), a compensation order of the Workers' Compensation Administration (Administration) awarding compensation and medical benefits but not resolving the issue of attorney fees is a final order for purposes of appeal. For the reasons discussed below, we hold that Worker's time to file her notice of appeal ran from the date of the compensation order. *See* NMSA 1978, § 52-5-8(A) (Repl.Pamp.1991); *Tzortzis v. County of Los Alamos,* 108 N.M. 418, 773 P.2d 363 (Ct.App.1989). Because no extensions of time were requested from or granted by this Court, *see* SCRA 1986, 12-201(E) & 12-601(C) (Repl.1992), Worker had thirty days from the date of the compensation order to file her notice of appeal with this Court. The notice of appeal having been filed more than thirty days after the compensation order, we grant Respondents' motion to dismiss Worker's appeal as untimely filed. *See Govich v. North Am. Sys., Inc.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) (timely filing of the notice of appeal is mandatory).

During calendaring, Worker indicated that her appeal of the attorney fee award was intended to preserve her entitlement to additional fees if this Court reversed the WCJ on the issues concerning the aggravation of her diabetic condition by the accidental injury. In view of our disposition of her appeal from the compensation order, we do not discuss her appeal from the attorney fees award further.

The cross-appeal raises several issues. Respondents indicate that they have been persuaded that the first issue is of minor significance. We construe it to have been abandoned. *See State v. Johnson,* 107 N.M. 356, 758 P.2d 306 (Ct.App.1988); *State v. Martinez,* 97 N.M. 585, 642 P.2d 188 (Ct.App.1982). In the remaining issues, Respondents argue that this Court should remand the case to the Administration for entry of findings and conclusions on the factors that are considered by the WCJ in determining the amount of attorney fees. For the reasons that follow in the discussion of the cross-appeal, we hold that Respondents failed to preserve any error with respect to the attorney fees award.

APPEAL.

On August 10, 1990, Worker suffered an accidental injury to her tailbone. Her claim for benefits was filed with the WCA on December 10, 1990. Briefly, the claim alleged that Worker fell at work, breaking her tailbone, and that the injury aggravated her preexisting diabetic condition. Ultimately a formal hearing was held on the matter. On June 16, 1992, the WCJ filed findings of fact and conclusions of law, awarding Worker temporary total disability

benefits and medical benefits for the broken tailbone, but rejecting her claim that the injury had aggravated her diabetic condition. On June 25, 1992, the WCJ filed a compensation order ordering that Worker be paid compensation consistent with the findings of fact and conclusions of law previously filed.

On June 26, 1992, Worker filed a motion for attorney fees. The WCJ held a hearing on the issue, and on July 20, 1992, filed an order awarding attorney fees to Worker. On August 4, 1992, Worker filed a notice of appeal in this Court, indicating that she was appealing both the compensation order and the order on attorney fees.

On August 13, 1992, Respondents moved to dismiss Worker's appeal, arguing that the notice of appeal was not timely with respect to Worker's attempt to appeal from the compensation order. Our first and second calendar notices proposed to grant the motion to dismiss. Worker has filed timely memoranda in opposition to both calendar notices.

In her latest response, Worker argues that this case should be assigned to either a general or a limited calendar for full briefing; she also requests oral argument. However, summary disposition is appropriate when the dispositive facts are clear and the parties have had an opportunity to express their views. *See Garrison v. Safeway Stores,* 102 N.M. 179, 692 P.2d 1328 (Ct.App.1984). The dispositive facts in this case are clear on the record. Worker's memoranda in opposition have been extensively researched and well argued. Moreover, we agree with Worker that it is important to resolve this issue expeditiously and by a published opinion because our ruling will have a substantial impact on the handling of appeals in workers' compensation cases. We do not think oral argument is necessary. Under these circumstances, we think assignment of this case to the general calendar would add nothing but delay to these proceedings.

In *Kelly Inn,* our Supreme Court adopted the following guidelines to determine the finality of an order or judgment for purposes of appeal:

> 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. 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; 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. [Citations omitted.]

113 N.M. at 238, 824 P.2d at 1040. In so holding, the Supreme Court specifically overruled *Watson v. Blakely,* 106 N.M. 687, 748 P.2d 984 (Ct.App.1987), and *Johnson v. C & H Construction Co.,* 78 N.M. 423, 432 P.2d 267 (Ct.App.1967), to the extent that those cases could be read to hold that a judgment was not final because an issue concerning attorney fees remained to be resolved. 113 N.M. at 239, 824 P.2d at 1041. The Court made it clear that the pendency of an issue concerning attorney fees did not destroy the finality of a judgment, regardless of whether the claim for fees was "conceptualized as part of the relief afforded by the statute or other governing rule or contract." *Id.* The Court considered the strong policy against piecemeal appeals, but determined that policy was outweighed by the "equally important policy of facilitating meaningful appellate review of cases in which the aggrieved party exercises the constitutional right to an appeal." *Id.* at 240, 824 P.2d at 1042.

In Worker's latest response, she contends: (1) that the filing of her motion for attorney fees extended the time for appeal, and therefore her notice of appeal was timely; (2) that workers' compensation proceedings are sui generis, and therefore *Kelly Inn* should not be applied to them; and (3) that *Kelly Inn* effects a substantial change in the law, which should not be

applied to this case. We discuss each of these contentions.

■ We turn first to Worker's contention that the filing of her motion for attorney fees tolled the time for filing the notice of appeal. Rule 12–201(D) provides, in pertinent part:

> If a party timely files a motion pursuant to Section 39–1–1 NMSA 1978, Rule 1–050(B), 1–052(B)(2), or 1–059 ... the ... time ... for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion ... whichever occurs first.

The Administration has adopted rules governing formal hearings. Rule WCD 89–2(I)(A) (June, 1989) provides in pertinent part that "[e]xcept where otherwise provided in these Rules, the Rules of Civil Procedure for the District Courts of New Mexico shall apply." We agree that the filing of one of the motions referred to in Rule 12–201(D) would extend the time for filing an appeal from the compensation order. However, we do not agree with Worker that such a motion was filed in this case.

■ Worker argues that her motion for fees can be treated as a motion under SCRA 1986, 1–059 (Repl.1992). In support of this, she cites *Croker v. Boeing Co. (Vertol Div.)*, 662 F.2d 975 (3d Cir.1981) (holding that the judgment was not final for purposes of appeal until the amount of attorney fees is determined); *Glass v. Pfeffer*, 657 F.2d 252 (10th Cir.1981) (civil rights action; judgment not final until the full extent of the party's liability is determined); and *Gurule v. Wilson*, 635 F.2d 782 (10th Cir.1981) (similar to *Glass*). However, these cases were decided at a time when there was a split in the circuits on the issue. This issue has now been resolved against Worker by the United States Supreme Court. *See White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (a motion for attorney fees is not a motion under Fed.R.Civ.P. 59(e) because it does not seek reconsideration of matters properly encompassed in a decision on the merits); *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988) (judgment on the merits is a final, appealable judgment; pendency of fee proceedings, regardless of the nature of entitlement to the fees, does not destroy the finality of the judgment).

Worker cites NMSA 1978, Section 39–1–1 (Repl.Pamp.1991). However, she no longer argues that her motion for attorney fees was a motion under that statute. The motion itself "requests an award of attorney's fees based on the attached affidavit of time and made pursuant to 52–1–54, NMSA." We do not think we can fairly characterize the motion as made under Section 39–1–1.

■ Our Supreme Court has clearly held that a judgment is final if it determines the rights and liabilities of the parties to the underlying controversy, even though there are collateral or separate questions that remain to be resolved. In determining the finality of the order, the critical issue is whether the subsequent proceedings will alter the judgment or moot or revise the decision embodied therein. *Kelly Inn*, 113 N.M. at 238, 824 P.2d at 1040. In this case, the compensation order resolved all the issues that had been raised by Worker concerning her entitlement to disability and medical benefits. The proceedings concerning fees would not affect or revise these determinations. Moreover, the proceedings concerning fees did not result in an amended compensation order, but in a separate order determining the amount of the attorney fees. Thus, we hold that the motion for attorney fees was not a motion directed "against such judgment" within the meaning of Section 39–1–1, and thus was not a motion under that statute for purposes of Rule 12–201(D).

■ Next, Worker argues that *Kelly Inn* should not be applied to workers' compensation proceedings because workers' compensation proceedings create rights, remedies, and procedures that are distinctive. *See, e.g., Williams v. Amax Chem. Corp.*, 104 N.M. 293, 720 P.2d 1234 (1986); *Security Ins. Co. v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975); *Anaya v. City of Santa Fe*, 80 N.M. 54, 451 P.2d 303 (1969).

Moreover, under the present statutory scheme, claims for compensation are handled by an administrative body rather than a district court.

Worker relies on the following language from *Sanchez v. Bradbury & Stamm Construction,* 109 N.M. 47, 781 P.2d 319 (Ct. App.1989):

> The general rule in administrative law is that, absent express statutory authorization, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." As observed by our supreme court in *Angel Fire [Corp. v. C.S. Cattle Co.,* 96 N.M. 651, 634 P.2d 202 (1981)], "[j]urisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme...." *Id.* at 652, 634 P.2d at 203. [Citations omitted.]

Id. at 49, 781 P.2d at 321. Worker points out that the workers' compensation act contemplates that employers be responsible for a portion of the worker's attorney fees in certain circumstances and requires Worker's attorney to obtain approval of any fee charged to her. *See* NMSA 1978, § 52–1–54(A) (Repl.Pamp.1991) (effective until January 1, 1991). Thus, Worker contends, the administrative proceedings are not final until the matters concerning the fees have been resolved.

Worker's reliance on *Sanchez* is misplaced. In *Sanchez* we held that this Court did not have jurisdiction to hear interlocutory appeals from the Administration. As we noted in that case, this Court has only such jurisdiction as the legislature provides for us. 109 N.M. at 48, 781 P.2d at 320. With respect to proceedings in the Administration, the legislature has provided for an appeal from the final order of the WCJ. Section 52–5–8(A). In *Kelly Inn,* our Supreme Court clarified the circumstances under which an order is final. In effect, then, *Kelly Inn* defines the final order to which Section 52–5–8(A) refers.

In a similar vein, Worker points out that the legislature has required that the decision of the WCJ filed after an evidentiary hearing on the merits:

> [S]hall be made in the form of a compensation order, appropriately titled to show its purpose and containing a report of the case, findings of fact and conclusions of law and, if appropriate, an order for the payment of benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978]....

NMSA 1978, § 52–5–7(B) (Repl.Pamp.1991). Worker contends that the use of the term "compensation order" in Section 52–5–7(B) and the term "final order" in Section 52–5–8(A) indicates that the legislature did not intend the compensation order to be a final order. However, we believe that the use of the term "final order" in Section 52–5–8(A) indicates only that the legislature recognized that a compensation proceeding may also be concluded in a manner that does not result in a compensation order.

This Court has previously noted the need for an expeditious resolution of compensation proceedings. *See, e.g., Sanchez,* 109 N.M. at 49, 781 P.2d at 321. Appeals from these proceedings are given a statutory priority in this Court. *See* § 52–5–8(B). *Kelly Inn* advances this policy by making compensation orders immediately appealable, despite the pendency of proceedings concerning fees.

Finally, Worker contends that this Court should consider her appeal on the merits because she reasonably relied on the long-standing precedent of *Johnson.* We recently indicated that this Court might have discretion to consider an otherwise untimely appeal when a party has relied on long-standing precedent that indicated that the order from which it wished to appeal was not final. *See In re Estate of Newalla,* 114 N.M. 290, 837 P.2d 1373 (Ct.App. 1992); *see also State v. Alvarez,* 113 N.M. 82, 85, 823 P.2d 324, 327 (Ct.App.1991) (suggesting that this court has discretion to consider untimely appeals). We assume without deciding that we have some discretion to consider untimely appeals. *Cf. Govich,* 112 N.M. at 230, 814 P.2d at 98 (time

and place of filing notice of appeal should be described as "mandatory"). However, in this case, we are not inclined to exercise our discretion.

Kelly Inn was decided on January 7, 1992, and published in the State Bar Bulletin on February 20, 1992. *See* Vol. 31, No. 8, SBB 173. Since its publication, we have interpreted and applied it as having overruled *Johnson,* although we have not yet done so in a formal opinion. In *Newalla,* the order from which appellant wished to appeal was filed before *Kelly Inn* was decided. The WCJ's findings and conclusions and the compensation order in this case were filed five months after the opinion in *Kelly Inn* was filed and approximately four months after the opinion had been published.

Moreover, on August 13, 1992, at the time Respondents filed their motion to dismiss the appeal as untimely, there was still time within which Worker might have obtained an extension of time to file the notice of appeal. *See* R. 12–201(E) & 12–601(C). Under the appellate rules, this Court was authorized to grant an extension of time within the sixty-day period after the compensation order was entered. *Id.* No motion for an extension of time has ever been filed.

Under these circumstances, we do not believe the appellate rules authorize the relief Worker requests. *See id.* While we agree that *Kelly Inn* changed the law, we are not persuaded that there is any basis for not applying it to this case.

Worker has moved that the case be remanded for the purpose of allowing the WCJ to amend her orders of June 25 and July 20, 1992, and enter a single order. *See State ex rel. Bell v. Hansen Lumber Co.,* 86 N.M. 312, 523 P.2d 810 (1974). Worker invokes NMSA 1978, Section 52–5–9 (Repl.Pamp.1991), the workers' compensation analogue to SCRA 1986, 1–060(B) (Repl.1992), saying that it was excusable neglect to fail to file a notice of appeal after the original compensation order was entered and before the attorney fees award was made. We deny the motion. Several cases decided under Rule 1–060(B) hold that it is not to be used to extend the time for an appeal. *See, e.g., Gedeon v. Gedeon,* 96 N.M. 315, 630 P.2d 267 (1981). By analogy, Section 52–5–9 provides no relief.

CROSS–APPEAL.

Respondents concede that their proposed findings and conclusions took the position that Worker was not entitled to fees at all because her attorney had not secured a benefit for her. Thus, Respondents did not request findings on the various factors considered by the WCJ in determining reasonable fees, such as the number of hours reasonably and necessarily spent by Worker's attorney on the matter, the extent to which the issues were contested, or the novelty and complexity of the issues. *See Woodson v. Phillips Petroleum Co.,* 102 N.M. 333, 695 P.2d 483 (1985) (discussing factors to be considered in determining a fee). Nevertheless, they argue that the WCJ was required to make findings on the various factors either by Section 52–5–7(B), or by our holding in *Jennings v. Steven J. Gabaldon Construction,* 97 N.M. 416, 640 P.2d 522 (Ct.App.1982). We disagree.

As we have noted above, nothing in the language of Section 52–5–7(B) indicates that it applies to subsequent orders awarding attorney fees. A court cannot read into a statute language that is not there, particularly when the statute makes sense as written. *Burroughs v. Board of County Comm'rs,* 88 N.M. 303, 540 P.2d 233 (1975). Similarly, to the extent that Respondents rely on language in *Jennings* to the effect that the failure to enter specific findings of each of the factors considered in determining reasonable fees is reversible error, we note that language was specifically overruled by our Supreme Court in *Woodson,* 102 N.M. at 339, 695 P.2d at 489. By failing to file proposed findings and conclusions on the specific factors to be considered in determining the fees, Respondents waived findings and conclusions on those issues. *See Bower v. Western Fleet Maintenance,* 104 N.M. 731, 726 P.2d 885 (Ct.App.1986); *see also* SCRA 1986, 1–052(B)(1)(f) (Repl.1992).

CONCLUSION.

For these reasons, Respondents' motion to dismiss Worker's appeal is granted, and the order awarding attorney fees is affirmed.

IT IS SO ORDERED.

PICKARD and BLACK, JJ., concur.

851 P.2d 1072

Henry SPRUYT, Petitioner,

v.

E. Lee SPRUYT, Respondent.

No. 20428.

Supreme Court of New Mexico.

April 7, 1993.

Lloyd O. Bates, Jr. Law Firm, Lloyd O. Bates, Jr., Las Cruces, for petitioner.

Lilley & Macias, P.A., Stephen Stevers, Las Cruces, for respondent.

OPINION

FRANCHINI, Justice.

This matter comes before us on a grant of certiorari. The parties stipulated to the following facts. Henry Spruyt (Husband) and E. Lee Spruyt (Wife) physically separated approximately eight years ago. Husband commenced a divorce proceeding in New York in March of 1987, and Wife commenced a similar proceeding in New York in February of 1989. Both proceedings are still pending and neither has ever been called for hearing. Husband relocated to New Mexico and established permanent residency here more than six months preceding the filing of a Petition for Dissolution of Marriage (Petition) in Dona Ana County. The parties further stipulate that they are incompatible and not reconcilable. The parties have no children.

In the New Mexico proceeding Husband seeks only dissolution of marriage and requests no relief regarding assets, debts, or alimony. The district court dismissed Husband's Petition on the grounds that it had no jurisdiction to hear the matter due to the pending actions in New York and alternatively that it should decline to exercise jurisdiction under the doctrine of

forum non conveniens. In its first calendar notice, the Court of Appeals dealt summarily with the jurisdictional issue, observing that nothing within the grant of jurisdiction for divorce actions states an exception for instances when an action for divorce is pending in another jurisdiction. *See* NMSA 1978, § 40–4–5 (Repl.Pamp.1989). However, by memorandum opinion the Court of Appeals affirmed the district court's application of the doctrine of forum non conveniens. The sole issue we consider is whether the district court abused its discretion in declining to exercise its jurisdiction in an action for divorce under the doctrine of forum non conveniens where the only relief requested is the dissolution of marriage. We reverse the Court of Appeals on the forum non conveniens question and remand to the district court.

This case presents us with a factual scenario very similar to that in *Buckner v. Buckner,* 95 N.M. 337, 622 P.2d 242 (1981). The parties in *Buckner* were involved in a pending legal separation in New York when Mr. Buckner filed for a divorce in New Mexico. *Id.* at 338, 622 P.2d at 243. The trial court dismissed the petition for lack of jurisdiction and on the grounds of forum non conveniens. *Id.* This Court rejected the forum non conveniens determination and concluded that the pending action for legal separation in New York was no impediment to the divorce action in New Mexico since our statutes recognize divorce and legal separation as distinct causes of action. *Id.* at 340, 622 P.2d at 245. We also stated that "New Mexico has a substantial interest in the marital status of its citizens. Its courts are open to residents who desire to obtain divorces on the ground of incompatibility." *Id.* at 339, 622 P.2d at 244.

In *Buckner,* this Court recognized that plaintiff's choice of " 'forum should not be disturbed except for weighty reasons....' " *Id.* (quoting Restatement (Second) of Conflict of Laws § 84 cmt. c (1971)). We also acknowledged *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) as the leading case on the doctrine of forum non conveniens. Among the factors *Gulf Oil* delineates to be weighed in invoking the doctrine are: Access to sources of proof, availability of witnesses, "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508, 67 S.Ct. at 843. *Gulf Oil* also states that by choice of forum plaintiff may not " 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* (footnote omitted).

[redacted] There are no complex questions of evidence or problems of proof in this case. Nor are there difficulties with the attendance of witnesses. In *Buckner,* we pointed out that Mr. Buckner could establish incompatibility through his own testimony. *Buckner,* 95 N.M. at 340, 622 P.2d at 245. Here, the parties have stipulated that they are incompatible and irreconcilable. That Husband is domiciled in New Mexico has also been stipulated. These stipulations provide the prerequisites establishing the right to divorce on the grounds of incompatibility. *Joy v. Joy,* 105 N.M. 571, 573, 734 P.2d 811, 813 (Ct.App.1987). Moreover, where jurisdiction, residence, and incompatibility are shown to exist, a New Mexico trial court has no discretionary right to deny a divorce. *Id.* at 574, 734 P.2d at 814.

The only consideration remaining is whether the choice of New Mexico as a forum for divorce is unduly oppressive or prejudicial to Wife. By affidavit attached to the parties' stipulation of facts, Wife's New York attorney asserts that if a divorce is granted in New Mexico "Husband *may* be able to sell, alienate, encumber or otherwise effect title to his interest in the marital residence, real property owned by the parties and other marital property." This assertion is made without reference to authority and suggests a result that "may" or "may not" occur. The affidavit also states that Wife would completely lose her right to receive her statutory share of Husband's estate should he die subsequent to the entry of a New Mexico judgment of

divorce. By this argument, it appears Wife is trying to claim that certain inheritance rights she may have in marriage outweigh the statutory and legal right of Husband to obtain a divorce. We find none of the reasons proffered by Wife so compelling as to disturb Husband's choice of New Mexico as a forum for the sole purpose of dissolving the parties' marriage.

A trial court abuses its discretion when its decision is contrary to logic and reason. *Roselli v. Rio Communities Serv. Station, Inc.*, 109 N.M. 509, 512, 787 P.2d 428, 431 (1990). Here, our analysis of all factors requiring consideration dictates that Husband's choice of New Mexico as a forum for obtaining a divorce should not be disturbed and that the district court abused its discretion in determining otherwise. Accordingly, we reverse the Court of Appeals and remand to the district court with instructions to grant Husband's petition for divorce.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

852 P.2d 683

Robert SCHOLES and Catherine Scholes, Plaintiffs–Appellees,

v.

POST OFFICE CANYON RANCH, INC., William C. Miller, Sr., Adeline Miller, William C. Miller, Jr., and Carol Miller, Defendants–Appellants.

No. 12260.

Court of Appeals of New Mexico.

July 6, 1992.

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

Steven L. Tucker, Jones, Snead, Wertheim, Rodriguez & Wentworth, P.A., Santa Fe, for defendants-appellants.

OPINION

BIVINS, Judge.

Defendants appeal from an order and judgment finding Plaintiffs the owners of a prescriptive easement over Defendants' property for the purpose of access to Plaintiffs' home. The sole issue raised is whether, as a matter of law, a presumption of adverse use can arise where the claimed prescriptive easement traverses large, open, and unenclosed private lands (referred to as the "neighbor accommodation

exception"). We hold that, under the circumstances of this case, the neighbor accommodation exception does not apply, and, therefore, affirm the district court. We make that determination not only on the basis of the district court's unchallenged findings, but also on Defendants' failure of proof.

A. FACTUAL BACKGROUND

Defendants do not challenge the facts found, only the law as applied to those facts. Defendants operate a nine to ten thousand acre ranch located in Hidalgo County, New Mexico, and Cochise County, Arizona. In the early 1970s, Plaintiffs acquired approximately five thousand acres of land adjoining Defendants' ranch on the east. Plaintiffs constructed improvements on their property, including a home. From January 1973 until they received a letter from Defendants' attorney in November 1987, Plaintiffs accessed their ranch from Highway 80 in Cochise County, Arizona, over a road that passes through land owned by a third party in Arizona, and then through Defendants' ranch. Defendants use the same road for access to their property.

In November 1987, Plaintiffs received a letter from Defendants' attorney stating that permission to use the road would be revoked effective January 1, 1988. Plaintiffs filed suit seeking declaratory and injunctive relief as a result of that action. The district court ruled in favor of Plaintiffs finding that they had acquired a prescriptive easement over Defendants' land.[1]

B. DISCUSSION

1. Standard of Review

On appeal, we review the challenge to a court's determination that a prescriptive easement exists by determining "whether each element required to establish a prescriptive easement has been proven by clear and convincing evidence." *Maloney v. Wreyford,* 111 N.M. 221, 224, 804 P.2d 412, 415 (Ct.App.1990). Plaintiffs were required to prove that they acquired the easement by a use which was " 'open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and [continuous] for a period of ten years with the knowledge or imputed knowledge of the owner.' " *Id.* (quoting *Hester v. Sawyers,* 41 N.M. 497, 504, 71 P.2d 646, 651 (1937)).

2. Adverse Use Requirement

The only element challenged by Defendants is whether Plaintiffs' use was adverse. Defendants presented a two-pronged permissive use argument below. First, Defendants claimed that they granted Plaintiffs express permission at the time Plaintiffs acquired their property, and later acknowledged the permissive use by providing Plaintiffs with matching keys to locks on gates crossing the roadway. Second, Defendants claimed that Plaintiffs' use was permissive under the neighbor accommodation exception recognized in *Hester,* 41 N.M. at 504–05, 71 P.2d at 651. *See generally* 3 Richard R. Powell, *The Law of Real Property* ¶ 413, at 34–111 (1992) ("Permission may be inferred from neighborly relation of the parties.").

a. Express Permission

With respect to express permission, the district court resolved that fact issue against Defendants. We do not understand Defendants to challenge the sufficiency of the evidence that support the findings of no express permission. Defendants base their appeal on the neighbor accommodation exception, which they contend applies as a matter of law. We now address that question.

b. The Neighbor Accommodation Exception

Plaintiffs contend on appeal that "[i]n the absence of proof of express permission, the general rule is that the use will be presumed to be adverse under claim of right." *Village of Capitan v. Kaywood,*

1. Because only portions of the road cross Defendants' deeded lands, the district court carefully avoided declaring an easement for access over lands owned by the federal and state government, or over land in Arizona.

96 N.M. 524, 525, 632 P.2d 1162, 1163 (1981). There is an exception to this presumption, however, under *Hester*, where the "claimed right-of-way traverses large bodies of open, unenclosed, and sparsely populated privately-owned land." *Id.*

(i) Proof of Open and Unenclosed Land

Defendants argue that the presumption of adversity does not apply because the neighbor accommodation exception concerning open and unenclosed lands controls, and claim that because Plaintiffs have failed to prove that the land is anything other than open and unenclosed, they cannot invoke the presumption of adverse use. We disagree. Defendants cannot claim that an exception applies because Plaintiffs failed to prove that the facts required for the exception do not exist. We hold that Defendants have the burden of producing evidence that the exception to the presumption of adverse use is applicable because Plaintiffs produced evidence that entitled them to the benefit of the rule that their use was presumed to be adverse under claim of right. *Id.; see also Schultz v. Kant,* 148 Ill.App.3d 565, 101 Ill.Dec. 764, 769, 499 N.E.2d 131, 136 (1986) (landowner's contention that use of road was permissive because the land was vacant and unenclosed failed where landowner could not prove that the land was vacant and unenclosed), *appeal denied,* 113 Ill.2d 585, 106 Ill.Dec. 56, 505 N.E.2d 362 (1987); *Ruchti v. Monroe,* 83 Wis.2d 551, 266 N.W.2d 309, 313 (1978) (where landowner failed to show facts which would support his theory of permissive use—that his lands are open and unenclosed—summary judgment was proper); *see also* SCRA 1986, 11-301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption....").

It follows, therefore, that Defendants had the burden of producing evidence that their property was a large body of privately-owned land which is open and unenclosed. The district court did not find, nor were they requested to find, that Defendants' property is large, open, and unenclosed. In fact, Defendants concede that although "[t]he record is not clear, ... it may be assumed that the pastures were fenced, since the use of gates and cattleguards is consistent only with the use of adjoining fences." New Mexico law is clear that the neighbor accommodation exception set forth in *Hester* is inapplicable to fenced land. *See Vigil v. Baltzley,* 79 N.M. 659, 661, 448 P.2d 171, 173 (1968); *Mutz v. Le Sage,* 61 N.M. 219, 220, 297 P.2d 876, 877 (1956); *see also Ruchti,* 266 N.W.2d at 313 (land which was fenced, developed for agricultural purposes, and occupied was not open and unenclosed for purposes of the rule). We hold, therefore, that Defendants failed to meet their burden of producing evidence that the neighbor accommodation exception applies.

(ii) Application of the Neighbor Accommodation Exception

Even if Defendants had shown that their land was open and unenclosed, we do not believe that the neighbor accommodation exception is applicable to the present case. The district court concluded that this exception was inapplicable because there was no way for Plaintiffs to use the road without passing Defendants' home; therefore, the use of the road should have been apparent to Defendants. In light of the policies supporting the neighbor accommodation exception, we agree, and affirm the decision of the district court.

In *Hester,* the court stated that "[i]n this state, where large bodies of privately owned land are open and uninclosed, it is a matter of common knowledge that the owners do not object to persons passing over them for their accommodation...." 41 N.M. at 504-05, 71 P.2d at 651. The supreme court in *Maestas v. Maestas,* 50 N.M. 276, 175 P.2d 1003 (1946), limited the neighbor accommodation exception to "large bodies of unenclosed land ... where the owners thereof could not reasonably know of passings over said lands." *Id.* at 279-80, 175 P.2d at 1006; *see Matsu v. Chavez,* 96 N.M. 775, 779, 635 P.2d 584, 588 (1981) (recognizing *Maestas* limitation of *Hester*); *Sanchez v. Dale Bellamah*

Homes, Inc., 76 N.M. 526, 529, 417 P.2d 25, 28 (1966) (same); *see also Ruchti*, 266 N.W.2d at 313 ("The obvious rationale for distinguishing wild lands from improved, occupied lands is that fairness to the landowner requires that he have notice of the prescriptive use of his land by others."). Indeed, the *Hester* court itself explained that "it would be against reason and justice to hold that a person so using a way over lands could acquire any permanent right, *unless* his intention to do so was known to the owner, or so plainly apparent from his acts that knowledge should be imputed to him." 41 N.M. at 505, 71 P.2d at 651 (emphasis added). Because it is undisputed that Defendants either knew or should have known of Plaintiffs' continuous use of the road, and in light of the surrounding circumstances, we hold that the neighbor accommodation exception does not apply to the facts of this case.[2]

In addition, we note that *Maestas* is factually similar to this case. In *Maestas*, the court refused to apply the neighbor accommodation exception where the strip of land involved was adjacent to defendants' domicile and used daily by plaintiff for the prescriptive period. *See* 50 N.M. at 280, 175 P.2d at 1006. Similarly, in the present action, there was no way for Plaintiffs to use the road in question without passing Defendants' home. *See also Pasley v. Hainline*, 272 Ky. 404, 114 S.W.2d 472, 473 (1938) (distinguishing between unenclosed woodland and cleared land close or contiguous to a residence or barn); *Leekley v. Dewing*, 217 Md. 54, 141 A.2d 696, 698 (1958) (explaining that some courts refuse to apply the neighbor accommodation exception to a road passing near a barn or residence).

To apply *Hester* in the manner suggested by Defendants, that is, to rebut the presumption of adverse use whenever large tracts of land are involved, regardless of the surrounding circumstances, would have the exception swallow the rule. We believe that the nature and extent of the use made, in light of the property owner's knowledge of the particular circumstances of use, should be considered. *See, e.g., Friend v. Holcombe*, 162 P.2d 1008, 1010 (Okla.1945) (where use constitutes an inconvenience or annoyance to the owner and owner permits use for the requisite period without attempting to interfere, his action will be taken as acquiescence as opposed to public travel through unimproved lands which may not raise any presumption of a grant); *Kruvant v. 12–22 Woodland Ave. Corp.*, 138 N.J.Super. 1, 350 A.2d 102, 112–13 (Ct. Law Div.1975) (distinguishing casual use by the public involving little practical inconvenience from daily use by the same individuals), *aff'd*, 150 N.J.Super. 503, 376 A.2d 188 (Ct.App.Div.1977).

Because we agree with the district court that the neighbor accommodation exception does not apply to the facts in this case, we affirm the judgment of the district court.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

852 P.2d 686

The NEW MEXICO DEPARTMENT OF HEALTH, Petitioner–Appellee,

v.

Theresa ULIBARRI, Respondent–Appellant.

No. 13971.

Court of Appeals of New Mexico.

April 7, 1993.

2. We note that some awareness of use must be contemplated in furthering the goal of "advanc[ing] friendly relations, good neighborliness and sociability between people living in sparsely settled or rural areas," *see Castillo v. Tabet Lumber Co.*, 75 N.M. 492, 495, 406 P.2d 361, 363 (1965); however, we do not believe that the neighbor accommodation exception applies to the type of use we presently consider.

Beth Schaefer, Sp. Asst. Atty. Gen., Asst. Gen. Counsel, Office of Gen. Counsel, New Mexico Dept. of Health, Santa Fe, for petitioner-appellee.

Dave Romero, Jr., The Romero Law Firm, P.A., Las Vegas, for respondent-appellant.

OPINION

MINZNER, Chief Judge.

Employee appeals the district court's reversal of the State Personnel Board's (Board) decision to reinstate her employment. The dispositive issue is whether the district court erred in determining that the Board did not have jurisdiction to hear Employee's appeal because Employee failed to file a timely notice of appeal with the Board.

Based on the reasoning discussed below, we reverse the district court's order and reinstate the Board's decision that Employee was improperly discharged from employment. We issue this opinion while the matter remains assigned to the summary calendar because the facts of the case are not disputed and both parties have filed memoranda in support of their respective positions. *See Garrison v. Safeway Stores,* 102 N.M. 179, 180, 692 P.2d 1328, 1329 (Ct.App.) (general calendar assignment unnecessary when facts are not disputed, both parties have moved for summary disposition, and both have filed memoranda in support of their position), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1984).

Initially, we note that our first calendar notice proposed to dismiss Employee's appeal before this Court for failure to file a timely notice of appeal with the district court. Although the notice of appeal was filed on time, it was not signed by Employee's attorney. After Employee filed a memorandum in opposition to the first calendar notice, we proposed to construe the failure of the attorney to sign as a technical violation, which in this instance should not prohibit Employee from pursuing her appeal. *See Lowe v. Bloom,* 110 N.M. 555, 556, 798 P.2d 156, 157 (1990); SCRA 1986, 12–312(C) (Repl.1992). Although the Department of Health (Department) filed a memorandum in opposition to the second calendar notice opposing our proposed disposition concerning the merits of Employ-

ee's appeal, the Department did not argue that Employee's appeal to this Court should be dismissed for failure to file a timely notice of appeal. Therefore, we reach the merits of Employee's appeal. *See State v. Sisneros,* 98 N.M. 201, 202–03, 647 P.2d 403, 404–05 (1982) (party opposing proposed disposition in calendar notice must point out error in fact or law in a memorandum in opposition).

FACTS

Employee was a nursing assistant at Las Vegas Medical Center, a hospital operated by the Department. She was dismissed for failing to conduct rounds every thirty minutes in order to check on patients. In a letter dated October 24, 1990, the Department stated that the effective date of Employee's dismissal would be October 27, 1990. The parties do not dispute that the Department never attempted to serve Employee personally with the termination notice. Instead, Employee's supervisor mailed the termination notice by certified mail, which Employee did not pick up from the post office until November 2, 1990. Employee then filed an appeal with the Board on November 28, 1990.

The Board's hearing officer (hearing officer) determined that it would be inequitable not to hear Employee's appeal on the merits because Employee may have filed her notice of appeal late. The hearing officer independently determined that the Department was required to first attempt to serve Employee personally with the notice of termination prior to serving it by mail. The hearing officer reinstated Employee, and the Board adopted the hearing officer's decision. When the Department appealed to the district court, the district court determined that the Board did not have jurisdiction over Employee's appeal because Employee's notice of appeal to the Board was untimely.

ANALYSIS

We begin our analysis by noting that as an employee of the Las Vegas Medical Center, a state facility operated by the Department, Employee is subject to the provisions of the State Personnel Act. *See* NMSA 1978, §§ 10–9–1 to –25 (Repl.Pamp.1992). In our second calendar notice, we proposed to reverse the district court's order. Specifically, we noted that State Personnel Board Rule 1.4(C) (1991) provides that when a notice is served by mail, the "person receiving service shall have three calendar days added to the response time contained in the notice." Thus, in the present case, since Employee's notice of termination was served by mail and stated that she had thirty days to appeal from the date the termination was effective, three days should be added to the time to respond. Adding three days to the time to respond would mean that Employee's notice of appeal to the Board was timely filed on November 28, 1990, because the deadline by which Employee had to file her appeal would be November 29, 1990. We also noted that State Personnel Board Rules 1.4(C) and 18.8(B)(5) (1991) use different language. Rule 1.4(C) refers to a "response time" contained in a notice, and Rule 18.8(B)(5) states that a notice of final action must inform an employee that he or she may "appeal" the disciplinary action to the Board within thirty calendar days of the effective date of the disciplinary action. We proposed to hold that the filing of an appeal constitutes a type of "response" from an Employee, and therefore the three-day mailing rule contained in Rule 1.4(C) applies to the notice of final action contemplated by Rule 18.8(B)(5). *See also Webster's Third New International Dictionary* 1935 (1966) ("response" defined as "an act or action of responding" or an "answer"). We think it is clear that the term "response," as used in Rule 1.4(C), includes the filing of a notice of appeal with the Board.

The parties agree that the State Personnel Board Rules were developed in order to effectuate the purposes of the State Personnel Act. *See* § 10–9–10(A) (duties of board include promulgation of regulations to effectuate Personnel Act). Those regulations are valid if they are in harmony with statutory authority. *Rivas v. Board of Cosmetologists,* 101 N.M. 592, 593, 686 P.2d 934, 935 (1984). In its memorandum filed in response to our second calendar

notice, the Department argues that our proposed interpretation of the Board rules in question would lead to absurd results. The Department argues that because NMSA 1978, Section 10–9–18(A) (Repl.Pamp.1992), provides that an employee's notice of appeal must be filed with the Board within thirty days of the termination notice, the Board may not promulgate a regulation adding three additional days for mailing. To do so, the Department argues, would allow the Board to go beyond the scope of its statutory authority, which is impermissible. *See Rivas,* 101 N.M. at 593, 686 P.2d at 935.

■ We agree with the basic proposition that an administrative agency must act within its statutory powers; however, we disagree that our interpretation of the Department's rules necessarily results in the agency going beyond its statutory powers. The authority of an administrative agency in making rules or regulations is not limited to those powers expressly granted by statute, but includes all powers that may be fairly implied therefrom. *Redman v. Board of Regents of the N.M. Sch. for the Visually Handicapped,* 102 N.M. 234, 237, 693 P.2d 1266, 1269 (Ct.App.1984), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1985). While Section 10–9–18(A) does provide that a notice of appeal to the Board shall be filed within thirty days of the notice of termination, we do not interpret this language as prohibiting the Board from adopting a three-day mailing rule to provide due process. *See, e.g., Rodriguez v. El Paso Elec. Co.,* 113 N.M. 672, 674–75, 831 P.2d 608, 610–11 (Ct.App.1992) (Workers' Compensation Administration (WCA) rule interpreted to include three-day mailing rule for filing of peremptory challenge to workers' compensation judge).

The Department next argues that the filing of a notice of appeal from a dismissal of employment is not a "response," and, instead, is a separate action. Therefore, the Department argues, Rule 1.4(C), which provides that an employee has three additional days to respond to notices served by mail, is inapplicable. We disagree. There is no language contained in the Board rules indicating that an appeal to the Board constitutes a separate, independent action. Moreover, we note that the Board rules do not define "response," nor is the term "appeal" excluded from the rule utilizing the term "response." As stated above, the word "response" as used in Rule 1.4(C) implies any type of answer, including a notice of appeal. Our interpretation of Rule 1.4(C) does not necessarily preclude the Board from modifying its rules to clearly state that the three-day mailing rule does not apply to notices of appeal filed with the Board; however, the Board must use clearer language if that is its intent. *See Rodriguez,* 113 N.M. at 675, 831 P.2d at 611 (no opinion expressed regarding WCA's authority to enact rule requiring parties to file peremptory challenges within ten days of filing of judge assignment; held only that WCA must use clearer language if that is its intent).

■ Insofar as the Department argues that our interpretation reads extraneous language into the Board rules in question, we reject that argument. We construe administrative agency rules in the same manner as we interpret statutes. *Wineman v. Kelly's Restaurant,* 113 N.M. 184, 185, 824 P.2d 324, 325 (Ct.App.1991). The words utilized in a statute are to be given their ordinary meaning. *City of Albuquerque v. Sanchez,* 113 N.M. 721, 725, 832 P.2d 412, 416 (Ct.App.1992). We have interpreted the word "response" in its ordinary meaning (i.e., an answer or the act of responding). Therefore, contrary to the Department's suggestions, we have not read extraneous language into the Board rules.

Finally, in response to the Department's suggestion that this Court has ignored the Board's own interpretation of its rules, we note that while the hearing officer determined that Rule 1.4(C) did not apply to Employee's case, the hearing officer did not specifically interpret the meaning of the rule. The Department fails to acknowledge the discussion contained in our second calendar notice in which we stated that even though the hearing officer may have been incorrect by assuming Rule 1.4(C) did not apply in the present case, we may still

uphold his ultimate conclusion that the Board had jurisdiction over Employee's appeal, *see Williams v. Williams,* 109 N.M. 92, 95, 781 P.2d 1170, 1173 (Ct.App.) (reviewing court may uphold decision if correct for any reason), *cert. denied,* 109 N.M. 54, 781 P.2d 782 (1989), and that we may do so even though Employee's appeal was first presented to the district court. *See Anaya v. New Mexico State Personnel Bd.,* 107 N.M. 622, 625, 762 P.2d 909, 912 (Ct.App.) (*citing Padilla v. Real Estate Comm'n,* 106 N.M. 96, 739 P.2d 965 (1987)) (in reviewing appeals perfected under the State Personnel Act, the scope of this Court is the same as that of the district court), *cert. denied,* 107 N.M. 673, 763 P.2d 689 (1988).

CONCLUSION

We hold that Rule 1.4(C) provides that if a notice of employment termination is served by mail, an employee has three additional calendar days to file a notice of appeal with the Board. Accordingly, Employee's notice of appeal was timely filed, and the Board had jurisdiction to hear Employee's appeal. Therefore, the order of the district court is reversed and the cause is remanded to the district court with directions to reinstate the Board's decision.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

852 P.2d 690

C.C. RAMIREZ, Joanne Herrera, Patty Diekman, Shirley Bishop, Suzanne Preith, Dorothy Senter, Jerrilou Hammett, Kingsley Hammett, Gary Epler and Joe L. Martinez, Plaintiffs–Appellants,

v.

CITY OF SANTA FE, a New Mexico municipal corporation, the City Council of the City of Santa Fe, in their official capacities as City Councilors for the City of Santa Fe, Peso Chavez, John Egan, Phil Griego, Bernie Beenhouwer, Peter Goodwin, David Schutz, the Urban Policy Committee, in their official capacities as members of the Committee, Nancy Long, Ouida McGregor, Ernesto B. Baca, Mercedes Romero, Janet Stoker, Karen Walker and Dolores Lee–Burciaga, Defendants–Appellees,

and

Camino Carlos Rey Partnership, Intervenors–Appellees.

No. 13312.

Court of Appeals of New Mexico.

April 7, 1993.

Ann Yalman, Santa Fe, for plaintiffs-appellants.

James C. McKay, City Atty., Santa Fe, for defendants-appellees.

Frank R. Coppler, Coppler & Aragon, P.C., Santa Fe, for intervenors-appellees.

OPINION

FLORES, Judge.

Plaintiffs appeal the district court's order of dismissal due to two jurisdictional defects: (1) lack of standing to challenge a City Council amendment to the General Plan which changed the classification of a thirty-acre tract of land from residential to industrial and commercial; and, (2) untimely filing of the petition for writ of certiorari in district court. Plaintiffs are landowners who own residential property near the Camino Carlos Rey Industrial Park, the thirty-acre parcel of land designated in the contested amendment (hereinafter "the Amendment") to the General Plan. Defendants in this case include the City of Santa Fe, City Council members, members of the Urban Policy Committee (hereinafter "the UPC"), and intervenors Camino Carlos Rey Partnership (hereinafter "the Developer"). The UPC is a committee of the Santa Fe City Council, and is responsible for making long-range policy and advisory recommendations to the City Council on the urban area General Plan and its amendments.

Plaintiffs raise four issues on appeal: (1) whether the district court erred in finding that Plaintiffs did not have standing to challenge the Amendment to the General Plan; (2) whether the district court erred in determining the petition for writ of certiorari was not timely filed pursuant to NMSA 1978, Section 3–21–9 (Repl.Pamp.1985); (3) whether the City Council's decision to grant the Amendment to the General Plan violated Plaintiffs' procedural due process rights; and, (4) whether Plaintiffs are entitled to a trial de novo pursuant to NMSA 1978, Section 3–19–8(C) (Repl.Pamp.1985). The Developer also raises the issue that Plaintiffs were required to request a supersedeas and stay pursuant to SCRA 1986, 12–207 (Repl.Pamp.1992).

We decline to address the issue of whether Plaintiffs' procedural due process rights were violated. There is nothing in the district court's order indicating it considered the many factual issues necessary for a conclusion that the UPC failed to hold a public meeting on the proposed amendment as required by Section 3–8–1.1 of the 1981 Santa Fe City Code (current version at Section 14–9.1(E) of the 1989 Santa Fe City Code) or that the City Council violated Plaintiffs' procedural due process rights by granting the Amendment to the General Plan. We will not resolve those factual issues before the district court has an opportunity to do so. *See Miller v. Smith,* 59 N.M. 235, 241, 282 P.2d 715, 719 (1955) (The New Mexico Supreme Court held that as an appellate court, it does not consider questions which have not been passed on by the trial court.); *In re Estate of Farrington,* 91 N.M. 143, 145, 571 P.2d 410, 412 (1977) (The appellate court is restricted to determine questions of law and must leave factual determinations to the trial court.).

We also decline to address the following legal issues for the reason that appellate courts do not issue advisory opinions: (1)

whether judicial review is appropriate under NMSA 1978, Section 3-19-8(A) (Repl.Pamp.1985); (2) what the appropriate standard of review is for that provision; (3) whether the trial de novo pursuant to Section 3-19-8(C) is an unconstitutional violation of the separation of powers doctrine contravening New Mexico Constitution, article III, Section 1; and (4) whether Plaintiffs are required to request a supersedeas and stay pursuant to SCRA 12-207 in pursuing an appeal in this case. *See Sena School Bus Co. v. Board of Educ.*, 101 N.M. 26, 29, 677 P.2d 639, 642 (Ct.App. 1984).

For the reasons that follow, we reverse the district court's order on the jurisdictional issues of standing and timeliness of filing the petition for writ of certiorari and remand to the district court for determinations consistent with this opinion.

BACKGROUND

Procedural Facts

The procedural background of this case is extensive. Judge Encinias, in the initial July 19, 1989 district court decision, on a motion to dismiss, dismissed the appeal and petition for writ of certiorari. Judge Encinias held that even assuming the appeal had been timely filed, there was no legal basis for the appeal because the twelve-month rule of Section 14-9.8 of the Santa Fe City Code did not apply to requests to amend the General Plan. Judge Encinias determined that the standing issue was therefore moot. Judge Encinias' decision also treated the motion to dismiss as a motion for summary judgment because Plaintiffs had submitted evidence in the form of affidavits regarding Plaintiffs' alleged harm and injury resulting from the Amendment. Shortly thereafter, a peremptory challenge disqualified Judge Encinias and the case was reassigned to a second judge. The case was assigned to yet a third judge on July 28, 1989. On October 5, 1989, the third judge issued an order dismissing all claims with prejudice and quashed the writ. However, this order had been improperly entered and was set aside on October 10, 1989. On February 5, 1990, the case was reassigned to a fourth judge, Judge Castellano. Judge Castellano granted the motion to dismiss based on two procedural defects: the statute of limitations for the writ, and lack of standing. Additionally, the motion to dismiss was granted based on violation of the twelve-month rule. Judge Castellano's order, entered on June 11, 1991, explicitly stated that "The prior decision of Judge Encinias is correct." In addition, the order clearly applied an abuse of discretion standard: "On the whole record there is no indication that the City defendants acted arbitrarily, capriciously or contrary to the law and therefor this cause should be dismissed." It is from the June 11, 1991 order that Plaintiffs appeal.

Statement of the Facts

The relevant activities of the Santa Fe City Council and the UPC as regards the amendment process to the General Plan are briefly as follows. The UPC held public meetings on February 25, 1988, and May 4, 1988. The UPC approved the Camino proposal on May 4, 1988 and requested that the City Council amend the General Plan. At the October 12, 1988 meeting, the City Council denied the request to amend the General Plan. At a January 24, 1989 UPC meeting, the UPC was informed about the following proposed changes to the Amendment: (1) a cul-de-sac instead of a through street to Aqua Fria; and, (2) a zoning change from industrial to commercial for a portion of the subject property. The parties dispute whether this was a public meeting within the meaning of Section 3-8-1.1 of the Santa Fe City Code which requires the UPC to review and act on all proposed amendments to the General Plan at a public meeting. On January 30, 1989, the UPC notified the City Council by letter that it sought a waiver of Section 3-8-1.1. The Developer submitted a revised proposal to amend on February 2, 1989. A week later, the City Council voted to publish notice of a March 8th public hearing on the proposed amendment to the General Plan. The City Council passed the Amendment as Resolution No. 1989-13 at the March 8, 1989 hearing pursuant to NMSA 1978, Section 3-19-10 (Repl.Pamp.1985).

DISCUSSION

Standing

Standing for judicial review in New Mexico always requires an allegation of direct injury to the complainant. *De Vargas Savings & Loan Ass'n v. Campbell,* 87 N.M. 469, 472, 535 P.2d 1320, 1323 (1975). The test for standing in New Mexico was clearly set forth in *De Vargas:* "to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise." *Id.* at 473, 535 P.2d at 1324; *see also Hotels of Distinction West, Inc. v. City of Albuquerque,* 107 N.M. 257, 260, 755 P.2d 595, 598 (1988); *Hawthorne v. City of Santa Fe,* 88 N.M. 123, 124, 537 P.2d 1385, 1386 (1975). In liberalizing the standing test for New Mexico, the New Mexico Supreme Court in *De Vargas* expressly overruled *Ruidoso State Bank v. Brumlow,* 81 N.M. 379, 467 P.2d 395 (1970). *De Vargas,* 87 N.M. at 473, 535 P.2d at 1324. The legal interest test enunciated in *Ruidoso* defined standing in terms of an aggrieved party who:

> is one having an interest recognized by law in the subject matter which is injuriously affected by the judgment, or one whose property rights or personal interests are directly affected by the operation of the judgment.... The true test is whether appellant's legal rights have been invaded, not merely whether he has suffered any actual pecuniary loss or been deprived of any actual pecuniary benefit. He must be aggrieved in a legal sense.

Ruidoso, 81 N.M. at 381, 467 P.2d at 397. In overruling the restrictive *Ruidoso* test, the New Mexico Supreme Court in *De Vargas* relied on the liberal trend in federal standing law and stated its agreement with the principles enunciated in *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). *De Vargas,* 87 N.M. at 472, 535 P.2d at 1323. *Sierra Club* expansively delineated the type of harm which confers standing in federal court. *Sierra Club,* 405 U.S. at 733–41, 92 S.Ct. at 1365–69. In that case, the Court stated that if the Sierra Club had shown that its members used the subject property at Mineral King and Sequoia National Park, the United States Supreme Court would have conferred standing based on an alleged injury to the environment from the contested land development plan. As the Court in *De Vargas* cited with approval, *Sierra Club* does not limit standing to economic harm but also recognizes that " 'aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' " *De Vargas,* 87 N.M. at 472, 535 P.2d at 1323 (quoting *Sierra Club,* 405 U.S. at 734, 92 S.Ct. at 1366).

The New Mexico Supreme Court also agreed with the slight extent of harm required by the United States Supreme Court in *SCRAP. Id.* Once the appellant alleged injury, the extent of injury required under *SCRAP* is slight: "[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *SCRAP,* 412 U.S. at 689–90, n. 14, 93 S.Ct. at 2416–17, n. 14 (quoting Kenneth C. Davis, *Standing: Taxpayers and Others,* 35 U.Chi.L.Rev. 601, 613 (1968)). In addition, *SCRAP* specified that the "pleadings must be something more than an ingenious exercise in the conceivable." *Id.* at 688, 93 S.Ct. at 2416. In *SCRAP,* the Court held that five law school student protestors had standing to contest the Interstate Commerce Commission's decision not to suspend a surcharge on certain freight rates. The attenuated harm the plaintiffs alleged, which was sufficient to fulfill the federal injury in fact requirement for standing, was simply that the rate increase would cause economic, recreational, and aesthetic harm due to an increase in the use of non-recyclable goods. This in turn would negatively impact upon the environment.

Plaintiffs, residential property owners whose properties are located near the land included in the Amendment, contend they have alleged the requisite injury to confer standing to sue. *See De Vargas,* 87 N.M. at 472–73, 535 P.2d at 1323–24. The range of proximity of Plaintiffs' properties to the subject property includes property immediately west and adjacent to the proposed project, three properties between one and one-half blocks and five blocks away, and properties three-tenths and six-tenths of a mile east of the subject property. The specific allegations regarding injury in fact or imminent threat of injury include: (1) fear of increased noise, traffic, crime, and pollution; (2) detrimental effect on the aesthetics of the area; (3) decline in property values; (4) intensification of traffic hazards at street intersections; (5) an increase in drainage, flooding, and runoff; and, (6) a change in the peaceful nature of the neighborhood.

Respondents and Intervenors assert that Plaintiffs failed to allege a sufficiently demonstrable injury. Furthermore, Respondents contend that mere proximity, speculative fears, and quality of life arguments are inadequate allegations of injury to confer standing. In addition to *De Vargas,* Respondents rely on the more restrictive language of *St. Sauver v. New Mexico Peterbilt, Inc.,* 101 N.M. 84, 85–86, 678 P.2d 712, 713–14 (Ct.App.1984) and *Webb v. Fox,* 105 N.M. 723, 725, 737 P.2d 82, 84 (Ct.App.1987). However, in enunciating a new test for standing, the New Mexico Supreme Court in *De Vargas* explicitly overruled *Ruidoso* and its progeny. *De Vargas,* 87 N.M. at 473, 535 P.2d at 1324. To the extent that the Court of Appeals in *Webb* relied on the *Ruidoso* legal interest test for standing, our interpretation of *De Vargas* shows us that such reliance was misplaced. The citation to *Ruidoso* in *St. Sauver* was mere dicta, and irrelevant to the holding of the case.

Plaintiffs further assert that the test for standing in New Mexico does not distinguish between zoning and planning. *See Hotels of Distinction West,* 107 N.M. at 260, 755 P.2d at 598; *Citizens for Los Alamos, Inc. v. Incorporated County of Los Alamos,* 104 N.M. 571, 725 P.2d 250 (1986); *Hawthorne,* 88 N.M. at 124, 537 P.2d at 1386. However, Respondents contend that standing for "[a]ny person, in interest" under Section 3–19–8(A) differs from standing for "[a]ny person aggrieved" under Section 3–21–9(A). Respondents do not articulate specifically how a standing analysis differs between zoning and planning, nor do Respondents cite any authority for the proposition that different tests for standing apply in zoning and planning contexts. We thus assume there is no such authority and need not consider this argument further. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984).

In fact, the standing test set forth in *De Vargas* made no such distinction and applied to "suit[s] arguing the unlawfulness of governmental action." *De Vargas,* 87 N.M. at 473, 535 P.2d at 1324. *De Vargas* went so far as to see as fundamental the claimant's right to "protect himself against injury as a result of unlawful governmental action, even in the absence of a controlling statute or constitutional provision." *Id.* at 472, 535 P.2d at 1323. *But see Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Furthermore, " '[t]here is no presumption against judicial review and in favor of administrative absoluti[sm] ... unless that purpose is fairly discernible in the statutory scheme.' " *De Vargas,* 87 N.M. at 473, 535 P.2d at 1324 (quoting *Data Processing Serv.,* 397 U.S. at 157, 90 S.Ct. at 831–32). In the instant case, both Sections 3–19–8(A) and 3–21–9(A) demonstrate the legislative intent that judicial review be attainable via appeal on the one hand and writ of certiorari on the other.

The type of harm alleged by Plaintiffs falls within the *Sierra Club* parameters of standing. *See De Vargas,* 87 N.M. at 472, 535 P.2d at 1323. The extent of harm alleged by Plaintiffs is less attenuated and more significant than "the trifle" required by *SCRAP. SCRAP,* 412 U.S. at 688, 93 S.Ct. at 2416. The threat of aesthetic, quality of life, and property harm al-

leged by Plaintiffs is also directly parallel to the type of harm which conferred standing in *Tate v. Miles,* 503 A.2d 187 (Del.Super.Ct.1986). In *Tate,* the Court held that residential property owners whose property was 1500 feet away from the rezoned land had standing to sue on the basis of assertions that the rezoning would increase noise, dirt, trash and traffic in the area. This in turn would interfere with the landowners' enjoyment of their property.

The case at hand can be distinguished from cases relied on by Respondents where standing was denied. In *Webb,* the defendant was a prospective purchaser who had neither an executed contract nor a purchase contract conditioned on the grant of the zoning request. Here, Plaintiffs have a more personal stake in the outcome of the controversy because they owned property at the time the City Council decision was rendered and they continue to own property near the proposed project. *But see Hotels of Distinction West,* 107 N.M. at 260, 755 P.2d at 598 (citing *State ex rel. Overton v. New Mexico State Tax Comm'n,* 81 N.M. 28, 462 P.2d 613 (1969)) (The plaintiff lacked standing because it had no personal stake in the outcome of the controversy.). The instant case can also be distinguished from *Citizens for Los Alamos* because unlike the appellant in *Citizens for Los Alamos,* Plaintiffs here do own property. *Citizens for Los Alamos,* 104 N.M. at 573, 725 P.2d at 252. In that case, the incorporated citizens did not have standing because they were not duly organized at the time the contested decision was rendered, nor did they own property. However, the Court expressly declined to address the issue of whether lack of property ownership in this situation would have affected standing had the incorporated citizens been duly organized.

Here, Plaintiffs have alleged sufficient threat of injury to satisfy the test enunciated in *De Vargas.* Accordingly, we reverse the district court's order that Plaintiffs lacked standing.

Timeliness of Filing the Petition for Writ of Certiorari

Plaintiffs contest the district court's order that the filing of the petition for writ of certiorari was untimely. The parties do not dispute that Section 3-21-9(A) limits the filing of the petition to "within thirty days after the decision is entered in the records of the clerk of the zoning authority." Nor do the parties contest that filing an appeal pursuant to Section 3-19-8 contains no such time limitation. Furthermore, the parties do not dispute that the thirty-day filing requirement will be strictly construed. *See Bolin v. City of Portales,* 89 N.M. 192, 548 P.2d 1210 (1976). However, the parties do dispute the date from which the City Council's decision triggers the thirty-day period. Plaintiffs assert that the triggering date is March 8, 1989, when the City Council passed the Amendment to the General Plan as Resolution No. 1989-13. Respondents assert the triggering date should be February 8, 1989, when the City Council decided to publish notice of the March 8, 1989 hearing rather than remanding to the UPC for another hearing at that level.

■ In assessing the finality of a decision for purposes of determining when the thirty-day statute of limitations began to run for Section 3-21-9, the New Mexico Supreme Court held that a contested zoning ordinance became final on the day it was passed, adopted, approved, and signed by the board and not on the date some five weeks later when the board approved the minutes of the former meeting. *Serna v. Board of County Comm'rs,* 88 N.M. 282, 540 P.2d 212 (1975). The Court made a similar determination in *Bolin* where the decision which triggered the statute of limitations was the final adoption of the ordinance by the City Council and not the date the appellants learned of the decision, nor the date the ordinance was first considered by the City Council. *Bolin,* 89 N.M. at 193-94, 548 P.2d at 1211-12. *See also Citizens for Los Alamos,* 104 N.M. at 572, 725 P.2d at 251 (The triggering date was the date of the County's decision to grant the contested special use permit.).

Plaintiffs argue that to find any other date except the date the City Council made

its final decision would be tantamount to forcing an individual to appeal before one is aggrieved or dissatisfied because the City Council might have voted to defeat the proposal as they had at the prior October 12, 1989 meeting. We find this argument to be both persuasive and consistent with *Bolin* and *Serna*. *Cf. Harrison v. ICX, Illinois-California Express, Inc.*, 98 N.M. 247, 647 P.2d 880 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (Appeals lie only from formal written orders or judgments signed by the judge and filed in the case, or entered upon the records of the court and signed by the judge.). Accordingly, we reverse the district court's order that the petition for writ of certiorari was not timely filed.

CONCLUSION

Based on the foregoing, we reverse the district court's order that Plaintiffs lacked standing and that the petition for writ of certiorari was not timely filed. We remand to the district court with instructions that the district court determine: (A) whether Plaintiffs' procedural due process rights were violated due to noncompliance with Section 14-9.1(E) of the Santa Fe City Code; (B) whether Section 3-19-8 applies and if so, (1) what the standard of review is; and (2) whether a supersedeas and stay were required pursuant to SCRA 12-207.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

853 P.2d 126

STATE of New Mexico, Plaintiff–Appellee,

v.

Marco Mata Y RIVERA, Defendant–Appellant.

No. 13540.

Court of Appeals of New Mexico.

Jan. 20, 1993.

Certiorari Denied March 2, 1993.

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Tom Udall, Atty. Gen. and Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender and Rita LaLumia Berg, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Judge.

Defendant appeals his convictions for unlawful carrying of a firearm in a licensed liquor establishment and negligent use of a deadly weapon. He raises the following issues: (1) whether the negligent use of a deadly weapon statute, NMSA 1978, § 30–7–4 (Repl.Pamp.1984), violates his right to bear arms under the New Mexico Constitution; (2) whether Section 30–7–4 is unconstitutionally overbroad and vague; (3) whether the trial court erred in admitting a sales receipt concerning Defendant's gun; (4) whether the trial court erred in admitting evidence concerning a liquor license; (5) the sufficiency of the evidence supporting Defendant's convictions; (6) whether the jury was adequately instructed; (7) whether Defendant was denied due process and his right to appeal because of an incomplete record; and (8) cumulative error. Defendant has expressly abandoned two other issues raised in a motion to amend the docketing statement filed while this case was assigned to the summary calendar. We affirm.

FACTS

In the early morning hours of March 16, 1991, Officer Holguin was dispatched to the Hiway Package Lounge in Carlsbad to investigate a reported robbery. Holguin determined that no robbery had occurred. While at the bar, Holguin observed a car in which Defendant was a passenger strike another car in the parking lot. Holguin approached the car to investigate. He shined a flashlight in the car, and saw Defendant, seated in the left rear seat, holding a small caliber handgun. Officer Holguin yelled "gun" to alert other officers at the scene. Holguin said the gun was pointed toward the driver of the car, Arturo Rueda. Mary Lou Amalla, Rueda's girlfriend, was also a passenger in the car.

Officer Holguin ordered the occupants of the car to exit with their hands up. Mr. Rueda and Ms. Amalla complied almost immediately; Defendant did not. Defendant finally exited the car after several minutes. During the time Holguin was ordering Defendant to put his hands up, Defendant kept them down and kept "shuffling" them. Defendant did not have the gun when he got out of the car.

After the occupants exited the car, Holguin looked inside. He found a brown bag containing, among other things, a handgun, a box of ammunition, a magazine for the gun, and a sales slip for the gun with Defendant's name on it. The gun and its magazine were in separate compartments

of the bag. Both Mr. Rueda and Ms. Amalla testified that Defendant had a bag with him when they met him earlier outside the bar, and that the bag and gun found in the car did not belong to them. Ms. Amalla stated that Defendant took the bag inside and put it on the floor beside him. Neither Mr. Rueda nor Ms. Amalla could identify the bag in the car as Defendant's, and neither saw a gun in the bag, bar, or car.

1. *ALLEGED INFRINGEMENT OF DEFENDANT'S RIGHT TO BEAR ARMS BY CONVICTION UNDER SECTION 30–7–4*

Defendant contends that, under the facts of this case, his conviction for negligent use of a deadly weapon violates his right to bear arms under the state constitution. *See* N.M. Const. art. II, § 6 (Repl.Pamp.1992). The State answers that the statute lawfully restricts Defendant's carrying a firearm while under the influence of alcohol.

Initially, we note that Defendant has not cited any authority supporting his contention. Thus, we need not consider it. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Nevertheless, we address Defendant's argument and find it to be without merit. The right to bear arms under the state constitution is not absolute, and a defendant's right to bear arms is circumscribed by the conditions under which he or she seeks to assert the right. *State v. Dees,* 100 N.M. 252, 254, 669 P.2d 261, 263 (Ct.App.1983) (quoting *United States v. Romero,* 484 F.2d 1324, 1327 (10th Cir.1973)). In *Dees,* we entertained a similar challenge to NMSA 1978, Section 30–7–3 (Repl.Pamp.1984), which prohibits the unlawful carrying of a firearm in a licensed liquor establishment. We held that the legislative purpose of Section 30–7–3 was to " 'protect innocent patrons of businesses held out to the public as licensed liquor establishments.' " *Id.* at 255, 669 P.2d at 264 (*quoting State v. Soto,* 95 N.M. 81, 82, 619 P.2d 185, 186 (1980)). We upheld Section 30–7–3 as a valid regulation of the right to bear arms.

We agree with the State that the rationale of *Dees* is applicable to this case. "An act is within the state's police power if it is reasonably related to the public health, welfare, and safety." *People v. Garcia,* 197 Colo. 550, 595 P.2d 228, 230 (1979) (en banc) (Colorado statute prohibiting possession of a firearm while under the influence of intoxicating liquor did not impermissibly restrict the defendant's right to bear arms and, thus, was not overbroad). The State permissibly exercises its police power by prohibiting the possession of firearms by persons under the influence of alcohol or drugs. *Id.* Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. *See id.; Dees,* 100 N.M. at 255, 669 P.2d at 264.

The constitutionality of a statute is generally subject to challenge only by someone who demonstrates the unconstitutional application of the statute to him. *State v. Casteneda,* 97 N.M. 670, 678, 642 P.2d 1129, 1137 (Ct.App.1982). Here, the evidence indicated that Defendant was a potential danger to the public. There was evidence that Defendant was intoxicated. Officer Holguin saw Defendant pointing the gun at Mr. Rueda. Defendant appeared to be loading the gun. We conclude that Defendant's constitutional right to bear arms was not impermissibly infringed by his conviction under Section 30–7–4.

2. *ALLEGED UNCONSTITUTIONAL VAGUENESS AND OVERBREADTH OF SECTION 30–7–4*

Defendant next contends that Section 30–7–4 is unconstitutionally vague and overbroad. Specifically, he argues that Section 30–7–4, when read with NMSA 1978, Section 30–7–1 (Repl.Pamp.1984), does not give fair notice of what conduct is prohibited. We disagree.

If a defendant challenges a statute as vague, the reviewing court presumes the statute is constitutional. *State v. James M.,* 111 N.M. 473, 477, 806 P.2d 1063, 1067 (Ct.App.1990), *cert. denied,* 111 N.M. 529, 807 P.2d 227 (1991). We consider the stat-

ute in its entirety, giving words their ordinary meaning unless a contrary intent is indicated. *Id.* "To satisfy the constitutional requirements of due process, the statute must provide adequate warning to a person of ordinary intelligence that his [or her] conduct is prohibited." *Id.*

Section 30–7–4(A)(2) defines negligent use of a deadly weapon as "carrying a firearm while under the influence of an intoxicant or narcotic." While "carrying a firearm" is not defined in Section 30–7–4, Section 30–7–1 defines "carrying a deadly weapon" as "being armed with a deadly weapon by having it on the person, or in close proximity thereto, so that the weapon is readily accessible for *use.*" (Emphasis added.) The definition of "deadly weapon" includes unloaded firearms. NMSA 1978, § 30–1–12(B) (Repl.Pamp.1984). We understand Defendant to argue that the term "use" is not defined, thereby rendering the statute vague because persons can be convicted without any showing that the firearm was used or intended to be used. He further argues that the statute does not provide clear guidelines for law enforcement officers because "under the influence" is not defined. Thus, the statute requires a subjective determination by the officer, giving rise to the possibility of uneven enforcement.

We conclude that Section 30–7–4(A)(2) is not unconstitutionally vague. The terms of the statute give fair warning of the prohibited conduct. A person may not have a deadly weapon "readily accessible for use" while under the influence of intoxicants or narcotics. We give the terms "accessible" and "use" their ordinary meanings. *See James M.,* 111 N.M. at 477, 806 P.2d at 1067. "Accessible" means "capable of being used." *Webster's Third New International Dictionary* 11 (1971). "Use" means "to put into action or service." *Id.* at 2523. A person of ordinary intelligence would understand what conduct is prohibited by the statute: having a firearm nearby, readily capable of being put into action or service, while under the influence of alcohol. The statute plainly does not require that the intoxicated person actually use or intend to use the firearm.

Further, an officer's determination that a person is "under the influence" is not entirely subjective. Officer Holguin gave several examples of objective indicators of impairment: odor of alcohol, bloodshot eyes, altered speech patterns, etc.

Defendant also contends the statute is overbroad, presumably based on his argument that his possession of the gun was protected under our state constitution. Generally, to have standing to challenge a statute as overbroad, a defendant must show that " 'his own conduct could not be regulated by a statute drawn with the requisite [narrow] specificity.' " *State v. Brecheisen,* 101 N.M. 38, 43, 677 P.2d 1074, 1079 (Ct.App.), *cert. denied,* 101 N.M. 11, 677 P.2d 624 (1984) (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965)).

Defendant cannot make this showing. As stated in the previous section, Defendant's conduct was dangerous. As such, it could be regulated even by a more narrowly drawn statute than the one at issue here.

Even if Defendant had standing, we do not agree with his overbreadth argument. The key factor in overbreadth analysis is the prohibition of legitimate acts. *Garcia,* 595 P.2d at 230. There is no constitutional right of intoxicated persons to carry firearms. *Id.* Thus, Section 30–7–4(A)(2), by prohibiting such conduct, does not prohibit legitimate acts and is not overbroad.

3. *THE SALES RECEIPT*

Officer Holguin found a sales receipt for the gun indicating that Defendant had purchased it at Michael Lee's Trading Company in Carlsbad on March 15, 1991. Defendant objected to admission of the receipt on the grounds it was hearsay and unauthenticated. The trial court admitted the receipt on the basis that it was simply offered to show what was found in the bag, and not for the truth of the matters asserted on its face. Defendant argues that the receipt was inadmissible hearsay and vio-

lated his confrontation rights because it was offered to show that he purchased the gun the day before the crimes.

We will affirm the trial court's admission of evidence absent a clear abuse of discretion. *State v. Worley,* 100 N.M. 720, 723, 676 P.2d 247, 250 (1984). A hearsay statement is an out-of-court oral or written assertion offered to prove the truth of the matter asserted therein. SCRA 1986, 11–801(A), (C). Hearsay is inadmissible absent an exception under the rules of evidence. SCRA 1986, 11–802. We agree with the State that the receipt was not hearsay. First, the receipt was offered simply to show what was found in the bag. Second, it also tended to prove that Defendant had possession and control of the contents of the bag. The receipt was not offered to prove that Defendant had purchased the gun at the time, place, and price indicated on the sales slip. It is true that the jury might have inferred those matters from the receipt. However, evidence admissible for one purpose is not to be excluded because it is inadmissible for another purpose. *State v. Wyman,* 96 N.M. 558, 560, 632 P.2d 1196, 1198 (Ct.App.1981). Moreover, Defendant did not request an instruction limiting the jury's consideration of the receipt to the purpose for which it was admitted. *See* SCRA 1986, 11–105; *State v. Gonzales,* 113 N.M. 221, 228, 824 P.2d 1023, 1030 (1992) (failure to request limiting instruction resulted in waiver of error).

Defendant also asserts that the receipt was inadmissible because it was unauthenticated. *See* SCRA 1986, 11–901(A). The requirement of authentication is satisfied by evidence sufficient to support a finding that the matter is what it is purported to be. *Id.* We reiterate that the receipt was admitted to show what was found in the bag, and that Defendant had control over the bag's contents. The receipt was not offered to prove the matters asserted on its face. Under these circumstances, we conclude Officer Holguin was a witness with knowledge sufficient to provide the required authentication. *See* SCRA 11–901(B)(1).

4. *EVIDENCE OF LIQUOR LICENSE*

Defendant claims the trial court erred in admitting evidence that the lounge was licensed because the State failed to provide the defense, in advance, information regarding that evidence. Because the State did not offer the license itself—only the testimony of Officer Holguin that he saw the license—Defendant claims he was unable to adequately defend his case as to the licensing element of Section 30–7–3, unlawful carrying of a firearm in a licensed liquor establishment. Defendant cites no authority for his argument and raises the issue under *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).

Although we need not consider Defendant's argument, *In re Doe,* 100 N.M. at 765, 676 P.2d at 1330, it is easily answered. Defendant knew of the charges against him. The State had the burden of proving that the establishment was licensed and disclosed the identity of its witnesses, including Officer Holguin. Defendant had an opportunity to learn of the officer's testimony. If he failed to do so, he cannot complain. This issue has no merit.

5. *SUFFICIENCY OF THE EVIDENCE*

Defendant maintains there was insufficient evidence supporting his convictions. To determine the sufficiency of the evidence, we inquire whether there exists substantial evidence to support a guilty verdict beyond a reasonable doubt as to each 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 [S]tate, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.*

a. To sustain the charge of negligent use of a deadly weapon in this case, the State was required to prove that Defendant carried a firearm while under the influence of alcohol. *See* § 30–7–4(A)(2). Officer Holguin testified that he saw Defendant in the back seat of the car carrying a handgun. There was also sufficient evi-

dence that Defendant was under the influence of alcohol at the time. While "under the influence" is not defined in Section 30–7–4, we find guidance from authority interpreting that phrase in the context of motor vehicle operation. A person drives while "under the influence" "[i]f, by virtue of having consumed intoxicating liquor, [his or her] ability to handle [a] vehicle with safety ... [is] lessened to the slightest degree." *State v. Copeland,* 105 N.M. 27, 34, 727 P.2d 1342, 1349 (Ct.App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986); SCRA 1986, 14–243. Officer Holguin testified that Defendant had a strong odor of alcohol about him, had bloodshot eyes, disobeyed his commands, was very talkative, and mocked the officers. Holguin, who had experience with about one hundred DWI arrests, also stated that Defendant's voice and speech patterns indicated he was impaired. Both Mr. Rueda and Ms. Amalla testified that Defendant was drinking inside the bar. Defendant points to evidence tending to explain away his physical symptoms and lack of cooperation. He also argues that the officer's testimony must be discounted because he did not administer any field sobriety or blood alcohol tests. With regard to Defendant's latter concern, we note Officer Holguin's testimony that he did not test Defendant because he was not driving. As for Defendant's attempt to provide alternative explanations for the evidence, it was for the jury to weigh the evidence, not this Court. *Sutphin,* 107 N.M. at 131, 753 P.2d at 1319. We conclude that Defendant's conviction for negligent use of a deadly weapon is supported by substantial evidence.

b. To sustain the charge of unlawful carrying of a firearm in a licensed liquor establishment, the State was required to prove that Defendant carried a loaded or unloaded firearm in an establishment licensed to dispense alcoholic beverages. Section 30–7–3(A); *see also Soto,* 95 N.M. at 82, 619 P.2d at 186.

Defendant states that the only evidence showing that the Hiway Package Lounge was licensed to dispense alcoholic beverages came through the testimony of Officer Holguin. He argues "the officer did not remember what the license said, nor who signed" it and "[t]here was no evidence that the license had not expired." Defendant argues that this evidence was insufficient. We disagree.

Officer Holguin testified that he had been in the lounge "numerous" times and knew it sold alcoholic beverages. Mr. Rueda and Ms. Amalla testified that they had been drinking beer with Defendant immediately prior to the arrest. Officer Holguin said he entered the lounge on the day following the incident and saw the liquor license on the wall. He wrote down the number of the license: 916. Holguin stated unequivocally that he knew the Hiway Package Lounge was a "liquor establishment." Additionally, on cross-examination, defense counsel asked the officer how he knew that the license was authentic. Holguin answered that he knew because he had called the Department of Alcoholic Beverage Control (ABC). Defense counsel did not allow the officer to relate the telephone conversation, and the interrogation on that subject ended.

While it may have been stronger proof to have offered the license, the testimony of the owner of the bar, *see id.,* or the testimony of a representative of the ABC, we believe the evidence presented made out a prima facie case of licensing. The fact that there was no evidence that the license had not expired does not defeat the showing. The jury could reasonably infer that the license was in effect at the time of the incident. The evidence that supports this inference is the fact that the incident occurred on March 16, the officer saw the license on March 17, and NMSA 1978, Section 60–6B–5 (Repl.Pamp.1992), provides that all licenses provided for in the Liquor Control Act expire on June 30 of each year. Thus, the fact that the lounge displayed a license in March supports an inference that the license had not expired.

Additionally, we note that it is the express policy of this State that the sale of alcoholic beverages shall be licensed, and that the Director of the ABC shall enforce that policy. *See* NMSA 1978, § 60–3A–2

(Repl.Pamp.1992); *see also* NMSA 1978, § 60–7A–4.1 (Repl.Pamp.1992) (a felony for any person to sell alcoholic beverages at any place other than a licensed premises or as otherwise allowed by Liquor Control Act); NMSA 1978, §§ 60–4B–4 to –5 (Repl.Pamp.1992) (Director shall have power to investigate and to issue regulations, both for the purpose of enforcing the Liquor Control Act). The existence of a license on the premises of the Hiway Package Lounge is evidence that this policy was followed with regard to the lounge. To adopt Defendant's argument, we would have to presume that the Director allowed the lounge to dispense alcoholic beverages without a license for no less than eight and a half months. This we cannot do.

In the absence of evidence to the contrary, there is a presumption that public officers have performed their duties in a regular and lawful manner, and this presumption places on the opposing party the burden of producing evidence to the contrary. *See Fulwiler v. Traders & General Ins. Co.*, 59 N.M. 366, 374–75, 285 P.2d 140, 145–46 (1955) (It was not error for the trial court to refuse to rule that a conditional sales contract was invalid for lack of acknowledgement, in part because the public official whose duty it was to receive and file an acknowledged copy of the contract was presumed to have done his duty—i.e., the official was presumed to have ascertained that the contract was acknowledged before accepting it for filing.); *Herrera v. Zia Land Co.*, 51 N.M. 390, 391–92, 185 P.2d 975, 976 (1947) (A meeting of the town board of trustees was presumed to be a regular meeting because "the law presumes that public officials perform their duties until the contrary is shown."); *State ex rel. Delgado v. Romero*, 17 N.M. 81, 85, 124 P. 649, 650 (1912) (presumption exists that each department of the government will do its duty); *People v. Goodenough*, 89 Misc.2d 455, 391 N.Y.S.2d 940, 941–42 (Just.Ct.1977) (presumption existed that notice of suspension of driver's license was transmitted to the defendant by public official whose duty it was to deliver the notice); *see also City of Houston v. Moody*, 572 S.W.2d 13, 14–15 (Tex.Ct.App.1978) (presumption existed that president of public water district was performing his duties in a regular, lawful manner when he signed promissory notes on behalf of district). We will not presume that the license displayed in March had expired the prior June, because that would require us to assume ABC allowed liquor to be sold for an extensive period of time after the statutory expiration date. We will allow the jury to draw an inference that the license displayed in March had been validly issued at one time, and that it was valid in March, based on the officer's description that it was a liquor license and that it was displayed for public view, and on a presumption that the agency was doing its job.

Defendant did not present any evidence to rebut the prima facie showing that the establishment was properly licensed. Thus, substantial evidence supports this element of the crime. *See Soto*, 95 N.M. at 82, 619 P.2d at 186.

c. We also hold that substantial evidence supports a finding beyond a reasonable doubt that Defendant carried a firearm in the lounge. Mr. Rueda and Ms. Amalla met Defendant outside the lounge. Defendant was carrying a bag. He took it inside the lounge. Later, when Officer Holguin searched the inside of the car, he found a bag. It contained a handgun. Although neither Mr. Rueda nor Ms. Amalla could identify the bag at trial, they testified that the bag did not belong to them. A reasonable inference is that it was the same one Defendant carried in the lounge. Also, since the bag contained a handgun when Officer Holguin conducted his search, and since Mr. Rueda and Ms. Amalla testified that the gun did not belong to them, it is reasonable to infer the bag contained the handgun when Defendant carried it in the lounge. *See State v. Paul*, 82 N.M. 619, 623, 485 P.2d 375, 379 (Ct.App.) (evidence connecting defendant to crime, although circumstantial, could properly serve as basis for inference of fact essential to establishment of offense), *cert. denied*, 82 N.M. 601, 485 P.2d 357 (1971). We hold that this element also is supported by substantial evidence.

6. *INSTRUCTIONS*

Defendant raises five issues concerning the adequacy of the trial court's instructions to the jury. Defendant contends that the trial court erred in its instructions on the charge of negligent use of a deadly weapon. He has moved that we certify these issues to the Supreme Court. *See* NMSA 1978, § 34–5–14(C) (Repl.Pamp.1990). We deny Defendant's request.

a. Defendant first argues that the trial court should have modified SCRA 1986, 14–703 to add the word "negligently." However, the trial court is required to give uniform jury instructions on the elements without modification. SCRA 1986, 14–101 to –9004 general use note. SCRA 14–703 is the elements instruction for the offense of negligent use of a deadly weapon. Further, addition of the word "negligently" was unnecessary since Section 30–7–4(A)(2) defines negligent use of a deadly weapon as "carrying a firearm while under the influence of an intoxicant or narcotic." The proscribed conduct is negligence per se. The trial court did not err in refusing Defendant's requested instruction.

b. Defendant also contends that the trial court erred in refusing his requested instruction defining negligence. As stated above, Uniform Jury Instruction 14–703 adequately defined negligence for the jury.

c. Defendant next argues that the trial court erred in refusing his requested instruction that the odor of alcohol on one's breath is not a sufficient basis for finding intoxication. *See Lopez v. Maes,* 81 N.M. 693, 699–701, 472 P.2d 658, 664–65 (Ct.App.), *cert. denied,* 81 N.M. 721, 472 P.2d 984 (1970). However, the odor of alcohol was not the only indication that Defendant was under the influence. Officer Holguin testified that Defendant had bloodshot eyes, disregarded his instructions, was very talkative, and mocked the officers. Other indicators were Defendant's voice and speech patterns. The officer stated his opinion that Defendant was under the influence. A party is entitled to an instruction on his theory of the case only if there is evidence to support it. *State v. Ontiveros,* 111 N.M. 90, 93, 801 P.2d 672, 675 (Ct.App.), *cert. denied,* 111 N.M. 77, 801 P.2d 659 (1990). Defendant's requested instruction was correctly refused because it misrepresented the evidence before the jury. *See State v. Kraul,* 90 N.M. 314, 317, 563 P.2d 108, 111 (Ct.App.) (instruction which is confusing is properly refused), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977).

d. Defendant additionally contends that the trial court erred in refusing to submit Element No. 3 of the Uniform Jury Instruction for unlawful carrying of a firearm in a licensed liquor establishment. *See* SCRA 1986, 14–702. Defendant argues that legal authority was an issue in this case because there was evidence that he was seen with the gun in the parking lot, a place he could lawfully possess one. *See* § 30–7–3(A)(4). Instruction No. 5 adequately instructed the jury on Defendant's right to possess a firearm in the parking lot. "Instructions are sufficient if, when considered as a whole, they fairly present the issues and the applicable law." *State v. Lucero,* 110 N.M. 50, 52, 791 P.2d 804, 806 (Ct.App.), *cert. denied,* 110 N.M. 44, 791 P.2d 798 (1990).

e. Defendant contends that the trial court erred in refusing his requested instruction differentiating between possession of a firearm in a licensed liquor establishment and possession in the parking lot. We agree with the State that the issue of possession of a firearm in the parking lot was adequately presented to the jury in Instruction No. 5. *See id.*

7. *INCOMPLETE RECORD*

The parties seem to agree that a portion of the parties' discussion concerning jury instructions is missing from the record. Citing *State v. Moore,* 87 N.M. 412, 534 P.2d 1124 (Ct.App.1975), Defendant contends he has been denied due process and his right to appeal. *See also Manlove v. Sullivan,* 108 N.M. 471, 474 n. 1, 775 P.2d 237, 240 n. 1 (1989). The State responds that Defendant can show no prejudice from the incomplete record.

It appears that the missing portion of the record dealt solely with jury instructions. Defendant's requested instructions are contained in the record proper. He has fully argued several instructions issues in this appeal. The State does not assert that any of those issues were not preserved. Moreover, this Court can consider Defendant's arguments by reviewing the instructions in light of the testimony at trial. We also note that before numbering the instructions, the trial court gave each party an opportunity to state its objections on the record. In short, Defendant has not demonstrated how the missing portions of the record prejudiced him. This case is distinguishable from *Moore,* where the complete absence of a transcript combined with the inability of this Court to review the Defendant's contentions without a transcript made any attempt at review impossible. *Moore,* 87 N.M. at 412–13, 534 P.2d at 1124–25. We conclude that Defendant has not established a deprivation of due process or of his right to appeal.

8. ***CUMULATIVE ERROR***

Finding no error, we find no cumulative error. *See State v. Larson,* 107 N.M. 85, 86, 752 P.2d 1101, 1102 (Ct.App.1988).

CONCLUSION

We affirm Defendant's convictions for negligent use of a deadly weapon and unlawful carrying of a firearm in a licensed liquor establishment.

IT IS SO ORDERED.

ALARID, C.J., and MINZNER, J., concur.

853 P.2d 135

STATE of New Mexico, Plaintiff–Appellee,

v.

Jay Allen ANDERSON, Defendant–Appellant.

No. 12899.

Court of Appeals of New Mexico.

Jan. 28, 1993.

Certiorari Granted March 11, 1993.

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

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Dan Cron, Rothstein, Walther, Donatelli, Hughes, Dahlstrom & Cron, Santa Fe, William C. Thompson, University of California, Irvine, CA, for defendant-appellant.

OPINION

CHAVEZ, Judge.

The opinion filed on December 14, 1992 is hereby withdrawn and this opinion is filed in its place. In this case we review the trial court's decision regarding the admissibility of some of the State's evidence that Defendant was the perpetrator of particular crimes. Specifically, that evidence was the result of forensic deoxyribonucleic acid analysis, known as DNA fingerprinting, matching, profiling, or evidence. It stated that Defendant's DNA matched DNA from samples taken from the victim and that there was an extremely high probability that the match was not a coincidence. After the trial court admitted the evidence, Defendant pled no contest to one count each of kidnapping, second degree criminal sexual penetration, aggravated battery, and extortion, and two counts of first degree criminal sexual penetration. He reserved his right to appeal. In his docketing statement, he raised seven separate issues. He did not brief the sentencing issue, and thus has abandoned it. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). Because we do not find general scientific acceptance of the FBI database, we reverse the trial court's order admitting the DNA evidence and remand for further proceedings.

JURISDICTION

Preliminarily, we dispose of the State's argument that we have no jurisdiction to consider Defendant's appeal because a jury never had the chance to consider the DNA evidence. The State posits that since a jury has never considered the evidence, there is no way we can tell whether any error would be harmless. The difficulty with the State's argument is that it does not recognize that the State made a bargain with Defendant. He pled nolo contendere to fewer charges than those in the indictment. If he were to lose this appeal, he would have no further right to trial. The State could have prosecuted on all charges, and did not have to agree to the plea. The State saves prosecutorial resources and avoids the possibility, no matter how slight the State thinks it is in retrospect, that a jury could acquit Defendant. This court considers a vast number of appeals in which a defendant pleads guilty or nolo contendere with reservation of a right to appeal an evidentiary ruling. We can discern no difference between such cases and this one. In agreeing to have Defendant plead nolo contendere, the State has waived its chance to argue harmless error. We have jurisdiction to consider this appeal.

THE THRESHOLD FOR ADMISSION OF SCIENTIFIC EVIDENCE

There are many thoughtful opinions explaining what DNA is and how laboratories process it for forensic use. *See generally United States v. Yee,* 134 F.R.D. 161 (N.D.Ohio 1991); *People v. Axell,* 235 Cal. App.3d 836, 1 Cal.Rptr.2d 411 (1991); *Commonwealth v. Curnin,* 409 Mass. 218, 565 N.E.2d 440 (1991); *People v. Mohit,* 153 Misc.2d 22, 579 N.Y.S.2d 990 (Westchester County Ct.1992); *State v. Pierce,* 64 Ohio

St.3d 490, 597 N.E.2d 107 (Ohio 1992). Rather than repeat these explanations, we refer the reader to these cases. The question is whether such evidence is generally accepted in the scientific community, and thus admissible in New Mexico.

New Mexico is a *"Frye"* state, which is to say that we determine whether scientific evidence is admissible according to the standard announced in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). *See State v. Lindemuth,* 56 N.M. 257, 243 P.2d 325 (1952). According to that standard, we admit scientific evidence if the principles behind it are "accorded general scientific recognition." *Id.* at 274, 243 P.2d at 336. This approach is the subject of some criticism. *See generally* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence,* ¶ 702[03] (1991). However, the *Frye* standard is still good law in New Mexico. *Fuyat v. Los Alamos Nat'l Lab.,* 112 N.M. 102, 811 P.2d 1313 (Ct.App.1991); *State ex rel. Human Servs. Dep't v. Coleman,* 104 N.M. 500, 723 P.2d 971 (Ct.App.1986); *State v. Blea,* 101 N.M. 323, 681 P.2d 1100 (1984). *But see State v. Dorsey,* 87 N.M. 323, 532 P.2d 912 (Ct.App.), *aff'd,* 88 N.M. 184, 539 P.2d 204 (1975); Leo M. Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence,* 6 N.M.L.Rev. 187 (1976) (arguing that by adopting the federal rules of evidence New Mexico had abandoned the *Frye* test in favor of a more liberal relevancy test). Until our Supreme Court sees fit to change the standard, and finding no quarrel with it, we are bound by *Frye. See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

Our Supreme Court has stated that in order for a scientific principle to be accepted as reliable, it must be "well-recognized." *Blea,* 101 N.M. at 326, 681 P.2d at 1103. This is because "[a]t some point, a new scientific technique becomes reliable enough to be used in court." *Simon Neustadt Family Ctr., Inc. v. Bludworth,* 97 N.M. 500, 504, 641 P.2d 531, 535 (Ct.App. 1982), *overruled on other grounds, Melnick v. State Farm Mut. Auto. Ins. Co.,* 106 N.M. 726, 749 P.2d 1105 (1988). Neither *Frye* nor its subsequent application by the courts of New Mexico provide much illumination on what this test means functionally. Romero, *supra,* at 190. "The percentage of those in the field who must accept the technique has never been clearly delineated." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,* 80 Colum.L.Rev. 1197, 1210–11 (1980) (footnote omitted). We turn therefore to the reason behind the *Frye* standard to determine just how much support there has to be for a scientific principle before evidence based on the principle is admissible.

Scientific evidence has an air of credibility to it that lay evidence does not enjoy. Ronald N. Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases,* 8 Utah L.Rev. 313, 322 (1963–64). This is particularly true when a computer is used to isolate complicated and "unique" human characteristics. *See* Jayne L. Jakubaitis, Note, *'Genetically' Altered Admissibility: Legislative Notice of DNA Typing,* 39 Clev.St.L.Rev. 415, 418–19 (1991) ("DNA typing appears to be potent evidence as jurors have shown substantial reliance on it and defendants often plea bargain rather than face trial by DNA.") (footnotes omitted); Claudia Rayford-Williams & Andreas V. Smith, *It's All in the Genes: The Application of DNA Fingerprinting in the Courtroom,* 34 How.L.J. 139, 151 (1991). A lay jury can implicitly pass judgment on lay evidence, but must leave to faith much of what occurs in the "black box" of science because its processes are not susceptible to lay understanding. *See generally* William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials,* 11 Law & Hum. Behav. 167 (1987) (empirical data showing lay juror tendencies to misunderstand statistical evidence). Our Supreme Court noted this concept as a reason for the inadmissibility, under the *Frye* standard, of testimony given under the influence of sodium pentothal, a so-called truth serum. *Lindemuth,* 56 N.M. at 273–74, 243 P.2d at 335–36. Others have echoed the same concern with respect to DNA evidence. *See, e.g., Curnin,* 565 N.E.2d at 442–43 n. 7; Janet

C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant,* 42 Stan. L.Rev. 465 (1990) (included among criticisms of many other aspects of DNA evidence). If a scientific principle has gained general acceptance in the scientific community, there is some assurance that the jury will not embroil itself in the question of the validity of the principle. Further, the jury's inclination to be awed by the principle will not be as problematic if scientists generally accept it.

In effect, then, the *Frye* process endorses the soundness of the scientific principle that is at the root of the evidence, and the jury is not required to pass on the scientific reliability of the process involved. *Coleman,* 104 N.M. at 503, 723 P.2d at 974. With this in mind, we consider options on what general acceptance in the scientific community ought to mean.

One option is that articulated in the magistrate's report and recommendation that the district court adopted as its own in *Yee.* Studying closely the mechanics of the decisions in the federal sixth circuit court of appeals, the magistrate determined that the scientific community need not unanimously accept the scientific principle. Defendant in this case does not contend that unanimity is necessary either. However, the magistrate in *Yee* stated that there is no general acceptance "only where the evidence has been manifestly unsupported outside the proponent's own laboratory." *Yee,* 134 F.R.D. at 199 (Magistrate's Report and Recommendation). This liberal view stands the general acceptance threshold on its head. In a given case, if there is little evidence of resistance to acceptance in the scientific community, then perhaps a lone voice outside the proponent's own laboratory could be compelling. In another case, however, there may be abundant evidence that scientists do not accept a particular principle. A lone voice of acceptance outside the proponent's own laboratory, in the face of overriding disapproval, should not compel a ruling that the principle is generally accepted.

The sixth circuit model appears to lower the generally accepted threshold. This lower threshold does not prevent a jury from considering scientific evidence that the scientific community, but for the principle's proponent and a few others, finds generally unacceptable. We are bound by *Lindemuth* to protect juries from evidence that the scientific community does not generally find acceptable. *See Alexander v. Delgado.*

The approach in *Yee* does not serve the *Lindemuth* policies. Also, the approach does not appear to be in step with sound decisions assessing the state of scientific developments in other contexts. Therefore, we decline to follow *Yee.*

The threshold that defendant urges upon us finds its origin in California. The courts in that state have expressed the threshold as being much higher than the sixth circuit's threshold. A scientific principle must have the support of the clear majority of scientists. *People v. Guerra,* 37 Cal.3d 385, 208 Cal.Rptr. 162, 690 P.2d 635 (1984) (en banc). *See also* Mary A. Williams, *Conviction by Chromosome,* 18 Student Law., Dec. 1989, at 26, 28 (1989). If there is a significant body of scientific thought opposing the principle, there is no clear majority. *Axell,* 1 Cal.Rptr.2d at 421. We agree that absent a clear majority of scientific support and in the face of a significant body of opposing scientific thought, a jury will struggle with issues of whether the scientific principle is legitimate. Or worse, the jury will be awed by scientific evidence that has not received a consensus endorsement and attach too much weight to such evidence. *See Symposium on Science and the Rules of Evidence,* 99 F.R.D. 187 (William A. Thomas ed., 1983) (mistakes, if they are to be made, should be on the side of failure to admit reliable evidence rather than failure to exclude unreliable evidence). These are the evils that our Supreme Court sought to prevent in *Lindemuth. Guerra* and *Axell,* more in line with New Mexico law, are more persuasive to us. Indeed, the State in this case embraces the "clear majority" threshold in its answer brief. We hold that

evidence must be accepted by a clear majority of the scientific community before we can consider it generally accepted or recognized.

STANDARD OF REVIEW

The parties disagree over what the standard of review should be. The State argues for a standard which states that we cannot reverse a trial court's ruling absent an abuse of discretion by the trial court. This is a general proposition applicable to most reviews of evidentiary rulings. *See State v. Jett,* 111 N.M. 309, 805 P.2d 78 (1991). Other jurisdictions have applied an abuse of discretion standard to review trial court decisions on whether scientific evidence is properly admissible. *See, e.g., State v. Montalbo,* 73 Haw. 130, 828 P.2d 1274 (1992); *People v. Lipscomb,* 215 Ill. App.3d 413, 158 Ill.Dec. 952, 574 N.E.2d 1345, *cert. denied,* 141 Ill.2d 553, 162 Ill. Dec. 501, 580 N.E.2d 127 (1991); *Kelly v. State,* 792 S.W.2d 579 (Tex.Ct.App.1990) (applying relevancy standard, not *Frye* standard), *aff'd,* 824 S.W.2d 568 (Tex.Crim. App.1992) (en banc). Defendant, on the other hand, argues that our review is de novo. He cites to *State v. Alberico,* —— N.M. ——, 861 P.2d 219 (App.1991), *cert. granted,* Sup.Ct. No. 20,282, —— N.M. ——, —— P.2d —— (January 16, 1992), as support.

[redacted] We agree that *Alberico* controls. The issue in that case concerned the admissibility of testimony from a mental health provider to the effect that because an alleged victim suffered rape trauma syndrome, someone raped rather than engaged in consensual intercourse with the alleged victim. Our review of the admission of such testimony was by way of a de novo appellate determination of the scientific support for the principle at issue. *Id.; cf.* Giannelli, *supra,* at 1222 (footnote omitted) ("The scope of appellate review of a trial court's application of the *Frye* test is another issue that has received minimal analysis but has generated much confusion."). Regardless of the extent of the use of de novo review, there is much to say in its favor.

The *Frye* test requires us to determine the level of acceptance of a particular procedure according to the science at the time. A ruling on that question should be the law until the scientific acceptance has significantly changed. Otherwise, every time such evidence is sought to be admitted, a trial court must undertake another *Frye* determination. This would waste judicial resources and prejudice impecunious criminal defendants. Moreover, the same evidence of acceptance by a global scientific community should apply to all cases at a particular juncture in the scientific progress on the subject. Yet under an abuse of discretion standard, we could affirm differing results on that same evidence. With de novo review, there is a centralized and final determination of the state of the scientific acceptance of a particular principle at a given point in time. *See* Giannelli, *supra,* at 1222–23.

There are two other facets of de novo review we should note. First, the trend is to review not only the testimony of experts at trial, but also the learned writings and judicial opinions on the subject. *See Coleman,* 104 N.M. at 502–03, 723 P.2d at 973–74; *see also Axell,* 1 Cal.Rptr.2d at 421–22; *Curnin,* 565 N.E.2d at 443. This makes sense because inclusion of learned writings and judicial opinions into the deliberation can allow a broader view of the acceptance of a scientific principle. Such expanded review also allows both sides of the question a more equal access to evidence rather than giving the advantage to the party that can afford to bring the best or most experts to trial. Finally, we do not review the level of acceptance of a particular result that a scientific principle creates. We do not try to sort out who is right or wrong. Instead, we review the level of acceptance of the scientific process. *See Guerra,* 690 P.2d at 656; *Axell,* 1 Cal. Rptr.2d at 421. In this regard, the party seeking admission of the evidence has the burden of proof of general scientific acceptance. *See Curnin,* 565 N.E.2d at 443. Once a particular scientific principle gains general acceptance or recognition, whether

the particular test result is right or wrong is a question for the jury. *See Yee,* 134 F.R.D. at 196.

THE EVIDENCE OF GENERAL SCIENTIFIC ACCEPTANCE

a. Expert Testimony at Trial.

The State presented three experts, one of whom was a rebuttal witness. The first was Stephen Daiger, Ph.D., a professor at the University of Texas. He is an expert in DNA laboratory procedures, analysis and typing, and population genetics. He generally testified about the method the FBI uses to extract DNA and ready it for inspection in a form appropriate for matching with other DNA samples. He explained that a person does initial screening to determine whether the samples ought to be included or excluded from further study. From what we can gather this appears to be a winnowing process by which the laboratory person excludes the most obvious nonmatches. Then a computer does further analysis to find closer matches. Dr. Daiger stated that within this preliminary process there are many controls to assure that the matches are valid.

After the match, if any, is made, the FBI undertakes a statistical analysis to determine what the chances are that the match is a coincidence. That is, the laboratory calculates how likely it would be that two DNA samples of the subject's type (defendant) would match on the computer and not be from the same person. There was evidence that the result of such a statistical analysis on defendant yielded a one in 6.2 million chance. Dr. Daiger testified that the procedure he outlined erred, if at all, to the benefit of defendants and was generally accepted in the scientific community.

The second witness for the State was Harold Deadman, Ph.D. His doctorate is in organic chemistry and he is a special agent for the FBI department that does DNA analysis. The trial court qualified him as an expert in DNA typing technology. He also described the process of separating out a DNA sample, the visual matching, and then the computer matching. He explained techniques that the FBI uses to assure accurate results. On cross examination, he stated that there was a chance for error, but that error would be obvious and either invalidate the whole test or merely show that the subject sample did not match with any other sample. Finally, he stated that the process was very well-accepted in the scientific community and was very reliable, conservative, and tended to favor defendants.

On rebuttal, the State called Bruce Budowle, Ph.D., an FBI director of research in DNA technology and author of learned writings on the FBI's DNA analytical process. *See, e.g.,* Bruce Budowle et al., *Fixed Bin Analysis for Statistical Evaluation of Continuous Distributions of Allelic Data from VNTR Loci for Use in Forensic Comparisons,* 48 Am.J.Hum.Genetics 841 (1991). The trial court qualified Dr. Budowle as an expert in human genetics, human population genetics, forensic application of DNA typing, and statistics. He stated that there was no evidence of any flaws in the statistics on which the FBI relied. He did not state that the FBI's statistical methods were generally accepted in the scientific community.

Defendant called four witnesses who were critical of the FBI's DNA evidence techniques. One witness was Randall Libby, Ph.D., a research fellow at the University of Washington. The trial court qualified Dr. Libby as an expert in molecular biology and forensic DNA testing. He testified that the scientific community was not ready to accept the FBI's testing procedures without more extensive protocol safeguards. One shortcoming he mentioned was the absence of adequate proficiency testing.

Another defense witness was Laurence D. Mueller, Ph.D., a professor at the University of California, Irvine. The trial court qualified him as an expert in evolutionary biology and population genetics. His main concern with the FBI analytical techniques is that the FBI has yet to validate a number of assumptions underlying their calculations. He stated that this concern was likely to be shared by other population geneticists. In an article that he has

published on the subject, he saw the problems with assumptions in the calculations as having an effect on the statistical frequency of DNA print matches. *See* Laurence D. Mueller, *Population Genetics of Hypervariable Human DNA,* in *Forensic DNA Technology* (1991).

Charles Taylor, Ph.D., a professor at the University of California, Los Angeles, was also a defense witness. He has expertise in population genetics and the application of statistics and probability theory to biology and genetics issues. The trial court qualified him as an expert in statistics and population genetics. Dr. Taylor's criticism of the FBI's methods was perhaps the sharpest of all the defense witnesses. He testified that the FBI's approach to statistical analysis is invalid and that the scientific community has yet to accept it. He stated that he was "quite certain" that the FBI's methods would not be acceptable to the scientific community. In detailing his concerns about the FBI statistical methods, he characterized them as "blatantly wrong" and having "very serious" problems.

Finally, Defendant called Seymour Geisser, Ph.D., a professor at the University of Minnesota. He has expertise in statistical methodology related to the biomedical and life sciences. The trial court qualified Dr. Geisser as an expert in statistics, biostatistics, and probability theory. He did not think the DNA statistical probabilities in this case are valid. He testified that the FBI procedures for computing statistics in forensic cases generally are not acceptable to the scientific community. He focused his criticism on some assumptions the FBI has used for drawing statistical conclusions. *See also* Seymour Geisser, *Some Remarks on DNA Fingerprinting,* 3 Chance: New Directions for Stats. & Computing 8 (1990).

b. Rulings from Other Jurisdictions.

It is clear that the weight of authority favors admission of DNA evidence. *See Axell,* 1 Cal.Rptr.2d at 423 n. 7 (citing numerous cases); *Hopkins v. State,* 579 N.E.2d 1297 (Ind.1991); *Smith v. Deppish,* 248 Kan. 217, 807 P.2d 144 (1991); *Commonwealth v. Rodgers,* 413 Pa.Super. 498, 605 A.2d 1228 (1992); Jakubaitis, *supra,* at 422–23; Lee Thaggard, Comment, *DNA Fingerprinting: Overview of the Impact of the Genetic Witness on the American System of Criminal Justice,* 61 Miss.L.J. 423, 440 (1991) (citing unreported Mississippi decisions admitting DNA evidence). At first blush, it appears attractive to side with this authority and rule similarly. However, close scrutiny of these decisions reveals their weakness as guiding, persuasive authority. First, in our canvass of the precedents, we find many decisions based on a record devoid of expert evidence from the party resisting admission of DNA evidence. *See, e.g., State v. Davis,* 814 S.W.2d 593 (Mo.1991) (en banc), *cert. denied,* — U.S. —, 112 S.Ct. 911, 116 L.Ed.2d 812 (1992); *Glover v. State,* 787 S.W.2d 544 (Tex.Ct.App.1990), *aff'd* 825 S.W.2d 127 (Tex.Crim.App.1992); *Spencer v. Commonwealth,* 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied,* 493 U.S. 1036, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990); *see also Curnin,* 565 N.E.2d at 442 n. 5 (citing cases). As we have suggested above, it appears that the effort to muster a case against admission of DNA evidence demands well-funded research. Thaggard, *supra,* at 429–30. We hesitate to follow cases that, at least in part, could be based on the complete absence of opposing scientific perspectives. *See People v. Pizarro,* 10 Cal.App.4th 57, 12 Cal.Rptr.2d 436 (1992) (remanding for *Frye* hearing because it was unacceptable to appellate court that only one expert, an FBI scientist, testified below).

Second, almost all of the cases that have admitted DNA evidence have dealt with one of the two main commercial laboratories that do DNA analysis, Cellmark Diagnostics Corporation (Cellmark) and Lifecodes Corporation (Lifecodes). *See, e.g., Commonwealth v. Rodgers,* 605 A.2d at 1236 (admitting Lifecodes analysis); *Cobey v. State,* 80 Md.App. 31, 559 A.2d 391 (Ct. Spec.App.) (admitting Cellmark analysis, no expert evidence on defense), *cert. denied,* 317 Md. 542, 565 A.2d 670 (1989); *see also Curnin,* 565 N.E.2d at 442–43 (excluding Cellmark analysis, no expert evidence pre-

sented by prosecution to support Cellmark's conclusion). There are many similarities among Cellmark, Lifecodes, and FBI analytical procedures. However, there appear to be important differences as well. One significant difference is that the Cellmark and Lifecodes laboratories use different databases than the FBI. *See Caldwell v. State,* 260 Ga. 278, 393 S.E.2d 436 (1990). The evidence in this case revealed further differences, the full importance of which the parties do not explain and which are difficult to understand. However, it is evident that the laboratories proceed differently. We will not say that a clear majority of the scientific community accepts the FBI's procedure because cases admit evidence that Cellmark and Lifecodes produced. *Cf. Pizarro,* 12 Cal.Rptr.2d at 449 (if new procedure at issue differs from similar procedure already passing *Frye* scrutiny, new procedure must undergo independent *Frye* scrutiny).

Finally, within the cases that admit DNA evidence, there is a subclass of cases that admit DNA evidence under a standard different than the *Frye* standard. *See, e.g., United States v. Jakobetz,* 747 F.Supp. 250 (D.Vt.1990), *aff'd* 955 F.2d 786 (2d Cir. 1992), *cert. denied* — U.S. ——, 113 S.Ct. 104, 121 L.Ed.2d 63 (1992); *Andrews v. State,* 533 So.2d 841 (Fla.Dist.Ct.App.1988), *cert. denied,* 542 So.2d 1332 (Fla.1989); *Pierce,* 597 N.E.2d at 112. Known as the "relevancy" standard, this other standard is thought to be more permissive than the *Frye* standard. *Andrews,* 533 So.2d at 846. *See generally* Giannelli, *supra,* at 1232–45; Elizabeth M. Bezak, Note, *DNA Profiling Evidence: The Need for a Uniform and Workable Evidentiary Standard of Admissibility,* 26 Val.U.L.Rev. 595, 608–13 (1992). When it is the level of acceptance in the scientific community we are trying to gauge, cases that hold DNA evidence to be relevant regardless of the level of scientific acceptance are inapposite.

This leaves us with five reported cases that applied the *Frye* standard to the FBI's DNA analysis. A federal court of appeals held that admission of the DNA evidence produced by the FBI was reversible error in *United States v. Two Bulls,* 918 F.2d 56 (8th Cir.1990), *vacated and reh'g en banc granted,* 925 F.2d 1127, *appeal dismissed,* 925 F.2d 1127 (9th Cir.1991) (after death of appellant). The case does not go so far as to say that the scientific community had not generally accepted the FBI's DNA analysis. However, the record showed that only one witness for the proponent of the evidence testified. This was not enough for a proper determination of the level of acceptance by the scientific community. Thus, the court remanded the matter to the trial court to take further evidence. *Id.* at 61. This case supports our view that a sparse record in a *Frye* hearing should not justify admission of such new and complex scientific evidence. Without a definitive decision on how the scientific community feels about this case, however, *Two Bulls* does not affect the weight of information relevant to the acceptance in the scientific community of the FBI's methods.

Although it expressed some questions regarding the FBI procedure, the Supreme Court of Hawaii, using a modified *Frye* standard, affirmed the trial court's refusal to grant a motion in limine on the DNA testing performed by the FBI laboratory. *Montalbo,* 828 P.2d at 1283. The Hawaii court enumerated five factors which must be satisfied before expert scientific evidence can be admitted in that jurisdiction, then found that once these were satisfied, the jury could determine the reliability of the evidence. *Id.* at 1280. Using this procedure, the Hawaii Supreme Court held the district court had not abused its discretion in admitting this DNA evidence. *Id.* at 1283.

The opinion in *United States v. Yee,* is very thorough and we accord due weight to its decision to admit the FBI's DNA evidence. Applying the same threshold here, we would affirm the trial court because there is substantial support outside the FBI's own laboratory for their methods. *Yee,* 134 F.R.D. at 165–66. We do not, however, believe the threshold for admissibility adopted by the *Yee* court is consistent with New Mexico law, as we explained above.

In *Mohit,* the court found that the procedure used to match the defendant's DNA with a specimen from the victim was generally accepted within the scientific community and therefore met the *Frye* standard. *Mohit,* 579 N.Y.S.2d at 995. The court, however, rejected the statistical significance derived from the extrapolation of the FBI database. *Id.* at 998–99. Because we find the *Mohit* opinion focuses directly upon our concern in the present proceeding we quote extensively from Judge Silverman's opinion:

> The evidence shows that there is sharp disagreement within the scientific community on the manner in which probability estimates are derived. It would appear that while human geneticists, on the whole, would find the FBI estimates acceptable, a significant number of respected population geneticists would not. The impression this court is left with, based on the record before it, is that human geneticists, more involved in the practical applications of genetics in dealing with disease, are not as concerned as the population geneticists in being more precise in citing probability estimates. More than one prosecution witness, for example, saw little relevance in being off by a power of 10. If the number is still very high, say one million instead of 100 million, what difference does it make? To the population geneticist, the difference is theoretically important.
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> . . . .
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> Does it matter in a criminal case if a jury is told 1 in 67,000,000 or 1 in 100,000? In most cases, probably not. But in a case where there is no reliable evidence other than the DNA evidence, it might mean a great deal. The difference in numbers might suggest that in the metropolitan New York area there could be 50 or more people who have a matching DNA profile, instead of, in theory, only 1 in the entire country.

Id. The New York court recognized, we think correctly, that it is the statistical aspect of the FBI procedure which is changing most rapidly and is least accepted within the scientific community:

> The bottom line is that when speaking of probabilities in this context we are speaking of theories, not facts, in an area which is relatively new. There is still a great deal to be learned. As the size of databases grows over the years there is no question but that there will be significant changes in allele frequencies used to make computations. What the FBI reports as a 1 in 67,000,000 today, in a few years may be 1 in 670,000,000 or 1 in 6,700,000. It's hard to say. Further study on subgroups may reveal no significant differences or just the opposite. It may in time be generally accepted that no two people on earth will have the same DNA profile across 4 probes.

Id. at 999. The New York court held that the FBI comparison of the defendant's DNA and the specimens taken from the victim were admissible, but only if the most conservative statistics were presented. *Id.* This required the state's expert to testify that the probability of a match was 1 in 100,000 rather than 1 in 67,000,000. *Id.* While we think *Mohit* is right on target regarding the reliability of the FBI database, we cannot find widespread substantial scientific evidence to support acceptance of such totally disparate results in the present record.

In *Commonwealth v. Lanigan,* 413 Mass. 154, 596 N.E.2d 311 (1992), the court also found the process by which the FBI estimated the frequency of defendant's DNA profile in the general population had not found general acceptance in the field of population genetics. The Supreme Judicial Court of Massachusetts reviewed both the evidence and recently published scientific data. The Massachusetts court rejected *Yee* and concluded:

> [T]he lively, and still very current, dispute described above regarding the role of population substructure constitutes something much more than a lack of unanimity. We cannot say that the processes by which Cellmark and the FBI estimated the frequency of the defendants' DNA profiles has found "general

> acceptance" in the field of population genetics.

Id. at 316.

Defendant has provided us with copies of seven unreported trial court decisions regarding admission of the FBI's DNA evidence. Two of these cases did not apply the *Frye* standard. *See State v. Passino,* No. 185-1-90 Fcr (Vt.Dist.Ct. May 13, 1991); *State v. Wheeler,* No. C89-0901CR (Or.Cir.Ct. Mar. 8, 1990). We note, however, that even under the more relaxed relevancy standard, these courts refused to admit DNA evidence.

The other five cases all applied the *Frye* test and refused to admit the evidence. One of the opinions contains a broad based rejection of the FBI's procedures. Recognizing the high level of prejudicial impact of the statistics that the FBI produces, that trial court stated, "Clearly there is not general agreement among the experts presented as a part of the record here." *People v. Despain,* No. 15589, slip op. at 7 (Cal.Super.Ct. Feb. 12, 1991). The remaining opinions contained focused rejections of specific aspects of the FBI's procedures. One trial court criticized the FBI's method of declaring a match between two samples. The court stated, "There is a profound, significant and honestly-held disagreement among [scientists] as to whether the protocol employed by the F.B.I. to declare a match of DNA fragments between a known and an unknown source has gained general acceptance in their scientific community." *People v. Halik,* No. VA 00843, slip op. at 39 (Cal.Super.Ct. Sept. 26, 1991). All the remaining trial court opinions include specific criticisms of the way the FBI translates a match into a prediction of possible coincidence in the general population. One of those courts stated:

> In the final analysis the totality of the evidence yields the unmistakable conclusion that there is substantial disagreement within the scientific community as to the population genetics issues that are central to the F.B.I.'s method of calculating statistical probabilities. That disagreement is sincere and significant, and goes to the very basis of the F.B.I.'s procedures.

People v. Fleming, No. 90-CR-2716, slip op. at 35 (Ill.Cir.Ct. Mar. 12, 1991); *see also United States v. Porter,* No. F06277-89, 1991 WL 319015 (D.C.Super.Ct. Sept. 20, 1991); *State v. Hummert,* No. CR 90-05559 (Ariz.Super.Ct. Apr. 16, 1991).

The State points out that the foregoing cases have no precedential value, implying that we should ignore them because they are trial court opinions from other states. In determining the admissibility of new scientific evidence, it is important to review both scientific literature as well as judicial decisions to determine whether the procedure "has been generally accepted as reliable and probative in both the scientific community and the courts." *Coleman,* 104 N.M. at 503, 723 P.2d at 974 (footnote omitted). Moreover, our review of these opinions reveals that they are thoughtful, well-reasoned efforts. The trial courts each took a hard look at the evidence of acceptance in the scientific community. They are therefore an indication of judicial acceptance of such evidence. On balance, it appears that the cases that have considered the FBI's methods under the *Frye* test and have carefully reviewed an extensive record have refused to admit the DNA evidence.

c. Learned Writings.

There is a large body of scientific literature supportive of DNA evidence generally, and the FBI's methods specifically. This literature may be rendered down to the statement that "an innocent suspect has little to fear from DNA evidence, unless he or she has an evil twin." Neil J. Risch & B. Devlin, *On the Probability of Matching DNA Fingerprints,* 255 Sci. 717,720 (1992). Corroborating this sentiment are further articles about specific aspects of DNA evidence. An incomplete list of those articles includes the following: Dwight E. Adams, *Validation of the FBI Procedure for DNA Analysis: A Summary,* 15 Crime Laboratory Dig. 106 (1988); Ranajit Chakraborty & Kenneth K. Kidd, *The Utility of DNA Typing in Forensic Work,* 254 Sci. 1735

(1991); Robin W. Cotton et al., *Research on DNA Typing Validated in the Literature,* 49 Am.J.Hum.Genetics 898 (1991). There are also secondary legal sources that strongly urge the courts to acquiesce to that portion of the scientific community that accepts DNA evidence. *See* Andre A. Moenssens, *DNA Evidence and Its Critics—How Valid Are the Challenges?,* 31 Jurimetrics J. 87 (1990); Suzanne H. Stenson, Comment, *Admit It! DNA Fingerprinting Is Reliable,* 26 Hous.L.Rev. 677 (1989).

As previously indicated, there is also a body of scientific literature which criticizes certain aspects of DNA profiling techniques. In addition to the Mueller and Geisser articles previously cited, *see* Eric S. Lander, *Invited Editorial: Research on DNA Typing Catching Up with Courtroom Application,* 48 Am.J.Hum.Genetics 819 (1991); William C. Thompson & Simon Ford, *DNA Typing,* 24 Trial, Sept. 1988, at 56, 56–64 (calling for additional validation of DNA profiling); *Forensic DNA Typing,* 255 Sci. 1050 (1992) (series of letters arguing pros and cons of use of DNA techniques). "Until some of these problems are cured and a consensus of scientists in the community agree that the techniques are generally accepted, a jurisdiction strictly following *Frye* may not admit DNA profiling evidence." Thaggard, *supra,* at 435. On the other hand, there is a substantial body of literature that questions the FBI's methods.

What appears to be of particular concern to many scientists is the FBI's use of a limited database for comparison of the suspect's DNA sample with that of others. The FBI's own scientists stated, "At present, there are few data on the distribution of VNTR alleles for particular loci for various racial and ethnic groups. Therefore, *there is no evidence to support the assertion* that a sample population adequately represents the true population or other subpopulation groups." Bruce Budowle & Keith L. Monson, A Statistical Approach for VNTR Analysis 3 (unpublished manuscript) (emphasis added). These scientists assure the reader that the FBI employs a process called "binning" that compensates for the absence of knowledge of how the DNA of differing populations may appear. *Id.* at 4–8. Yet there is further literature that continues to focus on this difficulty in the FBI's methods.

One scientist, otherwise supportive of DNA evidence, stated "Racial classification alone is probably too crude a categorization [for DNA samples]; finer distinctions are probably required, especially for hypervariable loci at which many alleles have low frequency." Eric S. Lander, *Population Genetic Considerations in the Forensic Use of DNA Fingerprinting 6* (1988 manuscript). Other scientists echo this concern. One concluded that "some astronomically small probabilities of matching by chance, which have been claimed in forensic applications of DNA fingerprinting, presently lack substantial empirical and theoretical support." Joel E. Cohen, *DNA Fingerprinting for Forensic Identification: Potential Effects on Data Interpretation of Subpopulation Heterogeneity and Band Number Variability,* 46 Am.J.Hum.Genetics 358, 367 (1989); *see also* R.C. Lewontin & Daniel L. Hartl, *Population Genetics in Forensic DNA Typing,* 254 Sci. 1745 (1991). Commenting on the efficacy of the binning process, another scientist stated generally that there was no way of assuring that it was accurate. Laurence D. Mueller, *Population Genetics of Hypervariable Human DNA,* in *Forensic DNA Technology* (1991). In fact, one study suggests that the different attempts at identifying particular features of a subpopulation's DNA profile are merely exploratory. S.J. Odelberg et al., *Characterization of Eight VNTR Loci by Agarose Gel Electrophoresis,* 5 Genomics 915, 921 (1989). This last study suggests that not only is the database too limited, there still remain difficulties in making it sound.

While this case was pending on appeal, a group of scholars that are part of the National Academy of Sciences released a prepublication manuscript of a report on DNA evidence. *See* Committee on DNA Technology in Forensic Science, National Research Council, *DNA Technology in Forensic Science* (forthcoming). The group

of scholars included many highly regarded names in science, medicine, and law. The bulk of the report urges the continued development of DNA evidence for forensic use. However, the report does include some criticisms of current methods of DNA typing. Again, the authors focus on one of the main criticisms, the absence of reliable subpopulation databases. *Id.* at § 3.2. The report discusses the debate over the need for subpopulation databases, and concludes that they indeed are necessary. This report is indicative of the absence of general acceptance. There is not just one author trying to make a point, but rather a group of people that has reached a consensus in rejecting one aspect of the current methods of forensic use of DNA evidence.

APPLYING THE THRESHOLD TO THIS CASE

We could go on extensively with our review of the literature, but bow to the fact that we cannot completely cover a science that develops as we write. *See generally* Gina Kolata, *U.S. Panel Seeking Restriction on Use of DNA in Courts,* N.Y. Times, April 14, 1992, at A1, A6 (announcing publication of National Academy of Sciences report).

We do not hold that all DNA identification techniques fail to meet the required standard of general acceptance in the scientific community. Indeed, our legislature considers some DNA blood typing valid in parentage proceedings. *Compare* NMSA 1978, § 40–11–13(C) (Repl.Pamp. 1989) *with* Unif. Parentage Act § 12(3), 9B U.L.A. 317 (1973). Rather, we hold that, based on the record before us, the State failed to meet its burden of proving the current FBI database and binning methodology is generally accepted among respected scientists. Other appellate courts have similarly refused to admit DNA identification where the record failed to convince them one or more of the specific procedures at issue were generally accepted within the scientific community. *See, e.g., Pizarro,* 12 Cal.Rptr.2d at 436 (FBI database not sufficient to support admission of DNA evidence); *State v. Schwartz,* 447 N.W.2d 422 (Minn.1989) (DNA identification generally accepted but no showing laboratory complied with accepted quality control guidelines); *People v. Castro,* 144 Misc.2d 956, 545 N.Y.S.2d 985 (N.Y.Sup.Ct. 1989) (DNA identification generally admissible but testing laboratory failed to use generally accepted scientific techniques).

It is the FBI derivation of the population frequency statistics we find lacks general scientific acceptance based on the record before us. Not only would the improbability of a coincidental match, one in 6.2 million, have the potential to appear overly impressive to a jury, the respected scientists produced by the defense raised very serious doubt as to the acceptability of the statistical foundation for any such number based on the FBI procedure. Dr. Laurence D. Mueller, an associate professor at the University of California, Irvine, was qualified as an expert in evolutionary biology and population genetics. Dr. Mueller, who completed four years of post-doctoral work in the field of population genetics at Stanford University, testified that the FBI's procedure for computing statistics relies on unproven assumptions that were not generally accepted in the scientific community. Dr. Charles Taylor, a professor of biology at UCLA, was qualified as an expert in statistics and population genetics. Dr. Taylor, who is a specialist in population genetics and the application of statistics and probability theory to problems in biology and genetics, testified that the FBI's approach to computing statistics was neither valid nor accepted by the scientific community. Dr. Seymour Geisser, the director of the School of Statistics at the University of Minnesota, was qualified as an expert in the fields of statistics, biostatistics and probability theory. Dr. Geisser also testified that the FBI approach to computing the frequency of DNA prints is seriously flawed on several grounds and was not generally accepted in the scientific community.

We find such testimony as to the lack of statistical reliability, by such well-recognized scientists, troubling because, as the magistrate observed in *Yee,* "Without the

probability assessment, the jury does not know what to make of the fact that the patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." *Yee*, 134 F.R.D. at 181.

The State persists, however, by arguing that the accuracy of the DNA probability calculations goes to the weight of the evidence for the jury's consideration. *See State v. Chavez*, 100 N.M. 730, 676 P.2d 257 (Ct.App.1983). We disagree. As the *Pizarro* court recently pointed out, the database chosen by the FBI process (e.g., Black, Hispanic, etc.) depends upon the ethnicity of the defendant and not necessarily the ethnicity of the perpetrator of the crime. It is misleading, therefore, to inform the jury that the odds are 6.2 million to one that someone other than defendant perpetrated the crime, when those odds depend entirely on the fact that defendant is a non-Hispanic Caucasian. If, in fact, the crime was committed by someone of a different racial or ethnic database, then the appropriate subgroup, and thus the odds, would change, perhaps dramatically.

The literature is replete with hope that the laboratories will continue to develop their methods, publish their findings, and thus gain general scientific acceptance. We note that we only rule on the FBI's DNA analysis in the context of current scientific thought. Mindful of the action-forcing nature of decisions that reject DNA evidence, we quote the following: "Research teams in Britain and the United States are continuing their studies and remain confident that their accumulated data will show the probability of chance matches to be very low. Until such data is available, however, sweeping generalizations about the technique's accuracy seem premature." (footnote omitted) Dan L. Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 Jurimetrics J. 455, 466 (1988); *see also* John Brookfield, *Law and Probabilities*, 355 Nature 207 (1992) (offering a way to gather accurate data for representation of subgroups, but stating that this will delay the acceptance of DNA evidence).

Based on the testimony in this record regarding the lack of current scientific acceptance of the FBI database, we reverse the trial court's order admitting the FBI's DNA evidence and remand for such further proceedings, consistent with this opinion, as the trial court finds appropriate. Because of this disposition, we do not consider Defendant's arguments regarding his motions for reconsideration and rehearing. Additionally, we deny Defendant's request for oral argument.

IT IS SO ORDERED.

BLACK and FLORES, JJ., concur.

853 P.2d 147

STATE of New Mexico, Plaintiff–Appellee,

v.

Aaron DOMINGUEZ,

and

Robert Ortega, Defendants–Appellants.

Nos. 13251, 13294.

Court of Appeals of New Mexico.

March 19, 1993.

Tom Udall, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Dan Cron, Rothstein, Walther, Donatelli, Hughes, Dahlstrom & Cron, Santa Fe, for defendant-appellant Aaron Dominguez.

Susan Gibbs, Santa Fe, for defendant-appellant Robert Ortega.

OPINION

APODACA, Judge.

Defendant Ortega's motion for rehearing having been granted, our original opinion filed November 23, 1992, is withdrawn and the following substituted for it.

Defendants have separately appealed their respective convictions for aggravated battery with great bodily harm. Because the appeals raise several common issues, we have consolidated them on this Court's own motion. *See* SCRA 1986, 12–202(F)(2) (Repl.1992). The common issues are whether the trial court erred in: (1) not requiring the state to provide racially neutral explanations for its exercise of peremptory challenges against Hispanic jurors; (2) denying defendants' motion to sever their trials from that of one of their codefendants; and (3) refusing defendants' requested jury instruction. Although defendants have taken different approaches in arguing these issues, their basic contentions are virtually identical and we shall so treat them in our discussion.

Dominguez raises the following additional issues: whether (1) sufficient evidence supported his conviction and (2) the trial court erred in denying his motion to dismiss the grand jury indictment. Another issue listed by Dominguez in the docketing statement but not briefed is deemed abandoned. *See State v. Fish,* 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). Dominguez also expressly abandoned another issue in his reply brief. Ortega also raises the issue of the legality of his sentence. Because we are unpersuaded by defendants' arguments with respect to each issue, except for Ortega's sentencing issue, we affirm both defendants' convictions. We remand for further sentencing proceedings in Ortega's appeal. Dominguez filed a motion for designation of nondocumentary exhibit, which motion was held in abeyance pending submission of his appeal to a panel for disposition. We deem the exhibit unnecessary to our disposition and therefore deny the motion.

FACTS

On the night of June 29, 1989, Paul Mascarenas, Jr., and his younger brother, Eric Mascarenas, were cruising and drinking beer in Penasco, Taos, and Rodarte. Eric testified that they bought three or four quarts of beer in Taos between 8 and 9 p.m., and went to the Rodarte Tavern to buy more beer at about midnight. While Paul went into the bar, Eric and a female companion waited in the car. When Paul returned, he was not wearing a shirt and had scratches on his body. Paul and Victor Cordova, one of a total of seven codefendants (including defendants in this appeal), had engaged in a "friendly" wrestling match in the parking lot of the bar. Paul and Cordova hugged and shook hands after the match. Eric became upset when he saw his brother's condition, although Paul told him the fight was "nothing" and "stupid." Eric got out of the car and challenged some of the assembled crowd to fight. Several witnesses testified that Eric was throwing "karate kicks," none of which landed on any person.

Eric testified that, following the argument, he and Cordova began fighting in one location, and everyone else rushed Paul. Eric, a state wrestling champion, was getting the better of Cordova until he was pulled off by Dominguez and hit by Alex Valdez with a jack. Eric ran to his car to get a baseball bat. At the same time, he saw a group of men, including defendants, "hitting and kicking" at Paul. Before the fight, two witnesses saw

George Lopez, another of the codefendants, with a knife. One of them testified that Lopez, apparently referring to one of the Mascarenas brothers, said: "If he comes at me, I'll fuck him up." Other codefendants were seen with a jack or pipe that night.

After the fight involving Paul broke up, he, Eric, and their female companion drove off. Paul lost control of the car less than 400 yards away, but Eric was able to stop it to prevent an accident. Paul had been stabbed eight times and was bleeding profusely. He died as a result of the stab wounds before help could arrive. While they were stopped on the side of the road, a car containing Dominguez, Cordova, Alex Martinez, and Alfred Garcia drove by. Dominguez reportedly said: "That's what they get." The occupants of the car understood Dominguez to mean that the Mascarenas brothers were having car trouble for having caused the fight. Eric also testified that, before the fight, Dominguez yelled something in Spanish, which Eric did not understand, in a tone that sounded like cursing.

Dr. Zumwalt, the pathologist who performed the autopsy on Paul's body, testified that either of two stab wounds could have caused death. Paul also suffered numerous bruises and contusions, one of which was a "pattern" injury on his forearm, which was consistent with having been hit by a tire iron or pipe. Dr. Zumwalt said Paul did not suffer any great bodily harm apart from the stab wounds.

Defendants and the five codefendants were jointly indicted for aggravated battery and conspiracy to commit aggravated battery. George Lopez was also indicted for Paul's murder. Defendants were jointly tried with George Lopez, Herbert Lopez, and Victor Cordova. The state argued for the guilt of all defendants other than George Lopez on an aiding and abetting theory, and the jury was so instructed. Ortega and Dominguez were convicted of aggravated battery.

COMMON ISSUES

1. *The State's Peremptory Challenges.*

The jury venire consisted of seventy-four persons. The trial court excused twenty potential jurors for cause. Of the fifty-four remaining jurors, forty were Hispanic and fourteen were Anglo. The judge's memorandum of petit jury selection indicated there were at least twenty-two Hispanic males on the panel of fifty-four. The first juror called, Adelina Marquez, was excused by defendants. The next juror, Manuel Mares, was peremptorily challenged by the state. Two Hispanic men, one Hispanic woman, and one Anglo woman were selected before the state used its second peremptory challenge to strike Jake Ortega. Defendants objected and asked for a racially neutral explanation for the strike. The prosecutor explained that his office had previously prosecuted Ortega and that he had failed to disclose this fact during voir dire.

Maysel Hernandez, Lawrence Fawcett, Samuel Gallegos, Raymond Trujillo, and Terry Sanchez were chosen before the state used three more peremptory challenges against Adelaido Romero, Trinidad Martinez, and Ronald Vigil. Defendants again objected and asked that the state be required to give racially neutral explanations for these challenges. The prosecutor refused, and the trial court upheld this refusal. The trial court commented that it saw no pattern of racial discrimination because the state had already accepted many Hispanics for service. None of the challenged jurors were asked any questions by the prosecutor during voir dire.

Loretta Gonzales and Ernestina Ortega were selected before the state exercised its sixth peremptory challenge against Francis Chacon.[1] Defendants renewed their objection, which was again denied by the trial court. Vincent Archuleta was chosen as the twelfth juror. Crucita Mondragon and Robert Jacobs were selected as alternates.

1. Although the trial court's jury selection memorandum indicates the masculine spelling of Francis, the juror was referred to as "she" during jury selection. Dominguez states that the jury questionnaire he received during voir dire indicates the juror was a male; however, the questionnaire is not part of the record on appeal. For purposes of our discussion, we assume Francis Chacon was a woman.

The jury ultimately seated consisted of six Hispanic men, four Hispanic women, and two Anglos. The alternate jurors were an Hispanic woman and an Anglo man.

In all, the state exercised six of its available seventeen peremptory strikes. Five of the six challenges were used against Hispanic men; the sixth was used against an Hispanic woman. Defendants argue that they established a prima facie case of discrimination under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), based on the state's pattern of strikes against Hispanic men. They assert that the trial court erred in not requiring the prosecutor to rebut the prima facie showing. The state, on the other hand, contends defendants did not establish a prima facie case.

The state's power to use peremptory challenges is limited by the Equal Protection Clause of the federal constitution. *Id.* at 84, 106 S.Ct. at 1716; *State v. Goode,* 107 N.M. 298, 300, 756 P.2d 578, 580 (Ct.App.), *cert. denied,* 107 N.M. 308, 756 P.2d 1203 (1988). A defendant may challenge the constitutionality of the state's selection of members of the petit jury when he shows he is a member of a cognizable racial group and establishes a prima facie case that potential jurors were excluded from the jury for racial reasons. *Goode,* 107 N.M. at 301, 756 P.2d at 581. Additionally, a potential juror may not be excluded on the basis of gender. *State v. Gonzales,* 111 N.M. 590, 599, 808 P.2d 40, 49 (Ct.App.), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991).

This Court has stated that:

> To establish a prima facie case, [a] defendant must show that: (1) he is a member of a cognizable racial group; (2) the state has exercised its peremptory challenges to remove members of that group from the jury panel; [and] (3) these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members from the panel solely on account of their race.

Goode, 107 N.M. at 301, 756 P.2d at 581. Once a defendant makes a prima facie showing that the state used its peremptory challenges improperly, the burden then shifts to the state to come forward with a racially-neutral explanation for its strikes. *Id.*

It is undisputed that defendants met the first two *Batson* criteria. *Batson,* 476 U.S. at 96, 106 S.Ct. at 1722–23. Our focus thus turns to the third factor. Some circumstances raising an inference of purposeful discrimination are: (1) a showing that the defendant's racial group is substantially underrepresented or eliminated entirely from the jury; (2) the susceptibility of the case to racial discrimination, as where the defendant and the victim are of different races; and (3) jurors of the defendant's race have been eliminated for reasons that are not applied to jurors of another race. *Goode,* 107 N.M. at 301, 756 P.2d at 581.

It is not necessary that all of the members of the cognizable racial group be removed or that the state use all of its peremptory challenges in order to establish a prima facie case. *Id.* Similarly, the fact that a defendant's racial group is not substantially underrepresented is not conclusive on the issue of the prima facie showing. *Id.* Striking a single juror for racial reasons violates equal protection. *Id.; see also United States v. Battle,* 836 F.2d 1084, 1085 (8th Cir.1987); *Stanley v. State,* 313 Md. 50, 542 A.2d 1267, 1283–84 (1988). In *Gonzales,* we held that an Hispanic defendant made out a prima facie case of discrimination by showing that the state exercised eighty percent of its peremptory challenges to eliminate Hispanics from the jury, even though the jury ultimately selected included four Hispanics and the state did not use all of its peremptory strikes.

Defendants concede that Hispanics were not underrepresented on the jury. Nor was this a case susceptible to racial discrimination because the victim, the defendants, and most of the witnesses were Hispanic. Defendants rely heavily on *Gonzales* in arguing that they established a prima facie case of discrimination. It is

undisputed that the state used its peremptory challenges to strike Hispanics. As we noted earlier, it also appears that none of the challenged jurors was individually questioned by the prosecutor on voir dire. *See State v. Aragon,* 109 N.M. 197, 201, 784 P.2d 16, 20 (1989) (prosecutor failed to engage jurors in more than a "random voir dire"); *State v. Sandoval,* 105 N.M. 696, 698, 736 P.2d 501, 503 (Ct.App.1987) (questions asked by prosecutor on voir dire should be considered in determining whether defendant has established a prima facie case); *cf. State v. Jim,* 107 N.M. 779, 782, 765 P.2d 195, 198 (Ct.App.) (fact that prosecutor failed to question Navajo on voir dire was insufficient under facts of the case to support inference of purposeful discrimination), *cert. denied,* 107 N.M. 720, 764 P.2d 491 (1988); *United States v. Young-Bey,* 893 F.2d 178 (8th Cir.1990) (fact that two stricken black jurors did not say anything on voir dire did not establish prima facie case).

We observe, however, that other circumstances tend to negate any inference of purposeful discrimination. Although the mere presence on the jury of members of the cognizable group is not conclusive, *see Gonzales,* 111 N.M. at 595, 808 P.2d at 45, such presence tends to undercut any inference of purposeful discrimination. *See United States v. Allison,* 908 F.2d 1531, 1537 (11th Cir.1990), *cert. denied,* — U.S. —, 111 S.Ct. 1681, 114 L.Ed.2d 77 (1991); *United States v. Dennis,* 804 F.2d 1208, 1211 (11th Cir.1986) (per curiam), *cert. denied,* 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987). Similarly, the fact that the prosecution did not use all of its available peremptory challenges weighs against a finding that a prima facie case has been established. *See State v. Lara,* 110 N.M. 507, 512, 797 P.2d 296, 301 (Ct.App.), *cert. denied,* 110 N.M. 330, 795 P.2d 1022 (1990); *United States v. Sangineto-Miranda,* 859 F.2d 1501, 1522 (6th Cir.1988); *United States v. Montgomery,* 819 F.2d 847, 851 (8th Cir.1987) (fact that government accepted jury including two blacks, when it could have used its remaining peremptory challenges to strike them, shows government did not attempt to exclude all blacks or to exclude as many as it could).

In this appeal, the state used only six of its seventeen challenges, or 35.3 percent, to strike Hispanics, and five of seventeen, or 29.4 percent, to strike Hispanic males. In *Gonzales,* we held that the state's use of eighty percent of its challenges to strike Hispanics was sufficient to establish a prima facie case. *See also Stanley,* 542 A.2d at 1278–799 (prima facie case made where state used eighty percent of peremptory challenges to strike blacks). We are not prepared to hold that the state's use of only 35.3 percent of its strikes to challenge Hispanics rises to the level of a prima facie showing of purposeful discrimination where the facts show that ten out of twelve jury members selected were Hispanic. *Cf. Sandoval,* 105 N.M. at 699, 736 P.2d at 505 (prima facie case established where prosecutor struck only two Hispanic jurors with chance of serving on the jury); *Battle,* 836 F.2d at 1085–86 (prima facie case established where government used five of six peremptories to strike five of seven blacks from panel).

Another relevant factor (in determining whether a prima facie showing has been made) is the racial makeup of the petit jury, as compared to the composition of the venire. "[L]ower courts are disinclined to find a prima facie [*Batson*] case . . . where the percentage represented on the petit jury turns out not to be below that on the panel." 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 21.3(d), at 254 (Supp.1991); *see Allison,* 908 F.2d at 1538 (no prima facie case where blacks were 21 percent of jury compared with 15 percent of venire); *Sangineto-Miranda,* 859 F.2d at 1522 (fact that percentage of minorities on ultimate jury is the same or greater than on the panel tends to negate inference of discrimination); *Williams v. State,* 258 Ga. 281, 368 S.E.2d 742, 747 (1988) (blacks constituted one-third of petit jury but only one-fourth of panel; no prima facie case), *cert. denied,* 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 606 (1989); *People v. Evans,* 125 Ill.2d 50, 125 Ill.Dec. 790, 796, 530 N.E.2d 1360, 1366 (1988) (no prima facie showing where jury 16.6 percent

black and panel 14.5 percent black), *cert. denied,* 490 U.S. 1113, 109 S.Ct. 3175, 104 L.Ed.2d 1036 (1989).

Here, forty of fifty-four, or 74.1 percent, of the qualified jurors were Hispanic. Approximately twenty-two of the fifty-four, or 40.7 percent, were Hispanic males. Including alternate jurors, eleven of the fourteen jurors, or 78.6 percent, were Hispanic. Six of the fourteen, or 42.9 percent, were Hispanic males.

Defendants contend that the prosecutor could not have eliminated all Hispanics from the jury, and thus, his failure to exercise all available challenges is irrelevant. Nevertheless, the prosecutor could have attempted to minimize the Hispanic presence on the jury by exercising additional challenges. The fact that he did not do so, in our view, tends to negate any inference of purposeful discrimination. *See Lara,* 110 N.M. at 512, 797 P.2d at 301; *Montgomery,* 819 F.2d at 851. Additionally, defendants' argument demonstrates that the state could hardly help striking Hispanic jurors because of the heavily Hispanic composition of the panel.

We note that Dominguez argues an additional circumstance he claims raises an inference of discrimination; namely, the fact that the prosecutor articulated a racially neutral reason for his peremptory challenge of Jake Ortega. Thus, Dominguez reasons that the prosecutor's silence on the other challenges was telling. Dominguez has not stated any authority for this proposition. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Besides, we may not consider the prosecutor's explanations for his peremptory challenges in determining whether a prima facie case of discrimination has been made. *Goode,* 107 N.M. at 301–02, 756 P.2d at 581–82.

Finally, before leaving this issue, we consider it necessary to clarify a statement made by this Court in *Gonzales.* There, we suggested that facts such as the state's failure to strike all members of the cognizable racial group or its failure to use all of its strikes should only be taken into account in determining whether the state rebutted a prima facie case. *Gonzales,* 111 N.M. at 597, 808 P.2d at 47; *cf. Lara,* 110 N.M. at 512, 797 P.2d at 301 (fact that prosecutor did not use all of available peremptory challenges considered in determining whether prima facie case made). However, we believe such factors should be weighed in the trial court's determination of whether a prima facie case has been established in the first instance, not in the state's rebuttal stage. *See Sandoval,* 105 N.M. at 698, 736 P.2d at 504; *State v. Moore,* 109 N.M. 119, 125, 782 P.2d 91, 97 (Ct.App.) (court considers *all* relevant circumstances in considering whether required showing made), *cert. denied,* 109 N.M. 54, 781 P.2d 782 (1989). Rebuttal of the prima facie case more appropriately encompasses the state's articulation of racially neutral, specific reasons for the challenges. *Moore,* 109 N.M. at 125–26, 782 P.2d at 97–98. For these reasons, we modify *Gonzales* to the extent that it indicates that such factors should be reserved for rebuttal of the prima facie case.

A defendant desiring to raise a *Batson* issue must "clearly make a prima facie case that shifts the burden of production." *Id.* at 127, 782 P.2d at 99. In this appeal, the state used six peremptory challenges to strike Hispanics, five of them males. The prosecutor did not individually question any of the challenged jurors during voir dire. On the other hand, the state did not use eleven of its available challenges and accepted numerous Hispanic jurors, including men. As a result, the jury that was selected had a higher percentage of Hispanics than the jury venire had. Based on these facts, we conclude that defendants did not meet their burden of establishing a prima facie case. Therefore, the trial court did not err in failing to require the state to explain the reasons for its challenges.

2. *Motion to Sever.*

Before trial, defendants unsuccessfully moved to have their trials severed from that of codefendant George Lopez. The state's theory of the case was that defendants aided and abetted Lopez in his infliction of great bodily harm on Paul Mascare-

nas. Defendants contend the joint trial prejudiced them because it allowed the jury to become confused about the culpability of each individual defendant and to convict by improperly imputing to them the acts and intent of others. Ortega points to evidence that he did not participate in the fight, that he had no weapon, and that he did not incite or participate in George Lopez' act. Dominguez relies on testimony that he was not in the vicinity of the fight until a few seconds before it ended and that he did not have a weapon.

Joinder of defendants is proper when the offenses "were part of a common scheme or plan," or "were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others." SCRA 1986, 5–203(B)(3)(a), (b). Our standard of review applicable to severance issues is exceedingly narrow. *State v. Ramming,* 106 N.M. 42, 47, 738 P.2d 914, 919 (Ct.App.), *cert. denied,* 106 N.M. 7, 738 P.2d 125, *and cert. denied,* 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987). The essence of our review is to determine whether the joint trial resulted in an appreciable risk that the jury convicted for illegitimate reasons. *Id.* To succeed in proving error in the denial of a motion to sever, a defendant must show that joinder prejudiced him. *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).

Defendants here do not argue improper joinder. Instead, they argue that the trial court erred in refusing to grant a severance to permit separate trials. All charges arose from the single, brief incident in which Paul Mascarenas was stabbed to death. We believe there were valid reasons to try defendants and George Lopez together. Defendants were part of a group of persons kicking and hitting Paul Mascarenas while George Lopez was stabbing him. The basis of defendants' culpability was that they aided and abetted Lopez. Thus, the jury necessarily had to consider defendants' actions in relation to the evidence against George Lopez. Also, defendants have not suggested that the evidence that George Lopez stabbed the victim would have been inadmissible against them at a separate trial. *See State v. Benavidez,* 87 N.M. 223, 227, 531 P.2d 957, 961 (Ct.App.1975) (holding trial court abused its discretion by denying severance where evidence would be admitted at joint trial that would be inadmissible against movant at a separate trial; decided under former rule).

Additionally, it is apparent to us that the jury was able to follow the evidence and apply it to each individual count and to each defendant. Although the evidence of the extent of each defendant's involvement was conflicting, the incident itself was brief and uncomplicated. Defendants, together with codefendants Herbert Lopez and George Lopez, were convicted of aggravated battery. However, Victor Cordova was found guilty only of battery, although the jury was instructed on aggravated battery. The jury also acquitted George Lopez of first degree murder, finding him guilty of second degree murder and aggravated battery. These distinct determinations indicate that the jury was able to separate the evidence against each defendant and differentiate among degrees of culpability. We conclude that the trial court correctly refused to sever defendants' trial. *See State v. Shade,* 104 N.M. 710, 725–26, 726 P.2d 864, 879–80 (Ct.App.), *cert. quashed sub nom. Vincent v. State,* 104 N.M. 702, 726 P.2d 856 (1986). We thus hold there was no abuse of discretion on this issue.

3. *Defendants' Requested Instruction.*

Defendants requested the following instruction: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent."

The trial court refused the requested instruction, instead giving SCRA 1986, 14–2822, the uniform instruction on aiding and abetting. Defendants contend their proposed instruction would have clarified the requirement that the jury find that they committed some affirmative act of encour-

agement in order to convict them. Ortega asserts there was no evidence that he was seen with a weapon, that he struck Paul Mascarenas, that he was heard making threats or offering encouragement to the other codefendants, or that there were any wounds found on the victim constituting great bodily harm outside of the fatal stab wounds inflicted by George Lopez. Dominguez specifically contends that the stabbing occurred before he arrived at the scene of the fight.

A defendant is entitled to a jury instruction on his theory of the case if there is evidence to support it. *State v. Ho'o,* 99 N.M. 140, 145, 654 P.2d 1040, 1045 (Ct.App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982). Trial courts should be liberal in instructing the jury with particularity on defenses supported by the evidence. *Poore v. State,* 94 N.M. 172, 174, 608 P.2d 148, 150 (1980); *see also State v. Privett,* 104 N.M. 79, 82, 717 P.2d 55, 58 (1986). In *Poore,* our Supreme Court reversed the defendant's conviction because the trial court had refused his requested instruction that specifically set out his theory of the case. In reversing, the Court noted that the trial court's instructions set out Poore's theory of defense "obliquely by inference." *Poore,* 94 N.M. at 174, 608 P.2d at 150.

We believe the facts of this appeal are distinguishable from those of *Poore.* First, we take issue with Ortega's characterization of the evidence of his participation in the attack against Paul Mascarenas. Eric Mascarenas testified that Ortega was among the several men "kicking and hitting" Paul. Alex Martinez stated that Ortega was among the first to rush the victim. George Lopez was in the group that attacked Paul. Also, as we discuss below in our discussion of the sufficiency of the evidence, the timing of the stabbing was not determinative of Dominguez' culpability as an aider and abettor.

The jury was instructed that, to convict defendants, it had to find that they "helped, encouraged or caused the crime to be committed." It also was instructed that defendants had to have intended that the crime be committed. Defendants must have shared the principal's intent to be convicted as aiders and abettors. *State v. Luna,* 92 N.M. 680, 683, 594 P.2d 340, 343 (Ct.App.1979). Their mere presence at the scene was insufficient. *State v. Salazar,* 78 N.M. 329, 331, 431 P.2d 62, 64 (1967). The intent required for aggravated battery is the intent to injure. NMSA 1978, § 30-3-5(A) (Repl.Pamp.1984); *State v. Valles,* 84 N.M. 1, 498 P.2d 693 (Ct.App.1972). It was not necessary that defendants intended or foresaw the results of George Lopez' acts. *See State v. Holden,* 85 N.M. 397, 400, 512 P.2d 970, 973 (Ct.App.), *cert. denied,* 85 N.M. 380, 512 P.2d 953 (1973). The evidence in this case demonstrated that defendants and George Lopez did not act independently of each other, even if defendants did not intend or foresee the stabbing. In this regard, defendants' requested instruction was potentially misleading since it suggested they could not be convicted if they did not intend or foresee the end result.

Unlike the situation in *Poore,* the instruction in this appeal clearly expressed what the jury was required to find in order to convict defendants. We agree with the state's argument that if "defendant[s] 'intended that the crime be committed' and 'helped, encouraged or caused' the crime, the principal can hardly be said to have acted independently." Requested instructions are properly refused if the subject matter is adequately covered by other instructions. *State v. Sparks,* 102 N.M. 317, 324, 694 P.2d 1382, 1389 (Ct.App.1985). It is also generally not error to refuse an instruction that instructs the jury what cannot be the basis of its verdict. *See State v. Brown,* 93 N.M. 236, 238, 599 P.2d 389, 392 (Ct.App.), *cert. quashed,* 93 N.M. 172, 598 P.2d 215 (1979), *cert. denied,* 444 U.S. 1084, 100 S.Ct. 1041, 62 L.Ed.2d 769 (1980). Here, the uniform jury instruction fully informed the jury of the elements of the offense of aiding and abetting. An approved jury instruction must be used without substantial modification or substitution, except where it is shown to be insufficient. *See* SCRA 1986, Uniform Jury In-

structions—Criminal, General Use Note. We conclude that the trial court did not err in refusing the requested instruction.

DOMINGUEZ' ISSUES

1. *Sufficiency of the Evidence.*

Dominguez contends the trial court erred in denying his motion for a directed verdict. The question presented by a directed verdict motion is whether there was substantial evidence to support the charge. *State v. Maestas,* 92 N.M. 135, 145, 584 P.2d 182, 192 (Ct.App.1978). Substantial evidence is evidence that is acceptable to a reasonable mind as adequate support for a conclusion. *Sparks,* 102 N.M. at 320, 694 P.2d at 1385. Evidence supporting a conviction may be direct or circumstantial. *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 in the evidence and indulging all permissible inferences to be drawn from it in favor of the verdict. *Id.* We do not weigh the evidence, and may not substitute our judgment for that of the jury so long as there is sufficient evidence to support the verdict. *Id.*

Our task then is to determine whether sufficient evidence existed to support the jury's verdict that Dominguez aided and abetted the aggravated battery against Paul Mascarenas. In *State v. Ochoa,* 41 N.M. 589, 599, 72 P.2d 609, 615 (1937), our Supreme Court stated:

> The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval.

Mere presence, or even presence with mental approbation, is insufficient to sustain a conviction as an aider or abettor. *Luna,* 92 N.M. at 683, 594 P.2d at 343. "Presence must be accompanied by some outward manifestation or expression of approval." *Id.*

Dominguez' theory is that the stabbing took place before he arrived at the place where Paul Mascarenas was being beaten. To support this argument, he focuses on evidence that he remained at the scene of the fight with Eric Mascarenas until the fight's conclusion and that he could only have been in the vicinity of the victim for a few seconds. Dominguez maintains that he could not have helped, encouraged or caused the aggravated battery to occur because the crime was committed before he arrived at the scene of the fight involving Paul. He also claims that the evidence shows he could not have intended the aggravated battery to occur.

We deem it unnecessary to decide whether the jury could have reasonably inferred that Dominguez was present at the aggravated battery scene before the stabbing. *But see State v. O'Dell,* 85 N.M. 536, 537, 514 P.2d 55, 56 (Ct.App.1973) (notwithstanding defendant's claim that he did not know of the robbery until after its commission, he could be convicted as accessory where he shot at pursuing police car; such evidence demonstrated defendant approved the robbery and shared robber's intent). As we noted previously (on the instruction issue), the intent required for aggravated battery is the intent to injure. § 30–3–5(A). Thus, although Dominguez was required to have shared the principal's intent, *see Luna,* 92 N.M. at 683, 594 P.2d at 343, he did not have to intend or foresee the end result (in this case, the stabbing). *See Holden,* 85 N.M. at 400, 512 P.2d at 973.

We hold that there was substantial evidence that Dominguez shared Lopez' intent. Before the fight, Dominguez was yelling in Spanish in an angry manner that sounded like cursing. After the fight with Eric ended, Dominguez rushed over to the scene of the fight with Paul and joined in that attack. Finally, after the fight, Dominguez and three others drove past the victim's stopped car. Dominguez said: "That's what they get." Dominguez displayed his approval of the crime before, during, and after the fight.

Additionally, felony aggravated battery occurs when the defendant acts "in any

manner whereby great bodily harm or death can be inflicted." § 30–3–5(C); *see also* SCRA 1986, 14–323. The jury was so instructed in this case. Dominguez was one of several men kicking and hitting the victim. One of the men had a tire tool. This evidence establishes that Dominguez acted in a way that would *likely* result in great bodily harm or even death to the victim, despite the lack of evidence of such harm.

2. *Motion to Dismiss Indictment.*

Dominguez moved to dismiss the indictment based on his inability to testify before the grand jury. At the hearing on the motion, he testified concerning his efforts to appear before the grand jury. Dominguez argues that, because he was incarcerated at the time, the state bore responsibility to assure his attendance at the grand jury. In response, the state argues that Dominguez: (1) did not show that he took sufficient steps to testify at the grand jury; and (2) did not show prejudice. We agree with the state's second point and therefore need not address the first.

A defendant must suffer "actual and substantial prejudice" before a trial court is required to dismiss an indictment for failure to receive a target notice because of the state's lack of diligence. NMSA 1978, § 31–6–11(B) (Repl.Pamp.1984); *see also State v. Penner,* 100 N.M. 377, 378, 671 P.2d 38, 39 (Ct.App.1983). The defendant must demonstrate that his missing testimony would have changed the vote of the grand jury on the issue of probable cause. *Penner,* 100 N.M. at 379, 671 P.2d at 40. We see no reason not to apply this standard where the defendant does not testify before the grand jury for other reasons, such as occurred in this appeal. *See generally Buzbee v. Donnelly,* 96 N.M. 692, 706, 634 P.2d 1244, 1258 (1981) (rejecting per se approach to dismissal of indictment).

Dominguez has not established how his missing testimony would have changed the vote of the grand jury. We therefore conclude that the trial court did not err in denying his motion to dismiss the indictment.

ORTEGA'S ISSUE—LEGALITY OF SENTENCE

Ortega was sentenced to three years imprisonment, all of which was suspended. At sentencing, the trial court gave Ortega the choice of paying a $5,000 fine or making a $500 donation to the Taos County Sheriff's Office. Ortega chose the $500 donation. The trial court ordered, as a specific term of probation, that Ortega make the donation within six months.

Ortega contends that the condition of probation requiring him to donate money to a local police agency was illegal. *See* N.M. Const. art. VI, § 30 (Repl.Pamp.1992) (all fees collected by judicial department to be paid into state treasury). The state argues that: (1) the probation condition was lawful because it was reasonably related to Ortega's rehabilitation, *see* NMSA 1978, § 31–20–6 (Repl.Pamp.1990); and (2) the condition did not violate the state constitution because the donation did not constitute a fee collected by the judicial department.

A claim that a sentence is unauthorized can be raised for the first time on appeal. *Sparks,* 102 N.M. at 325, 694 P.2d at 1390. The trial court's authority to sentence is only that which has been provided by statute. *Id.* at 324, 694 P.2d at 1389. Conditions of probation that are not authorized by law are void. *State v. Ayala,* 95 N.M. 464, 465, 623 P.2d 584, 585 (Ct.App. 1981). The trial court may not impose an unauthorized sentence, even where the defendant agrees to it. *State v. Crespin,* 96 N.M. 640, 642–43, 633 P.2d 1238, 1240–41 (Ct.App.1981) (even if defendant waived double jeopardy protection and agreed to increased length of probation and to increased penalty through changed conditions of probation, trial court could not so order in absence of statutory authority); *see also State v. Chavez,* 100 N.M. 750, 751, 676 P.2d 827, 828 (Ct.App.1984); *but see State v. Padilla,* 98 N.M. 349, 354, 648 P.2d 807, 812 (Ct.App.) (parties could agree to probation costs exceeding those authorized by statute), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).

The state concedes that charitable contributions unauthorized by statute have not been upheld. *See United States v. Wright Contracting Co.,* 728 F.2d 648 (4th Cir.1984). At least one court has also struck down a condition of a sentence involving possible reduction of a fine in return for the defendant's contribution to an authorized charity. *See United States v. Haile,* 795 F.2d 489, 491 (5th Cir.1986). Section 31–20–6 does not authorize trial courts to order charitable contributions to law enforcement agencies other than local crime stopper programs. § 31–20–6(E). We also cannot agree that the condition was reasonably related to Ortega's rehabilitation since the Sheriff's Office was unaggrieved by Ortega's actions. *Cf.* NMSA 1978, § 31–17–1 (Repl.Pamp.1990) (restitution to be made to victims of defendant's criminal activities). We conclude that the trial court's condition of probation requiring Ortega to contribute $500 to the Taos County Sheriff's Office was unauthorized. Thus, we need not reach Ortega's constitutional argument.

Citing *Padilla,* the state argues that Ortega waived his right to complain about the sentence by agreeing to it below. We think the state's reliance on *Padilla* is misplaced. In *Padilla,* the defendant's attorney actively suggested the unauthorized probation costs in lieu of incarceration. Further, the trial court in *Padilla* simply ordered probation costs in excess of those permitted by statute. It did not extend the length of the defendant's probation or order that probation costs be paid to an unauthorized entity. *See Chavez,* 100 N.M. at 751, 676 P.2d at 828; *Crespin,* 96 N.M. at 642–43, 633 P.2d at 1240–41. Finally, we do not concur in the state's characterization of Ortega's choice as an "agreement." Ortega's choice was between an illegal yet small "donation" and a legal fine ten times greater than the donation, truly a "Hobson's choice." *See generally State v. Whitaker,* 110 N.M. 486, 491–94, 797 P.2d 275, 280–83 (Ct.App.1990) (defendant given choice between restitution of large sum of money and prison term without inquiry into ability to pay). We conclude that these circumstances resulted in the nonexistence of a "choice" that was available to Ortega.

The probation condition requiring Ortega to contribute $500 to the Taos County Sheriff's Department was unauthorized and therefore void. At the same time, we agree with the state that the trial court clearly believed that a monetary penalty was necessary for Ortega's rehabilitation and intended Ortega to pay some sort of fine. Under these conditions, we believe it would be unfair to simply strike the probation condition. *Cf. State v. Gibson,* 96 N.M. 742, 743, 634 P.2d 1294, 1295 (Ct. App.) (plea agreement stands or falls as a unit; defendant may not be relieved of part of plea bargain without giving up benefits he received in the bargain), *cert. denied,* 97 N.M. 140, 637 P.2d 571 (1981).

However, we disagree with the state that, on remand for imposition of a valid sentence, the trial court should have discretion to impose a fine of $5,000. Although an invalid sentence may be corrected even if the valid sentence is more onerous, *see State v. Dennis F.,* 104 N.M. 619, 622, 725 P.2d 595, 598 (Ct.App.1986), a valid sentence may not be subsequently increased. *See Williams v. State,* 81 N.M. 605, 471 P.2d 175 (1970). The state apparently believes that the "donation" and the "fine" were different; we disagree. A "fine" is a sum of money that a court orders to be paid as punishment for a crime. *See Black's Law Dictionary* 524 (West 5th ed., abridged 1983). A "donation" is a voluntary payment. *See Webster's Third New International Dictionary* 672 (Philip Babcock Gove et al. eds., unabridged ed.1976). We believe that both options offered to Ortega were essentially fines, albeit of differing amounts and with payment intended to go to different entities, because the court was ordering payment as punishment for a crime. The amount ordered was within the proper range for a fine, *see* NMSA 1978, § 31–18–15(D)(3) (Repl.Pamp.1990) (authorizing court to impose up to $5,000 fine for fourth degree felony), and therefore the order was valid except for the portion directing that payment be made to the Taos County Sheriff's

Office, which is not among the entities statutorily authorized to receive payment. On remand, therefore, we order the trial court to reconsider imposition of a fine not to exceed $500. *Cf. Williams,* 81 N.M. at 607–08, 471 P.2d at 177–78 (where defendant had been orally sentenced to a maximum of 35 years and sentence revised later to maximum of life, fairness required that 35 years be restored as the maximum).

CONCLUSION

We affirm defendants' convictions. We vacate the portion of Ortega's sentence requiring a donation to the Taos County Sheriff's Office. This matter is remanded to the trial court for further sentencing proceedings consistent with this opinion, and the entry of an amended judgment and sentence.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

853 P.2d 160

STATE of New Mexico, Plaintiff–Appellee,

v.

Miguel Angel GALLEGOS, Defendant–Appellant.

No. 13,497.

Court of Appeals of New Mexico.

March 29, 1993.

Tom Udall, Atty. Gen., Joel Jacobsen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Leonard J. Foster, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

ALARID, Judge.

Miguel Angel Gallegos (Defendant) seeks reversal of a jury conviction for armed robbery with firearm enhancement, claiming:

1. The trial court erred in not allowing Defendant's brother to display his tattoos;

2. The trial court erred in denying Defendant's requested jury instruction on eyewitness testimony; and,

3. The identification procedures were impermissibly suggestive.

On the first issue, we find that the trial court erred in refusing to admit the tattoo display as demonstrative evidence. However, the refusal does not constitute plain error, so reversal is not warranted. On the second issue, we find no error in the trial court's rejection of the tendered instruction. The third issue is without merit, and we summarily dismiss that claim. The judgment is affirmed.

FACTS

Defendant was convicted of the armed robbery of an Albuquerque convenience store and sentenced to ten years in prison, with four years suspended. The only evidence identifying Defendant as the robber was the testimony of the store clerk, who said the robber was wearing a nylon stocking mask, green "army" jacket, and a sock over his left hand. Despite the attempted disguise, the clerk said she immediately recognized Defendant, a regular customer, as the robber because the stocking had holes cut out for his eyes, nose, and mouth. In identifying Defendant as the robber, the store clerk told police Defendant had a tattoo on his left hand and tattoos on his arms, even though the tattoos were not visible during the robbery.

At trial, Defendant attempted to show that the clerk had confused him with his brother, Martin Gallegos (the brother), who frequently accompanied Defendant to the store. To illustrate his point, Defendant sought to have his brother display his tattoos for the jury. In a pretrial hearing, the trial court concluded that the brother's display of his tattoos would be testimonial evidence, subjecting him to cross-examination. Because the brother intended to assert his Fifth Amendment privilege against self-incrimination, the court barred him from exhibiting his tattoos. The court did allow Defendant and his brother to stand next to each other so jurors could compare their physical characteristics.

DISCUSSION

I. Tattoo Display

Physical characteristics that tend to identify a person are nontestimonial evidence. *State v. Mordecai,* 83 N.M. 208, 210–11, 490 P.2d 466, 468–69 (Ct.App.1971). Compelling an individual to display identifying characteristics does not implicate the Fifth Amendment because the constitutional protection against self-incrimination "is limited to disclosures that are 'communicative' or 'testimonial' in nature and does not include identifying physical characteristics." *Id.* at 211, 490 P.2d at 469. Therefore, an individual may be compelled to provide a handwriting sample, *State v. Archuleta,* 82 N.M. 378, 382–83, 482 P.2d 242, 246–47 (Ct.App.1970), *cert. denied,* 82 N.M. 377, 482 P.2d 241 (1971); pose for photographs, *Mordecai,* 83 N.M. at 211, 490 P.2d at 469; or wear a mask, walk, and speak for identification purposes, *State v. Ramirez,* 78 N.M. 584, 434 P.2d 703 (Ct.App. 1967).

No New Mexico appellate court has addressed the issue of admissibility of tattoos as demonstrative evidence. Courts in other jurisdictions, however, have concluded that a tattoo display used to identify an individual or rebut a witness's identification is admissible as demonstrative evidence. *United States v. Bay,* 762 F.2d 1314, 1315–16 (9th Cir.1984) (reversing trial court's refusal to permit defendant to display tattooed hands); *State v. Martin,* 519 So.2d 87 (La.1988) (trial court erred in refusing to let defendant display tattoo without being subjected to cross-examination). We agree.

Although the trial court erred in ruling that the tattoos were testimonial and therefore inadmissible, we hold that error to be harmless and we reject the State's argument that the issue was not preserved. Defendant's attempt to offer the evidence was sufficient to preserve the issue for appellate review.

The store clerk testified that she recognized the robber because of his facial characteristics. She recalled that Defendant had a rosary tattooed on his left hand, as did his brother. She could not recall or describe the tattoos Defendant had on his arms, except to say she believed Defendant only had tattoos on his upper arms. Defendant testified that his brother had more tattoos than he did; specifically, that Defendant had only one tattoo on his upper left arm, while his brother had tattoos covering both arms. Allowing the jurors to observe the brother's tattoos would have added nothing to the jurors' comparison of the two because Defendant neither described nor displayed his own tattoos.

Although there were some other minor discrepancies between the clerk's identification of Defendant and Defendant's testimony, the discrepancies do not raise grave doubts about the clerk's identification. At the time of the robbery, the clerk was not identifying a stranger. She had waited on both brothers numerous times in previous months and said she could easily distinguish between the two. The jury also had the opportunity to view the two brothers while they stood side-by-side to determine if their physical similarity was likely to confuse the store clerk. Given these facts, the trial court's error in not permitting the tattoo display does not give rise to the level of prejudice that would warrant reversal.

II. Jury Instruction

Defendant also claims that the trial court erred in refusing to instruct the jury on the infirmities in eyewitness testimony. The trial court rejected Defendant's tendered instruction that would have focused the jury's attention on factors that tend to question the reliability of an eyewitness's identification. The instruction was patterned after the model jury instruction in *United States v. Telfaire,* 469 F.2d 552, 558–59 (D.C.Cir.1972). The trial court did give the uniform jury instructions on witness credibility and reasonable doubt, SCRA 1986, 14–5020 and –5060.

New Mexico appellate courts have held that the uniform jury instructions on witness credibility and reasonable doubt cover a defendant's theory of misidentification by an eyewitness. *State v. Ortega,* 112 N.M. 554, 575, 817 P.2d 1196, 1217 (1991); *State v. Mazurek,* 88 N.M. 56, 58, 537 P.2d 51, 53 (Ct.App.1975). Because the trial court gave the witness credibility and reasonable doubt instructions approved by our Supreme Court, we hold that the rejection of the specific instruction was not reversible error.

III. Identification Procedures

Defendant's final argument is based on two claims: that the clerk's initial identification of Defendant was improperly bolstered and that the procedures the police used in the photograph array were impermissibly suggestive. Defendant did not object to testimony about either issue at trial. In the absence of timely objection, we will examine such claims under the fundamental error doctrine. *State v. Hennessey,* 114 N.M. 283, 287, 837 P.2d 1366, 1370 (Ct. App.), *cert. denied,* 114 N.M. 82, 835 P.2d 80 (1992). However, we need not reach the fundamental error analysis in this case because neither Defendant's brief nor the trial transcripts provide any support for either claim.

The judgment is affirmed.

IT IS SO ORDERED.

MINZNER, C.J., and APODACA, J., concur.

853 P.2d 163

Ida GALLEGOS, Claimant–Appellant,

v.

CITY OF ALBUQUERQUE, a self-insured employer, Respondent–Appellee.

No. 13730.

Court of Appeals of New Mexico.

April 7, 1993.

Certiorari Denied May 20, 1993.

David A. Archuleta, Albuquerque, for claimant-appellant.

Richard J. Shane, Deborah S. Dungan, Padilla, Riley & Shane, P.A., Albuquerque, for respondent-appellee.

OPINION

HARTZ, Judge.

Ida Gallegos (Worker) appeals from a disposition order of the workers' compensation administration (the Administration) which ruled that as of March 26, 1990, she had no residual disability from a January 30, 1989, accident she suffered while working for the City of Albuquerque (the City). We affirm because the workers' compensation judge (the WCJ) could rationally have determined that Worker had failed to meet her burden of establishing disability after March 25, 1990.

The record in this case is quite lengthy and involved. With the assistance of able briefs and oral argument by both parties we have thoroughly reviewed the evidence. We will not repeat the evidence in detail. We recite only those facts necessary to an understanding of this opinion.

Worker was injured by a fall in a City storeroom on January 30, 1989. At the time, she held the number two administrative position in the City's Weed and Litter Division. A doctor at the City's Employee Health Center released her to work without restrictions two weeks later. During the next year Worker worked episodically, sometimes with restrictions. She complained of various ailments, including headaches and pain in her neck, shoulder, lower back, and right leg. Twice she fell at her home, each time injuring a finger. Worker's treating physicians originally believed that the first fall was caused by her back injury of January 30, 1989. On February 21, 1990, Dr. Barry Diskant, medical director of the City's Employee Health Center, placed Worker on leave. She was complaining of pain and he thought that she could not continue working in a job which required "a lot of driving." At the hearing before the WCJ both parties presented evidence concerning the City's offer to Worker of another position and her response to the offer. She did not work for the City after February 21, 1990. Dr. Diskant testified that Worker reached maximum medical improvement on March 26, 1990.

While Worker was not working, the City paid her benefits for temporary total disability. The City also paid for treatment and consultation by a number of physicians. In August 1990 a neurologist to whom Worker had been referred made a preliminary diagnosis of multiple sclerosis, based on an MRI of her brain. On November 21, 1990, the City filed with the Administration a Petition to Reduce Benefits, seeking a termination or reduction of temporary total disability benefits. The City continued to pay Worker full benefits for temporary total disability until the Administration filed a Recommended Resolution on January 15, 1991, recommending that Worker's benefits be reduced to thirty percent permanent partial disability. The City made the recommended partial disability payments up to the time of the hearing before the WCJ.

We now discuss the allocation of the burden of persuasion, whether the WCJ's ruling is affirmable, and whether we can consider evidence in the supplemental record on appeal.

I. BURDEN OF PERSUASION

The City filed its petition pursuant to NMSA 1978, Section 52–5–5(A) (Repl.Pamp.1991), which permits "any party" to file a claim with the director of the Administration when a dispute arises under the Workers' Compensation Act (the Act). The Administration then attempts to resolve the dispute informally and issues a recommendation for resolution within sixty days after receipt of the claim. Section 52–5–5(C). If either party timely rejects the recommendation, the matter is assigned to a WCJ for hearing. *Id.* The first issue before us is whether the City bore the burden of persuading the WCJ that Worker's benefits should be terminated or reduced. We hold that the City did not bear that burden. The burden was on Worker to establish entitlement to benefits.

The legislature introduced the procedure provided by Section 52–5–5 in 1986, when it created the Administration and removed workers' compensation cases from the district courts. Under former law the only way to initiate a judicial determination of a worker's entitlement to benefits was for the worker to file a claim after the employer failed or refused to pay compensation. *See* NMSA 1978, §§ 52–1–26, –31(A) (Orig.Pamp.). Once the district court had entered a judgment awarding benefits, either party could apply for a change in benefits. NMSA 1978, § 52–1–56(A) (Orig.Pamp.). In the initial judicial proceeding the worker had the burden of persuasion with respect to entitlement to benefits. *See Aguilar v. Penasco Indep. Sch. Dist. No. 6,* 100 N.M. 625, 628, 674 P.2d 515, 518 (1984). After the initial judgment the party seeking a change in benefits had the burden of persuasion with respect to the change. *See Amos v. Gilbert W. Corp.,* 103 N.M. 631, 635–36, 711 P.2d 908, 912–13 (Ct.App.1985). Thus, an employer seeking reduction in benefits had the burden to establish that there had been a decrease in disability, whereas a worker seeking an increase in benefits had the burden of establishing an increase in disability. *See id.* These rules accord with the law in other jurisdictions. *See* 3 Arthur Larson, *The Law of Workmen's Compensation* § 80.33(a) (1989) (worker has burden of proving the claim), § 81.33(c) (burden is on movant who seeks to open the award).

Prior to filing its petition the City had been paying Worker full benefits for temporary total disability. Although New Mexico has adopted what is apparently the minority rule that permits voluntary payment of benefits by the employer to be treated as competent evidence of liability, *see Romero v. S.S. Kresge Co.,* 95 N.M. 484, 486, 623 P.2d 998, 1000 (Ct.App.), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981), *overrruled on other grounds by Dupper v. Liberty Mutual Ins. Co.,* 105 N.M. 503, 734 P.2d 743 (1987); 2B Larson, *supra,* § 79.43, New Mexico has rejected the contention that voluntary payment by the employer shifts the burden of persuasion from the worker to the employer. *See Romero,* 95 N.M. at 486, 623 P.2d at 1000. In holding that the voluntary payment of compensation benefits does not create a presumption that the employer is liable, our Supreme Court wrote, "To impose the presumption would not only be contrary to the remedial nature of workmen's compensation but would also discourage prompt payment of benefits which might be essential for the worker's survival." *Wilson v. Richardson Ford Sales,* 97 N.M. 226, 228, 638 P.2d 1071, 1073 (1981); *accord* 2B Larson, *supra,* § 79.43, at 15–426.112. In other words, it is against public policy to penalize an employer by shifting the burden of persuasion when the employer voluntarily takes action that benefits the worker.

The identical public policy considerations argue against shifting the burden of persuasion to the City in the circumstances of this case. Under settled law, Worker would have the burden of persuasion if she were the one to file a petition with the Administration. *See Toynbee v. Mimbres Memorial Nursing Home,* 114 N.M. 23, 27, 833 P.2d 1204, 1208 (Ct.App. 1992); *Sanchez v. Molycorp, Inc.,* 113 N.M. 375, 378, 826 P.2d 971, 974 (Ct.App.1992). Worker could not file a claim for disability benefits, however, so long as the City was paying full benefits. *See* NMSA 1978, § 52–5–18 (Repl.Pamp.1987); *Armijo v. Co–Con Constr. Co.,* 92 N.M. 295, 296, 587 P.2d 442, 443 (Ct.App.), *cert. denied,* 92 N.M. 260, 586 P.2d 1089 (1978), *overruled on other grounds by Raines v. W.A. Klinger & Sons,* 107 N.M. 668, 763 P.2d 684 (1988), *and by Maitlen v. Getty Oil Co.,* 105 N.M. 370, 733 P.2d 1 (Ct.App. 1987). Thus, to induce Worker to file a claim the City would need to reduce the benefits it was paying. Although statutory sanctions against bad faith misconduct by an employer should discourage an employer from reducing payments unjustifiably, NMSA 1978, § 52–1–54(G) (Repl. Pamp.1987), the record in this case would certainly have supported a finding of good faith if the City had reduced Worker's benefits on its own instead of first filing its petition with the Administration. By pro-

ceeding in that manner the City would have ensured that Worker bore the burden of persuasion. To impose the burden of persuasion on the City because it chose a procedure more beneficial to Worker would deter other employers from taking the same path. The public policy expressed in *Wilson* suggests that the law should not be interpreted to discourage employers from (1) paying full benefits and filing a petition under Section 52–5–5, rather than (2) reducing benefits to induce the worker to file a petition. The burden of persuasion therefore should not shift to an employer who chooses the first course.

Nothing in the changes to the Act since *Wilson* suggests legislative repudiation of the public policy expressed in that opinion. In 1987 the legislature added a declaration of purpose to the Act. The declaration includes the following:

> It is the intent of the legislature in creating the worker's compensation division [1] that the laws administered by it to provide a workers' benefit system be interpreted to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law. It is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' benefits legislation shall not apply in these cases. The workers' benefit system in New Mexico is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Accordingly, the legislature hereby declares that the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

NMSA 1978, § 52–5–1 (Repl.Pamp.1987). If anything, this declaration of purpose—particularly the instruction to interpret the Act even-handedly—reinforces the public policy expressed in *Wilson.* We conclude that in this action Worker bore the burden of persuasion to establish her entitlement to benefits.

II. AFFIRMABILITY OF THE AWARD

Worker's attorney argues vigorously and passionately that the WCJ's decision was a miscarriage of justice. Counsel recognizes, however, that this Court cannot judge the credibility of witnesses, reweigh the evidence, or make its own findings of fact. *See Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 126–30, 767 P.2d 363, 365–69 (Ct.App.), *cert. denied,* 107 N.M. 785, 109 N.M. 33, 781 P.2d 305 (1988). Our role is limited to deciding whether it was rational for the WCJ to determine that Worker had not satisfied her burden of persuasion in establishing that after March 25, 1990, she was disabled by her work-related accident. *See Sosa v. Empire Roofing Co.,* 110 N.M. 614, 616, 798 P.2d 215, 217 (Ct.App.1990). By that standard we must affirm.

For almost all of Worker's medical complaints, there was expert testimony by physicians that the complaints were not caused by Worker's fall on the job on January 30, 1989. Several physicians testified that the fall did not cause or aggravate Worker's multiple sclerosis. Physicians testified that her headaches probably were the result of chronic sinusitis, not her fall at work. Although the first fall at home that injured Worker's finger originally was attributed to leg weakness caused by the injury to Worker's back in the January 1989 fall at work, after Worker was diagnosed as having multiple sclerosis several physicians testified that Worker's lower-back injury probably did not cause either

1. For several years the administering authority for the Act was the workers' compensation division of the labor department.

fall at home. Other testimony may have supported contrary findings. But our task is not to determine whether the record would have supported a different result; it is only to determine whether the WCJ could properly reach the decision that was rendered. *See Bowles v. Los Lunas Sch.*, 109 N.M. 100, 104, 781 P.2d 1178, 1182 (Ct.App.), *cert. denied*, 109 N.M. 131, 782 P.2d 384 (1989). The WCJ had no duty in this case to recite why he relied on some expert testimony rather than contrary testimony. *See Empire W. Cos. v. Albuquerque Testing Lab.*, 110 N.M. 790, 794, 800 P.2d 725, 729 (1990) (findings required only on ultimate facts).

It appears, however, that the WCJ believed that Worker's accident of January 30, 1989, caused a "small central disc protrusion" at L5–S1 in Worker's spine. The physicians sometimes referred to the protrusion as a "herniation." Did the evidence before the WCJ compel a finding that Worker was disabled by the disc protrusion, or was it rational for the WCJ to find that Worker had not proved that she was disabled by her lower-back problem?

The disc injury was revealed by a CT scan taken on February 17, 1989. Despite that injury, Worker's treating physicians released her to work without restrictions for most of that year. On February 21, 1990, Dr. Diskant removed her from work on the ground that she could not "continue working in a field type of job which requires a lot of driving." He testified that it was his understanding that her duties had changed. He said: "[Worker] was complaining that she was not able to tolerate the degree of driving that was required of her. In light of the herniated disc, I thought that that complaint was plausible[.]" Dr. Diskant's removal of Worker from her job was predicated on Worker's complaints of pain. The WCJ did not need to credit Dr. Diskant's determination of disability if there was reason to doubt Worker's complaints. *See Nunez v. Smith's Management Corp.*, 108 N.M. 186, 189–90, 769 P.2d 99, 102–03 (Ct.App.1988) (even under uncontradicted-medical-evidence rule, which relates to causation rather than extent of disability, WCJ need not credit uncontradicted medical testimony based on a disputed version of facts).

Worker's credibility was called into question throughout the proceedings. Her description of the January 30, 1989, accident differed substantially from that of another City employee who allegedly witnessed the accident. Various medical records indicate that she may have intentionally exaggerated her symptoms. For example, one doctor reported in the medical records:

> It might be noted however that when the patient attempted to get up onto the table she was able to move her chin close to her chest, which exhibits a range of motion far in excess of what she had demonstrated when asked to perform range of motion maneuvers with the cervical spine.

Also, the WCJ could have viewed Worker's conduct in responding to the City's offer of a new position as indicating a desire to avoid working. This and other evidence in the record created a rational basis for the WCJ to doubt Worker's credibility. Another fact finder may have found Worker to be fully credible, but this Court cannot reverse the WCJ on that ground. *See Tallman*, 108 N.M. at 127, 767 P.2d at 366.

Thus, the WCJ could rationally disbelieve Worker's complaints of pain unless the pain would necessarily follow from the objective medical findings. In that regard, a neurologist who reviewed the February 1989 CT scan stated, "Lumbosacral spine films showed a slight disc bulge at L5–S1 which I do not think is significant." A second neurologist, Dr. Michael Freedman, spoke of a "small but probably insignificant disk herniation of the lumbar spine." An MRI taken on August 9, 1989, showed that the degree of herniation of the disc had diminished. There was no evidence of thecal or nerve root compression. Dr. Freedman testified that from the physical findings he could not determine whether the disc was causing pain. He said that normal daily activities would not be a problem for Worker. A Physical Capacities Evaluation performed by the work performance center at Presbyterian Hospital in

April 1990 indicated no restriction on activities involving driving automotive equipment.

Again, although the record would support a finding in favor of Worker with respect to disability caused by her lower back injury, the WCJ could rationally decide that Worker had not satisfied her burden of establishing that the injury disabled her from performing her job. Therefore, we must affirm the WCJ's determination that Worker was not disabled after March 25, 1990.

III. SUPPLEMENTAL RECORD

After Worker filed her notice of appeal she filed with the Administration an application to modify the disposition order pursuant to NMSA 1978, Section 52–5–9 (Repl.Pamp.1991). The WCJ denied the application. Worker did not appeal from the denial but moved this Court to allow a supplemental record on appeal that would include the pleadings relating to her application and the tape recordings of the hearing on the application. We granted the motion.

Worker now requests us to consider in this appeal various evidence contained in the supplemental record. We deny the request. Our review of the order from which Worker appeals cannot be based on evidence that had not been presented to the WCJ at the time the order was issued. *See* SCRA 1986, 12–216(A) (Repl.1992) (question not preserved for appellate review if not invoked in lower tribunal); *Strickland v. Roosevelt County Rural Elec. Coop.*, 99 N.M. 335, 344, 657 P.2d 1184, 1193 (Ct.App. 1982), *cert. denied,* 99 N.M. 358, 658 P.2d 433, *cert. denied,* 463 U.S. 1209, 103 S.Ct. 3540, 77 L.Ed.2d 1390 (1983). Because Worker did not appeal from the WCJ's ruling on her application for modification, we need not decide whether the WCJ had jurisdiction to *deny* the application. *See Archuleta v. New Mexico State Police,* 108 N.M. 543, 548, 775 P.2d 745, 750 (Ct.App.), (noting authority concerning jurisdiction of trial court to hear motions pursuant to SCRA 1986, 1–060(B) during pendency of appeal), *cert. denied,* 108 N.M. 384, 772 P.2d 1307 (1989).

IV. CONCLUSION

For the reasons stated above, we affirm the disposition order of the Administration.

IT IS SO ORDERED.

MINZNER, C.J., and APODACA, J., concur.

853 P.2d 168

STATE of New Mexico, Plaintiff–Appellee,

v.

Larry BLAKELY, Defendant–Appellant.

No. 13616.

Court of Appeals of New Mexico.

April 9, 1993.

Certiorari Denied May 25, 1993.

Tom Udall, Atty. Gen., Joel Jacobsen, 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 from the judgment and sentence on one count of possession of cocaine and the enhancement of his sentence as a habitual offender. On appeal, he argues that: 1) the trial court erred in denying his motion to suppress; 2) the trial court erred in denying his motion for mistrial based on prosecutorial misconduct, and in refusing to give a curative jury instruction that he tendered; and 3) the trial court erred in denying his motion to set aside the verdict based on alleged juror misconduct. Other issues raised 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.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We affirm. Only the first issue raised by

Defendant merits publication, so only that part of the opinion discussing the motion to suppress will be published.

FACTS

During the early morning hours of February 16, 1990, Defendant telephoned "911" in Hobbs and told the operator that he wanted to commit suicide. The operator stayed on the line with Defendant while Jack Thomas of the Hobbs Police Department and two other officers drove to Defendant's residence. Officer Thomas found the door ajar and went into Defendant's residence. Thomas found Defendant with bloodshot eyes, smelling of alcohol, and seemingly intoxicated. Defendant said he had "shot up some dope," that he wished he were dead, and that he wanted to kill himself.

Pursuant to Hobbs Police Department procedure, Officer Thomas took Defendant into protective custody. He told Defendant he was being taken into custody for his own safety for purposes of a mental health evaluation and the safety of others. Officer Thomas walked Defendant out to the squad car. At the patrol car, Thomas handcuffed Defendant. Officer Thomas asked Defendant if he had any weapons and patted him down to make sure he had no weapons. Defendant said he had a pocket knife, which Officer Thomas took from him. Defendant also said he had a syringe and further volunteered that he also had dope in his pocket. Officer Thomas searched for and found a small amount of cocaine inside a plastic bag in Defendant's pocket.

Officer Thomas then drove Defendant to the police station. A staff member from the Hobbs Guidance Center was called to the station to evaluate Defendant. The staff member determined that Defendant did not need to be committed or otherwise held for treatment. Defendant was booked for possession of cocaine and placed in a holding cell, whereupon he attempted to commit suicide by hanging himself with his belt. Defendant was transported by ambulance to the Lea Regional Hospital.

Defendant was convicted of cocaine possession and found to be a habitual offender. This appeal followed.

DEFENDANT'S MOTION TO SUPPRESS WAS PROPERLY DENIED.

On appeal from a trial court's denial of a motion to suppress, the facts are viewed in the manner most favorable to the state and "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, 132, 666 P.2d 1274, 1279 (Ct.App.1983).

Defendant argues that the initial patdown was unlawful. He contends that *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *State v. Cobbs,* 103 N.M. 623, 711 P.2d 900 (Ct.App.1985), stand for the proposition that an officer cannot conduct a patdown unless he has a reasonable suspicion that the suspect is armed or dangerous. Defendant argues that the officer had no reason to think that he had weapons, and that it was unreasonable to pat him down because he was already handcuffed. We disagree.

All *Terry,* 392 U.S. at 21, 88 S.Ct. at 1879, and *Cobbs,* 103 N.M. at 627, 711 P.2d at 904, require is a determination that such a patdown is "reasonable" based on a balancing of the public interest against the individual's right to be free from arbitrary interference by law officers. Officer Thomas testified that Defendant smelled of alcohol, appeared intoxicated, and was threatening suicide. We believe Officer Thomas could have reasonably concluded his safety justified a patdown search of a person being taken into protective custody. *See Commonwealth v. Tomeo,* 400 Mass. 23, 507 N.E.2d 725 (1987). This conclusion is further supported by the testimony of Officer Thomas that he had dealt with "possible mental people" before and had been injured by them. *See Gilbert v. State,* 289 So.2d 475 (Fla.Dist.Ct.App.) (search of jacket of incoherent person who was threatening suicide justified to prevent potential harm to defendant herself), *cert. denied,* 294 So.2d 660 (Fla.1974).

More importantly, Officer Thomas had express statutory authorization to conduct this patdown. Police officers or public service officers are expressly authorized by statute, NMSA 1978, § 43–2–19 (Repl.Pamp.1989), to make a protective search of an intoxicated person who is taken into protective custody, prior to transporting him to a residence, health care facility, or jail.

Defendant next argues even if the patdown was valid, Officer Thomas exceeded the proper scope of a patdown. We have difficulty understanding the factual basis of this claim and since it was not presented to the trial court, we do not consider it. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct.App.1987).

During his patdown, Defendant volunteered that his jacket pocket contained a syringe and "dope." Defendant contends that because of his consumption of drugs and alcohol he was incompetent and unable to provide consent to the search of his pockets. The test for competence to make a statement is well settled. In order for a defendant to make a valid statement, the defendant must have had sufficient mental capacity at the time he made the statement to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy. *State v. Sisneros*, 79 N.M. 600, 446 P.2d 875 (1968); *State v. Chavez*, 88 N.M. 451, 541 P.2d 631 (Ct.App.1975). There is a presumption of competence, and the burden is on the defendant to show some evidence to the contrary. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112, *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 400 (1975).

Defendant relies on Officer Thomas's testimony that Defendant was intoxicated, had been drinking and shooting dope all day, had been threatening to commit suicide, and was "less than coherent." However, as the State points out, Defendant correctly informed the police officer that he had dope in his pocket. This indicates that he was conscious of the act of putting the dope in his pocket, remembered it, and stated it with reasonable accuracy. *See State v. Melton*, 239 Neb. 790, 478 N.W.2d 341, 347 (1992).

Defendant further argues the statement was not voluntary but a product of coercion. We do not find evidence this argument was advanced by Defendant below. Even if Defendant did rely on this theory in the district court, however, we believe it is misguided. It was Defendant, not the police, who initiated the encounter. *See State v. Vincik*, 436 N.W.2d 350, 353 (Iowa 1989). The fact that Defendant was being taken into custody does not preclude a valid consent to a search. *State v. Sedillo*, 81 N.M. 47, 462 P.2d 632 (Ct.App.), *cert. denied*, 81 N.M. 40, 462 P.2d 625 (1969); L.A. Bradshaw, Annotation, *Validity of Consent To Search Given by One in Custody of Officers*, 9 A.L.R.3d 858, § 5[a] (1966). It is "coercive police activity" that is a necessary predicate to finding that a statement was not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). "Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained." *Id.* at 166, 107 S.Ct. at 521.

Once Defendant voluntarily made the statement that there was "dope" in his pocket, Officer Thomas had probable cause to believe that a crime was being committed, specifically possession of a controlled substance. *See* NMSA 1978, § 30–31–23 (Repl.Pamp.1989). This would, of course, provide a proper legal foundation for both a full search and the actual arrest of Defendant. *See State v. Jones*, 96 N.M. 14, 15, 627 P.2d 409, 410 (1981) (warrantless arrest is valid where the officer has probable cause to believe that a crime has been committed by the person whom he arrests).

Defendant's "911" call was a plea for help. When the police responded, Defen-

dant volunteered that he had been shooting dope all day and wanted to kill himself. As Officer Thomas was patting down Defendant for transport under protective custody, Defendant volunteered that his pockets contained a pocket knife, a syringe, and "dope." Defendant's motion to suppress was properly denied.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

853 P.2d 722

V.P. CLARENCE COMPANY, a Texas corporation, Plaintiff-Appellant,

v.

Henry A. COLGATE, Maureen A. McGuinness and Henry A. Colgate d/b/a Colgate Properties, Defendants-Appellees.

No. 20623.

Supreme Court of New Mexico.

May 5, 1993.

Kemp, Smith, Duncan & Hammond, P.C., John P. Eastham, Albuquerque, for plaintiff-appellant.

Eaves, Bardacke & Baugh, P.A., John M. Eaves, Albuquerque, for defendants-appellees.

OPINION

FROST, Justice.

This appeal requires us to determine whether a Texas loan brokerage company violated the registration requirement of the New Mexico Mortgage Loan Company and Loan Broker Act, NMSA 1978, Sections 58–21–1 to –27 (Repl.Pamp.1991),[1] by providing loan brokerage services to individuals in New Mexico without a registration certificate. Plaintiff-appellant V.P. Clarence Company ("Clarence"), a loan brokerage firm without a New Mexico registration certificate under the Loan Broker Act, sued defendants-appellees Henry Colgate and Maureen McGuinness (collectively "Colgate"), New Mexico residents doing business in New Mexico as Colgate Properties, to recover brokerage fees allegedly owed for services rendered. The New Mexico district court dismissed Clarence's claim for failure to comply with the Act's registration requirement, Section 58–21–3. Because we find that Clarence was not required to obtain a registration certificate or to plead compliance with or exemption from the Act, we reverse and remand for proceedings consistent with this decision.

Standard of Review

This matter was presented to the trial court as a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *See* SCRA 1986, 1–012(B)(6) (Repl.Pamp.1992). In addition to briefs submitted by the parties on the motion before the district court, Clarence submitted an affidavit of its president, Kenneth Clarence. Colgate did not submit affidavits or other evidence to oppose the Clarence affidavit or to support the factual assertions made in its briefs. Because the trial court considered matters outside the pleadings, this action must be treated as an appeal of the entry of summary judgment. SCRA 1–012(B); *Graff v. Glennen,* 106 N.M. 668, 668, 748 P.2d 511, 511 (1988). The applicable standard of review, therefore, is that for summary judgment, and not the 12(B)(6) standard of accepting all well-pleaded facts as true and determining whether a claim has been stated upon which relief can be granted based solely on the pleadings. *Graff,* 106 N.M. at 668, 748 P.2d at 511. We also note that, although relied upon to an extent by the parties, the briefs and arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding. *See Archuleta v. Goldman,* 107 N.M. 547, 551, 761 P.2d 425, 429 (Ct.App.) (stating that for purposes of establishing a dispute of material fact in summary judgment proceedings, statements in unsworn briefs are not evidence), *cert. denied,* 105 N.M. 689, 736 P.2d 494 (1987); *Trujillo v. Puro,* 101 N.M. 408, 411, 683 P.2d 963, 966 (Ct.App.) (stating that arguments of counsel are not evidence for the purpose of summary judgment), *cert. denied,* 101 N.M. 362, 683 P.2d 44 (1984).

Facts

In February 1991, Clarence and Colgate executed an engagement letter authorizing Clarence to obtain for Colgate a mortgage loan of 4.7 million dollars secured by the BLM building in Santa Fe. The agreement provided that Clarence would earn a commission of one percent of the loan amount upon delivery to Colgate of a loan commitment conforming to agreed specifications.

1. Unless otherwise noted, the New Mexico Mortgage Loan Company and Loan Broker Act, NMSA 1978, §§ 58–21–1 to –27 (Repl.Pamp.1991) shall be referenced throughout as the "Loan Broker Act" or simply the "Act."

On March 15, 1991, Clarence presented to Colgate a loan commitment from the Pan American Life Insurance Company, and Colgate executed it five days later.

It is undisputed that Clarence is a loan broker in Texas that does not have a registration certificate under Section 58–21–3 to transact business as a mortgage loan company or loan broker in this state. It is also undisputed that, as stated in Clarence's unopposed affidavit, Clarence performed all brokerage services for Colgate in El Paso, Texas after having been contacted by Colgate at its office in El Paso. The transaction that is the subject matter of this lawsuit is the only mortgage brokered by Clarence with any connection to New Mexico since Section 58–21–3 was enacted in 1983. Clarence never visited New Mexico in connection with the loan transaction, and all related correspondence and telephone calls originated from its office in El Paso. There is no evidence that Clarence makes purchases, employs regular personnel, keeps bank accounts, owns or rents office or other property in this state, or has any other contacts with New Mexico.

Clarence argues that the Loan Broker Act is not implicated by its agreement with Colgate because the Act's registration requirement only applies to brokerage firms and brokers who "transact business in the state of New Mexico." Section 58–21–3. This claim is based upon Clarence's unchallenged factual assertion that all of its brokerage services were performed in Texas. Clarence contends that because the Act is entirely inapplicable, it is not required to plead compliance with or exemption from its provisions, and the district court erred in dismissing its suit for noncompliance with the Act.

Colgate counters that the Loan Broker Act is applicable because Clarence had sufficient contacts with New Mexico in its brokerage business pursuits to constitute the "transact[ion of] business in the state of New Mexico, either directly or indirectly," under Section 58–21–3. These contacts are: Clarence agreed to broker a loan for a New Mexico business (Colgate Properties), owned by New Mexico residents (Colgate and McGuinness), to be secured by New Mexico real estate (the BLM building in Santa Fe), and Clarence sued Colgate to recover its loan brokerage fee in New Mexico district court.[2] Like Clarence's principal argument, Colgate's argument is based upon a substantive assessment of the scope of our Loan Broker Act.

Discussion

Summary judgment is proper when the case presents no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. SCRA 1986, 1–056(C) (Repl.Pamp.1992); *Koenig v. Perez,* 104 N.M. 664, 665, 726 P.2d 341, 342 (1986). For purposes of summary judgment, facts set forth in affidavits that are uncontroverted must be taken as true. *State ex rel. Bardacke v. New Mexico Fed. Sav. & Loan Ass'n,* 102 N.M. 673, 675, 699 P.2d 604, 606 (1985). Taking Clarence's uncontroverted affidavit as true, none of its brokerage services were provided in New Mexico, and there is no genuine issue of material fact on the determinative issue in this appeal.

In interpreting and applying statutes, we must determine and effectuate the intent of the legislature, *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988), using the plain language of the statute as the primary indicator of legislative intent, *General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Statutory language that is clear and unambiguous must be given effect. *State v. Jonathan M.,* 109 N.M. 789, 790, 791 P.2d 64, 65 (1990). Section 58–21–3 of the Loan Broker Act states:

2. Clarence allegedly had other minor contacts with New Mexico according to Colgate's briefs. In particular, Colgate alleges that the loan brokerage contract was "signed and formed" in New Mexico. Such bare assertions of fact made only in briefs, unsupported by evidence formally submitted in judicial proceedings, are arguments of counsel which cannot be considered as evidence to be passed upon by this Court. *See Fitzsimmons v. Fitzsimmons,* 104 N.M. 420, 427, 722 P.2d 671, 678 (1986).

> It is unlawful for any person to transact business in the state of New Mexico, either directly or indirectly, as a mortgage loan company or loan broker without first filing an application with the director and obtaining a registration certificate under the Mortgage Loan Company and Loan Broker Act [this article], unless such person is exempt from the provisions of the Mortgage Loan Company and Loan Broker Act under the provisions of Section 6 [58–21–6 NMSA 1978] of that act.

Section 58–21–3 (brackets in original).

The Act's registration requirement applies only to mortgage loan companies or loan brokers who "transact business in the state of New Mexico, either directly or indirectly." *Id.* By its clear and unambiguous terms, the emphasis of this prerequisite to the Act's applicability is on the requirement that brokers "transact business in the state of New Mexico." Because Clarence did not perform the compensable services of a mortgage loan company or a loan broker in New Mexico, it did not "transact business in the state of New Mexico." Clarence's incidental contacts with New Mexico necessary to communicate with its New Mexico client are too remote to constitute transacting business in this state under the Act. Decisions interpreting sections of the New Mexico Business Corporation Act, NMSA 1978, Sections 53–11–1 to –18–12 (Repl.Pamp.1983 & Cum.Supp.1992), which condition their applicability upon "transacting business in this state" under Business Corporation Act Section 53–17–20, are in accord with our view that simply providing services to a New Mexico resident without performing any portion of such services in New Mexico does not constitute the transaction of business in New Mexico. *See, e.g., Riblet Tramway Co. v. Monte Verde Corp.,* 453 F.2d 313, 318 (10th Cir.1972) (holding under New Mexico law that a Washington corporation that sold ski lifts to New Mexico customers did not transact business in New Mexico although it had sent representatives to New Mexico to conduct an on-site inspection, and later, to secure and collect its debts); *Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc.,* 81 N.M. 10, 12–13, 462 P.2d 144, 146–47 (1969) (holding that a foreign corporation in the business of financing aircraft purchases that provided credit to New Mexico clients from out-of-state did not transact business in New Mexico by enforcing liens on personal property in New Mexico), *cert. denied,* 397 U.S. 1076, 90 S.Ct. 1521, 25 L.Ed.2d 811 (1970); *J.H. Silversmith, Inc. v. Keeter,* 72 N.M. 246, 249, 382 P.2d 720, 723 (1963) (holding that a foreign insurance company that from out-of-state appointed and removed New Mexico insurance agents and collected premiums on their behalf did not transact business in New Mexico).

As grammatically structured, the aside, "directly or indirectly," qualifies the main requirement that the broker "transact business in the state of New Mexico." *See* § 58–21–3. The qualification "directly or indirectly" appears intended to prevent a loan broker or brokerage firm from escaping regulation under the Act by alleging that it never physically entered New Mexico, or that it transacted business here only indirectly through its agents. We do not believe that the language "directly or indirectly" in Section 58–21–3 is intended to modify precedents defining the transaction of business in New Mexico under Section 53–17–1 of the New Mexico Business Corporation Act, thereby forcing brokers with the most minimal, insignificant contacts with New Mexico to register under the Loan Broker Act. Because the legislature is presumed to act with knowledge of relevant case law, and the provisions of a statute must be read together with other statutes *in pari materia, Incorporated County of Los Alamos v. Johnson,* 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989), we interpret the transaction of business requirement in the Loan Broker Act consistently with our Business Corporation Act precedents, absent a more clear statutory directive in the Loan Broker Act evidencing legislative intent to modify our interpretation.

Our view that the Loan Broker Act only applies to those who perform loan brokerage activities in New Mexico has been

adopted by several jurisdictions with similar statutes. For example, in *Lucas v. Gulf & Western Industries, Inc.*, 666 F.2d 800, 803 (3d Cir.1981), the Third Circuit Court of Appeals held that the Florida real estate brokers licensing statute defining brokers as those who perform certain activities "in this state" did not apply to persons who rendered brokerage services concerning Florida realty from outside Florida. Similarly, in *Paulson v. Shapiro*, 490 F.2d 1, 4 (7th Cir.1973), the fact that all real estate brokerage negotiations occurred outside Wisconsin rendered the Wisconsin real estate broker licensing statute inoperative. Also, in *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1151 (9th Cir.1986), the court ruled that under the California statute stating that "it is unlawful for any person to engage in ... business ... as a real estate broker ... within this state without first obtaining a real estate license," a broker unlicensed in California can recover on a contract relating to California realty when his brokerage activities are not performed in California.

Finally, the fact that Clarence chose to sue Colgate to recover his commission in a New Mexico court does not affect our conclusion. Under the Business Corporation Act, a statute similar to the Loan Broker Act in terms of its public policy objectives, the mere filing of a lawsuit in a New Mexico court does not in and of itself constitute "transacting business in this state," § 53–17–1(A). Though technically inapplicable, this provision indirectly affects our view of what level and nature of activity amounts to "transact[ing] business in the state of New Mexico" and, due to the similarity between the two provisions, it instructs our application of the relevant statute. We therefore conclude that under the Loan Broker Act, Section 58–21–3, merely filing a lawsuit in a New Mexico court does not in and of itself constitute "transact[ing] business in the state of New Mexico."

Conclusion

Under the facts appropriately before us, Clarence's compensable loan brokerage services were performed entirely in Texas. We find as a matter of law that Clarence did not "transact business in the state of New Mexico" under Section 58–21–3 of the Loan Broker Act, and that, consequently, it is not required to obtain a registration certificate under the Act.[3]

For the foregoing reasons, we reverse the decision of the district court and remand for proceedings consistent herewith.

IT IS SO ORDERED.

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

853 P.2d 726

AZTEC WELL SERVICING CO., INC., Gary Dean Cole, Stanley S. Brooks, Max Larson, and Andrew K. Brashear, Plaintiffs–Appellees,

v.

PROPERTY & CASUALTY INSURANCE, GUARANTY ASSOCIATION OF the STATE of New Mexico, Defendant–Appellant.

No. 20569.

Supreme Court of New Mexico.

May 10, 1993.

3. It is noteworthy that unlike the New Mexico Real Estate Brokers and Salesmen Act, NMSA 1978, 61–29–1 to –29 (Repl.Pamp.1990 & Cum. Supp.1992), and the New Mexico Business Corporation Act, the Loan Broker Act does not expressly bar from filing suit in New Mexico courts those who do not properly register under it. *See* § 61–29–16 (Repl.Pamp.1990); § 53–17–20(A). It is therefore unresolved whether a violation of the Loan Broker Act's registration requirement, Section 58–21–3, erects a per se barrier to filing suit in our courts. Because we find that Clarence did not violate Section 58–21–3, we need not reach this issue.

Felker, Ish, Hatcher, Ritchie, Sullivan & Geer, P.A., Carol J. Ritchie, Santa Fe, for defendant-appellant.

Tansey, Rosebrough, Gerding & Strother, P.C., Richard L. Gerding, Farmington, for plaintiffs-appellees.

OPINION

FROST, Justice.

Aztec Well Servicing Company, Inc. ("Aztec") filed a declaratory judgment action against the New Mexico Property and Casualty Insurance Guaranty Association (the "Association") in the District Court of Santa Fe County on behalf of four claimants: Gary Dean Cole, Stanley S. Brooks, Max Larson, and Andrew K. Brashear ("the claimants").[1] From the District

1. Brashear's claim was fully satisfied before the trial below, and the District Court correctly found that he did not have a "covered claim." The parties apparently agreed with the court

Court's decision on the merits in favor of Aztec, the Association appeals. As to the issues in sections I and II of this opinion, the Court is unanimous. As to the issue in section III regarding prejudgment interest, the special concurrence authored by Justice Montgomery represents the majority opinion.

FACTS

Each of the claimants was injured in an oil well fire, and they sued Aztec and other defendants in a personal injury action. In a jury trial on liability only, the jury found Aztec 25% at fault for the injuries to Brooks and Larson and 23% liable for the injuries to Cole. After the jury trial on liability, Aztec stipulated to the claimants' damages as follows: Cole—$2.6 million of which Aztec's 23% liability share equalled $598,000; Brooks—$800,000 of which Aztec's 25% share was $200,000; and Larson—$600,000 of which Aztec's 25% share was $150,000.

Aztec's primary insurance carrier was Home Insurance Company with which Aztec had liability insurance with policy limits of $300,000. Aztec carried excess insurance coverage with Mission National Insurance Company ("Mission"), which provided coverage for losses in excess of $300,000 up to $10 million. Mission became insolvent, however, during the settlement negotiations with the claimants in which its attorneys participated. Aztec then entered into settlement agreements with each of the claimants.

Under the settlement agreements that Aztec negotiated, Home Insurance paid Cole $300,000, which constituted its policy limits and Aztec's entire insurance proceeds. Aztec itself paid $67,500 to Brooks and $20,000 to Larson. Each claimant released Aztec from further claims, and Aztec agreed to pursue an action against the Association on their behalf.

After Mission's insolvency, Aztec received notice that Mission was being liquidated and later received a claim form from the Department of Insurance for the State of California (the "Conservator"). The Conservator had partially filled out the form. Aztec completed the form, stating that multiple personal injury claims were outstanding and unliquidated. In the claim form, Aztec also made reference to the claimants' pleadings and settlement documents that it already had provided to Mission. There was no dispute that Aztec's proof of claim was timely filed.

PROCEDURAL HISTORY

After its claims were denied, Aztec filed this action against the Association, seeking the maximum statutory recovery of $100,000 per claimant under the Property and Casualty Insurance Guaranty Law, NMSA 1978, Sections 59A-43-1 to -18 (Repl.Pamp.1992) (the "Act"). Eventually, the Association moved for summary judgment in the District Court. The parties agreed that affidavits and answers to discovery were dispositive on summary judgment and provided all of the information necessary for a decision on the merits of the case.

The District Court found that prior to its insolvency, Mission retained attorneys to represent its interests, that they recommended settlement of the claims, and that accordingly Mission had actual notice of the claims which the Court imputed to the Association. The District Court also found that the proof of claim which Aztec filed was timely and sufficient to place the Association on notice of the claims. In addition, the Court concluded that the Association, by law, stood in the shoes of Mission and assumed all rights, duties, and obligations of Mission. The Court also found that the actual damages of the claimants exceeded the amounts received from Aztec and that their unpaid claims were covered under the Act. The District Court held, therefore, that the claimants were entitled to receive $100,000 each from the Association, plus prejudgment interest at the statutory rate from the filing of the complaint to the date of judgment, and costs.

because the briefs on appeal referred to Cole, Brooks, and Larson only.

ISSUES

I. *Interpretation of the Act*

The Association is a statutory entity, which consists of all property and casualty insurers doing business in New Mexico, that administers a fund comprised of assessments upon member insurers to pay claims made upon insolvent insurers. *See* NMSA 1978, § 59A–43–2 (Repl.Pamp.1992); *In re Mission Ins. Co.*, 112 N.M. 433, 435, 816 P.2d 502, 504 (1991); *see also* 2A Couch on Ins.2d, § 22:27 at 599 (Rev. ed. 1984); 19A Appleman, Ins. Law & Practice, § 10801–02 at 364 (Rev.Vol.1982). The stated purpose of the Act is "to provide a mechanism for payment of covered claims under certain insurance policies to avoid ... financial loss to claimants or policyholders because of insolvency of an insurer...." Section 59A–43–2. Under the Act, the Association is obligated to the policyholder or claimant for a "covered claim" that exists before insolvency of the insurer and for claims arising within 30 days after the determination of insolvency. Section 59A–43–7(A)(1). Thus, the Association's liability is triggered by the insolvency of the insurer, and it is for all practical purposes deemed to be the insurer just as if the insurer were solvent. Section 59A–43–7(A)(2).

A. *Cole*

On appeal, the Association argues that the District Court erred in holding that Cole's claim was a "covered claim" under Subsection 59A–43–4(C), which reads:

> "covered claims" means an *unpaid claim* of an insured or of a liability claimant ... that arises out of and within the coverage and not in excess of the applicable limits of an insurance policy ... issued by an insurer authorized to transact insurance in this state, if such insurer becomes an insolvent insurer.... (Emphasis added)

The Subsection also limits individual covered claims to $100,000. The Association essentially asserts that Cole did not have an unpaid claim. The Association denies that Cole was entitled to recover any amount under the Act because his recovery from Home Insurance should offset the entire liability of the Association. The Association contends that under Section 59A–43–11(A), entitled "Nonduplication of recovery," any amount payable on a covered claim must be reduced by any amount recovered from any other insurance policy. It follows, according to the Association, that because Cole recovered more than $100,000 from another insurance policy, he should receive no recovery under the Act. Aztec asserts that such an interpretation is absurd, and we agree.

The relevant part of Section 59A–43–11(A) states: "Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery available *under such insurance policy.*" (Emphasis added). The emphasized language refers to the policy described in the first sentence of Section 59A–43–11(A), which states that any "person having a claim against any insurer under any provision in an insurance policy ... other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under the policy."

The Association urges upon us a strict interpretation of the Act because it was enacted in derogation of the common law, but this ignores the fact that the Legislature provided for liberal construction of the Act to implement its purposes. *See* 1984 N.M.Laws, ch. 127, § 785, p. 1259. Our interpretation of the statute must be consistent with legislative intent, and our construction must not render the statute's application absurd, unreasonable, or unjust. *City of Las Cruces v. Garcia*, 102 N.M. 25, 26–27, 690 P.2d 1019, 1020–21 (1984).

Although our statute is not a model of lucidity,[2] we read Section 59A–43–11(A)

2. *See Arizona Property & Casualty Ins. Guar. Fund v. Herder*, 156 Ariz. 203, 751 P.2d 519, 523 (1988). Other courts have construed language almost identical to that in Section 59A–43–11(A). The Supreme Court of Vermont determined that similar language in its statute was "ambiguous if not contradictory." *See International Collection Serv. v. Vermont Property & Casualty Ins. Guar. Ass'n*, 150 Vt. 630, 555 A.2d 978, 980 (1988). In addition, the Court of Ap-

to apply to situations in which the insured is entitled to proceeds from two collateral policies insuring against the same risk, one of which becomes unavailable due to insolvency. In such situations, the Act requires the insured to exhaust first its available insurance coverage before seeking recovery from the Association. For example, if Aztec had another excess insurance policy, the proceeds of which were available in this situation, then the Act would require the application of such proceeds to offset the claimants' damages before seeking recovery from the Association under the Act.

Unlike the construction given by the Association, therefore, the reasonable interpretation of Section 59A–43–11(A) is that it requires an offset of proceeds available to the claimant from another insurance policy that is not insolvent and does not constitute a "covered claim" under the Act. In addition, the offset is applied against the insured's liability, or against the claimant's damages as the case may be, not against the statutory amount of liability of the Association. *See International Collection Serv. v. Vermont Property & Casualty Ins. Guar. Ass'n,* 150 Vt. 630, 555 A.2d 978, 980 (1988); *Arizona Property & Casualty Ins. Guar. Fund v. Herder,* 156 Ariz. 203, 751 P.2d 519, 523 (1988) (reaching same result).

To require an offset, as the Association urges, of the amount recovered from the primary insurance carrier against the Association's liability would be absurd because it was that recovery which triggered the application of Mission's excess insurance policy in the first place.[3] Moreover, to interpret the Act as the Association does would eviscerate its express purpose of avoiding financial loss to a legitimate claimant as a result of the insolvency of its insurer to which the claimant paid premiums. *See Connecticut Ins. Guar. Ass'n v. Union Carbide Corp.,* 217 Conn. 371, 585 A.2d 1216, 1225 (1991).

Our interpretation also is consistent with the intent of the Legislature to avoid duplication of recovery as expressed in the title to Section 59A–43–11(A). This Subsection was designed to prevent double recovery or windfall, not to reduce the amount of the claimant's damages that remain partially unsatisfied. *Id.* It is self-evident that payment from an excess insurance policy after the exhaustion of primary coverage is not duplicative. Bound to interpret the Act to implement the Legislature's intent without making its application an absurdity, we hold that payment from the primary insurer cannot be used to offset the Association's pecuniary obligations for the insolvent excess insurer. *See Washington Ins. Guar. Ass'n v. McKinstry Co.,* 56 Wash.App. 545, 784 P.2d 190, 192, *cert. denied,* 114 Wash.2d 1017, 791 P.2d 535 (1990) (noting statute's purpose of avoiding financial loss to claimant, court held that allowing association to offset payments from primary insurer against its liability when it stands in shoes of an insolvent excess insurer would contravene purpose of statute).

It is clear, then, that the District Court was correct in holding that Cole was entitled to an award of $100,000 from the Association. Here, the depletion of proceeds from Aztec's primary insurance policy triggered Mission's excess insurance policy. Thus, if Mission were solvent, it would be liable to Cole under its policy for $298,000, the remaining amount of its insured's liability to Cole. Because Mission became insolvent, however, the statute triggered the liability of the Association. Accordingly, the Association steps into the shoes of the

peals of Washington interpreted a similar offset provision, and in its discussion referred to the "practical inconsistencies and ambiguities" of the statute. *See Washington Ins. Guar. Ass'n v. McKinstry Co.,* 56 Wash.App. 545, 784 P.2d 190, 192, *cert. denied,* 114 Wash.2d 1017, 791 P.2d 535 (1990).

3. The Association relies heavily on opinions from the Iowa and Montana Supreme Courts. Both cases, however, involved the application of specific statutory provisions that required a credit reduction of a recovery from other sources against the liability of the association. As such, those cases are inapposite. *See Stecher v. Iowa Ins. Guar. Ass'n,* 465 N.W.2d 887, 888 n. 2 (Iowa 1991); *Palmer v. Montana Ins. Guar. Ass'n,* 239 Mont. 78, 779 P.2d 61, 64 (1989).

insolvent insurer, and for all practical purposes it *is* the insolvent insurer except that the Association is only liable for up to $100,000 per claim. *See* § 59A–43–4(C). The Association, therefore, became bound by law to the extent of Mission's obligations on the excess insurance policy just as if Mission had not become insolvent. *See* § 59A–43–7(A)(2).

B. *Brooks and Larson*

The Association argues on one hand that it was not bound by Aztec's settlement agreements with Brooks and Larson because Mission did not approve or ratify the agreements. After its insolvency, neither Mission nor the Association participated in the settlement negotiations. The Association contends that the District Court had to conclude that it was bound by the settlement agreements to justify an award to the claimants. On the other hand, the Association argues that if it were bound, it would be liable only for amounts paid to Brooks and Larson under the settlement agreements.

Again, the Association misses the point. To constitute a covered claim under the Act, the District Court did not have to conclude that the Association was bound by the settlement agreements with Brooks and Larson. The District Court correctly analyzed the statute and found that their damages exceeded the proceeds available under Aztec's primary insurance policy, thus bringing Mission's excess policy into effect. Because Mission became insolvent and their claims remained unpaid, the Association's statutory liability was triggered. Brooks and Larson, therefore, were entitled to an award of $100,000 each under the Act. Any settlement agreement by Aztec with Brooks and Larson was irrelevant to whether they had a covered claim under the Act. The Association undertook Mission's obligations under the excess insurance policy, not Aztec's obligations under its settlement agreements. The District Court, therefore, was correct in holding that both Brooks and Larson were entitled to an award from the Association.

II. *Sufficiency of Notice*

The Association also argues that the District Court's award to Cole must be overturned because he failed to give timely notice of his claim as required by the Conservator and NMSA 1978, Section 59A–41–21(A) (Repl.Pamp.1992). The Association claims that invalid notice to the Conservator defeats Cole's claim against the Association. According to the Association, only Brooks and Larson gave the proper notice by way of the proof of claim that Aztec filed on their behalf. The Association essentially claims that Aztec should have filed three separate proof of claim forms with the Conservator, one for each claimant. Aztec asserts that Mission had actual notice of the claims, which should be imputed to the Association, and that while its proof of claim form did not explicitly denote Cole's claim, it was sufficient to notify the Association and the Conservator of the various claims by Aztec.

Without deciding whether actual knowledge by Mission may be imputed to the Association, we conclude that Section 59A–41–21(A) does not require notice to the Association; it requires notice only to the domiciliary receiver, in this case the Conservator, or the ancillary receiver. Aztec, as the insured and the real claimant, amply notified the Conservator in its proof of claim form of the claimants' personal injury claims precipitating coverage under Mission's policy. That is all Section 59A–41–21 requires. Even though the proof of claim form did not specifically denote Cole as a claimant, we hold that it substantially complied with Section 59A–41–21(B). The Association has referred us to no persuasive authority that would justify its position, which essentially is that strict compliance with notice requirements is jurisdictional in this case. We decline to adopt such a position because it would defeat the Act's salutary statutory purpose noted above and would be contrary to the Legislature's direction to liberally construe the Act to implement that purpose.

Thus, the District Court was correct in determining that the claimants were entitled to a recovery from the Association in

the amount of $100,000 each. Accordingly, the District Court's award of covered claims to Cole, Brooks, and Larson is affirmed.

III. *Prejudgment Interest*

Last, the Association contested the District Court's award of prejudgment interest and costs to the claimants, arguing that the statutory limit on covered claims and the specific exclusion of interest and costs under the Act precluded such an award. The limitations clause provides that:

> individual "covered claims" shall be limited to [$100,000] *and shall not include any amount in excess of [$100,000],* and the total amount of covered claims which may be asserted by any claimant, including also covered claims brought by any party on behalf of such claimant or as a result of injuries to such claimant shall not exceed [$100,000] per occurrence....

Section 59A–43–4(C) (emphasis added). The same Subsection also provides that a covered claim "shall not include supplementary payment obligations, including but not limited to adjustment fees and expenses, attorneys' fees and expenses, court costs, interest and bond premiums incurred prior to the determination that an insurer is an insolvent insurer...." *Id.*

As stated at the beginning of this opinion, the Court is divided on the issue of prejudgment interest as discussed in the present section of this opinion. The majority takes the view that the district court properly awarded prejudgment interest and costs, for the reasons set out in Justice Montgomery's concurring opinion below. The undersigned and Justice Baca disagree with this view; this section therefore represents a dissenting opinion on the issue of prejudgment interest.

Aztec asserted and the majority holds that an award of prejudgment interest rests within the discretion of the trial court under NMSA 1978, Section 56–8–4(B) (Repl.Pamp.1986) and cannot, therefore, be subject to the statutory cap. In addition, Aztec argued and the majority holds that the statute only excludes costs and interest from the definition of "covered claim," but does not proscribe an award of interest in addition to an award of a covered claim. To support its interpretation, Aztec offered the example of Section 59A–43–7(B)(1), which permits the Association to settle and pay claims including an award of attorneys' fees and costs in addition to an award for a covered claim.[4]

We are not persuaded by Aztec's arguments; rather, we believe that the Act is clear in limiting compensation to an individual claimant in the form of a "covered claim" to $100,000 per occurrence, and a covered claim is all that the Association is authorized to award a claimant as compensation. *See* § 59A–43–4(C). In this State, prejudgment interest is compensation for the loss of the use of funds to which the claimant is entitled, and it is considered an item of damages. *See Ranch World of N.M., Inc. v. Berry Land & Cattle Co., Inc.,* 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990); *United Nuclear Corp. v. Allendale Mut. Ins. Co.,* 103 N.M. 480, 488, 709 P.2d 649, 657 (1985); *Bradbury & Stamm Constr. Co. v. Bureau of Revenue,* 70 N.M. 226, 238, 372 P.2d 808, 816 (1962). The District Court's award of prejudgment interest was improper, therefore, because the compensation in this case including the prejudgment interest exceeded the express statutory limit for a covered claim.[5] *See Sands v. Pennsylvania Ins. Guar. Ass'n,* 283 Pa.Super. 217, 423 A.2d 1224, 1229 (1980) (construing similar statutory language, court excluded prejudgment interest from "covered claim" because it would have exceeded statutory limit).

In addition, the majority turns the exclusion of interest from a "covered claim" on its head. The majority states that because

4. Section 59A–43–7(B)(1) states: "Though not a covered claim as defined in [Section 59A–43–4(C)], the association may, if it determines it necessary to the settlement and disposition of claims, pay adjustment fees and expenses, and attorney's fees and expenses incurred prior to the determination that an insurer is an insolvent insurer; ...."

5. It was undisputed that the total recovery per claim including prejudgment interest would exceed the statutory limit.

Section 59A–43–4(C) makes it clear that interest is excluded as an element of compensation in a "covered claim," interest may be granted in addition to an award, notwithstanding the statutory cap. The Act authorizes the Association, however, to award a recovery only for "covered claims," except when it may exercise its discretion to award attorneys' fees and costs. Section 59A–43–7(B)(1) merely allows the Association to exercise its discretion in administering claims and does not direct it to award attorneys' fees and costs in all circumstances. In no event may the Association exercise its discretion to award prejudgment interest in addition to a "covered claim" and thereby exceed the statutory limit.

The statutory cap on compensation here does not usurp the trial court's exercise of discretion to award prejudgment interest because the trial court may not compel the Association to award what the law has not authorized it to award. In addition, it is well-settled that a statute dealing with a specific subject will be given effect over a more general statute encompassing the same subject. *Stinbrink v. Farmers Ins. Co. of Ariz.*, 111 N.M. 179, 182, 803 P.2d 664, 667 (1990). For example, in *State ex rel. Human Servs. Dep't v. Judy H. (In re Melissa H.)*, 105 N.M. 678, 735 P.2d 1184 (Ct.App.), *cert. denied*, 105 N.M. 644, 735 P.2d 1150 (1987), the Court of Appeals determined that a specific statute governing the award of costs and expenses prevailed over the general rule of awarding costs and expenses in civil litigation. *Id.* 105 N.M. at 679, 735 P.2d at 1185. The Court rejected the argument that because the specific statute did not contain a provision for the award of certain costs, the general rule for awarding costs applied. Likewise here, just because the Act does not specifically provide for an award of prejudgment interest (and indeed, it may preclude such an award), it does not follow that the general statute regarding prejudgment interest, Section 56–8–4, fills in that void. Thus, the majority is incorrect when it states that "the absence of an express allowance [of prejudgment interest] did not deprive the court of authority to make such an award."

We have said that the Association's liability is triggered by the insolvency of the insurer and that it is for all practical purposes deemed to be the insurer just as if the insurer were solvent. Section 59A–43–7(A)(2). But this is not the same as holding that the Association is the legal successor of the insolvent insurer and thus liable for its legal obligations as a guarantor. *See Sands*, 423 A.2d at 1229. Instead, the Association is liable to pay only "covered claims" subject to a statutory cap. Prejudgment interest in this case, therefore, may not be awarded in addition to the covered claims. This is not to say, however, that Section 59A–43–4(C) necessarily excludes prejudgment interest as an element of compensation comprising a portion of a "covered claim" when the total amount of compensation is less than the statutory cap.

The majority sees no reason to distinguish between pre- and postjudgment interest, but other courts have done so, and we find the distinction significant. Postjudgment interest cannot be considered part of covered claim because it is not compensation comprising part of an unpaid claim against an insolvent insurer. *See FIGA v. R.V.M.P. Corp.*, 874 F.2d 1528, 1533 (11th Cir.1989). Because the Act allows the Association to sue and be sued, it is subject to the laws of this State just like any other litigant. *See* § 59A–43–7(B)(3); *Sands*, 423 A.2d at 1229. Postjudgment interest under the majority's analysis, therefore, could be awarded in addition to a judgment (covered claim) against the Association even if the amount of interest exceeded the statutory cap. *See Sifers v. General Marine Catering Co.*, 892 F.2d 386, 398 (5th Cir.), *modified on other grounds*, 897 F.2d 1288 (5th Cir.1990). Prejudgment interest, on the other hand, is compensation which forms part of the judgment amount.

The majority notes that an award of prejudgment interest furthers the general purposes of compensating a plaintiff for the loss of the use of its money and of fostering settlement and preventing delays. These are worthy purposes, but are com-

pletely irrelevant here in the face of the limit upon the compensation that the Association is authorized to award.

Nor does the limitation on recovery defeat the stated purpose of the Act to avoid financial losses to claimants as a result of the insurer's insolvency. The statutory remedy was not intended to make the claimant whole, but only to mitigate the loss caused by the insolvency of the insurer. *See International Collection Serv.*, 555 A.2d at 980.

The Legislature has provided a remedy where there was none at common law, and if it meant to do more, it would have so specified. Here, the Act limits compensation in the form of a covered claim to $100,000. An award of prejudgment interest, which is another form of compensation to be distinguished from postjudgment interest, was improper in this case because it exceeded the statutory cap on compensation. The District Court was incorrect, therefore, in awarding prejudgment interest and costs.

BACA, J., concurs.

RANSOM, C.J., and MONTGOMERY and FRANCHINI, JJ., specially concur.

MONTGOMERY, Justice (specially concurring).

I (and the undersigned concurring Justices) concur with the foregoing opinion by Justice Frost, except that we disagree with his and Justice Baca's conclusion that the trial court erred in awarding prejudgment interest and costs. A majority of the Court has concluded that prejudgment interest and costs were properly awarded to each of the claimants. This opinion therefore announces the ruling of the Court on this issue and explains our reasoning.

We do not agree with the Association that the trial court's award of prejudgment interest was inconsistent with the Act's limitation on the Association's liability. The Association argues that the $100,000 limit on "covered claims" in Section 59A–43–4(C) precludes awarding prejudgment interest to the claimants since the amount of the court's judgment to each claimant, not including prejudgment interest, was already equal to $100,000. In other words, the Association argues that the statutory cap of $100,000 on a covered claim includes prejudgment interest, so that a total judgment against the Association on a claim, including prejudgment interest (and costs), cannot exceed $100,000.

To support its position, the Association contends that the Act's cap on covered claims limits the Association's liability on all compensatory damages. It then argues that prejudgment interest is an element of compensation and is therefore included within the statutory cap.

We do not dispute the Association's characterization of prejudgment interest as an element of compensation. *See Ranch World, Inc. v. Berry Land & Cattle Co.*, 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990) (award of prejudgment interest is compensation for loss of use of funds). However, the issue before us is not whether prejudgment interest constitutes compensation for loss of the use of funds; rather, the issue is whether prejudgment interest is included within the definition of "covered claims" so as to be limited or excluded by the Act's liability cap of $100,000 per occurrence on individual "covered claims." We hold that it is not.

Section 59A–43–4(C) defines "covered claims" in pertinent part as follows:

> an *unpaid claim* of an insured or of a liability claimant ... that arises out of and within the coverage and not in excess of the applicable limits of an insurance policy ... issued by an insurer authorized to transact insurance in this state, if such insurer becomes an insolvent insurer....

(Emphasis added.)

We believe that an "unpaid claim" refers to an amount that a claimant seeks to recover from an insolvent insurer and subsequently against the Association; it does not include prejudgment interest, which is an amount that is awarded later, after litigation has begun and been completed, to a successful claimant. The words of the section themselves (quoted in

Justice Frost's opinion) support this interpretation by expressly excluding supplementary payment obligations, including interest and court costs, from the definition of covered claims. The statutory cap on covered claims, therefore, while limiting the Association's liability on an *unpaid claim,* does not limit the total amount that a successful claimant may recover in a judgment against the Association.

"Court costs" is one of the types of "supplementary payment obligations" referred to in the statute. "Interest" is another.[1] A third is "attorneys' fees and expenses." This third type of supplementary payment obligation might arise, for example, if the Association unreasonably refused payment of an insured's claim against an insolvent insurer under a policy providing first-party coverage and the court awarded reasonable attorney's fees under NMSA 1978, Section 39-2-1 (Repl.Pamp.1991). The notion that an insured or a liability claimant seeking payment of a claim against an insolvent insurer may not recover these types of supplementary payment obligations in a successful action against the Association—whether the claim is less or greater than $100,000—strikes us as simply untenable.

The Association submits, as an alternative argument, that if prejudgment interest is not included within a "covered claim" and therefore is not subject to the statutory cap, the trial court nonetheless erred in awarding it because the Act does not authorize such an award. We disagree because we do not believe that specific authority within the Act itself is necessary to award prejudgment interest. While we would certainly abide by an express prohibition in the Act against an award of prejudgment interest, the absence of an express allowance did not deprive the court of authority to make such an award. On the contrary, the trial court had that authority under either NMSA 1978, Section 56-8-3 or Section 56-8-4(B) (Repl.Pamp.1986).[2] *See United Nuclear Corp. v. Allendale Mut. Ins. Co.,* 103 N.M. 480, 488, 709 P.2d 649, 657 (1985) (prejudgment interest under § 56-8-3(A) awarded for breach of contract); *Southard v. Fox,* 113 N.M. 774, 776-78, 833 P.2d 251, 253-55 (Ct.App.1992) (prejudgment interest awarded under § 56-8-4(B) in action based on tort).

Our holding furthers the general purposes of awarding prejudgment interest. One such purpose is to compensate a plaintiff for the loss of the use of money, resulting from the defendant's failure to pay, during the pendency of a lawsuit. *Ranch World,* 110 N.M. at 404, 796 P.2d at 1100. We perceive no reason why we should not advance this purpose in the

1. The statute does not distinguish between pre- and post-judgment interest. Since both forms of interest accrue after the insured's claim against the insolvent insurer has ripened into a "covered claim" and the Association has been adjudicated liable therefor, we see no reason to draw any such distinction ourselves.

2. The trial court did not specify whether it was awarding prejudgment interest under § 56-8-3 or § 56-8-4(B). Section 56-8-3 (which, as demonstrated by, *e.g., United Nuclear,* has been interpreted to authorize prejudgment interest in an appropriate case) provides in part:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:
>
> A. on money due by contract....

Section 56-8-4(B) provides:

> 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.

The fact that the court allowed prejudgment interest at the rate of 15% suggests that the court was relying on § 56-8-3, which probably was proper since the money due to the claimants from the Association was "due by contract." On the other hand, the fact that the court granted prejudgment interest from the date the complaint was filed, instead of an earlier date, such as the date the Association or the Conservator was notified of the claims, suggests that the court may have had § 56-8-4(B) in mind. In any event, because no issue is raised on this appeal as to the applicable statute, the appropriate rate, or the proper date from which the prejudgment interest started to run, we do not rule on any of these potential issues.

present context. On the contrary, it would be inequitable to deny successful claimants under the Act the cost of the lost opportunity to use the money of which the Association had use during the lawsuit. *Cf. Ulibarri v. Gee,* 107 N.M. 768, 769, 764 P.2d 1326, 1327 (1988) (when award is remanded for a new decision because of excessiveness, new award accrues interest from the date of the original judgment).

Our holding also furthers the purposes of fostering settlement and preventing delay. *See Southard,* 113 N.M. at 778, 833 P.2d at 255 (purpose of § 56–8–4(B) is to foster settlement and prevent delay). By allowing an award of prejudgment interest to a successful claimant in an action against the Association, we encourage the parties to settle their disputes promptly.

This Court has previously held that an injured party is generally entitled to prejudgment interest *as a matter of right* when the amount due by contract is fixed or liquidated. *E.g., United Nuclear,* 103 N.M. at 488, 709 P.2d at 657; *Shaeffer v. Kelton,* 95 N.M. 182, 187–88, 619 P.2d 1226, 1231–32 (1980). When the amount is not fixed or readily ascertainable, the trial court has discretion to award prejudgment interest. *United Nuclear,* 103 N.M. at 488, 709 P.2d at 657; *Shaeffer,* 95 N.M. at 187, 619 P.2d at 1231. In the present case, the award of prejudgment interest might very well be viewed as a matter of right since the amount due to each claimant was fixed and readily ascertainable. In any event, the Association has not demonstrated that the trial court abused its discretion in making the award.

On the issue of prejudgment interest and costs, then, as well as on the other issues discussed in Justice Frost's opinion for the Court, the trial court's judgment is affirmed in all respects.

IT IS SO ORDERED.

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

853 P.2d 737

Frank M. GARCIA, Claimant–Appellee,

v.

BORDEN, INC., and Cigna Insurance, Respondents–Appellants.

No. 13661.

Court of Appeals of New Mexico.

March 29, 1993.

Harold O. Atencio, Butt, Thornton & Baehr, P.C., Albuquerque, for respondents-appellants.

David C. Chavez, Chavez & Chavez, Los Lunas, for claimant-appellee.

OPINION

DONNELLY, Judge.

Employer and its insurance company appeal a compensation order of the Workers' Compensation Judge (WCJ) awarding temporary total disability benefits and attorneys' fees to Worker. We discuss whether: (1) expert testimony was required to establish that Worker's accident arose from a risk related to his employment; (2) the decision of the WCJ that Worker suffered a disability due to a work-related accident is supported by substantial evidence; (3) it was error to admit rebuttal testimony concerning the cause of Worker's accident; and (4) the WCJ erred in determining that Worker was temporarily totally disabled. We affirm.

FACTS

Worker was employed as a cheese worker for Employer. His work included, among other things, cleaning pipes and equipment and cooking, processing, and packing cottage cheese. He also was directed to use chlorine to sanitize lines connected to the cheese processing equipment. On March 19, 1991, Worker began work and thereafter began experiencing dizziness while applying sanitation chemicals to the equipment. When the dizziness continued to affect him, Worker decided to go to the employees' locker room and rest with a wet towel over his head. He testified that when he reached into his locker for a towel he was still experiencing the effects of the chlorine, and that he became dizzy and fell, hitting his lower back on the locker door. When he fell to the floor, he heard a pop and felt a pain in his back; thereafter, he experienced tingling and numbness in his legs. He rested for a while and then returned to work. He was told to continue working and to seek medical treatment the next day. Worker was treated for back pain and was given a medical excuse from work for several weeks. When he was released to return to work, he was told his job as a cheese worker was no longer available. Instead, Employer offered him a job doing clean-up work, earning the same salary. Worker refused this job because he was still physically disabled and the new position required more strenuous activity than he could perform. Thereafter, Worker filed a compensation claim; following a hearing the WCJ awarded him temporary total disability benefits, medical benefits, and attorneys' fees.

I. *RISK INCIDENT TO EMPLOYMENT*

Employer denies that Worker suffered a job-related injury or that Worker's testimony was sufficient to establish that the alleged accident arose out of and in the course of his employment. Employer argues that the WCJ erred in granting an award of compensation because Worker failed to establish by expert testimony that his injury was caused by an accident which arose out of a risk of his employment.

To establish a right to workers' compensation benefits, Worker must prove that he suffered a compensable injury arising out of and in the course of his employment. NMSA 1978, § 52-1-28(A) (Repl.Pamp.1991). For an injury to "arise out of" the employment, there must be a showing that the injury was caused by a risk to which a worker was subject by reason of his employment, and the employ-

ment must contribute something to the hazard which gave rise to the injury. *Adamchek v. Gemm Enters., Inc.*, 96 N.M. 24, 26, 627 P.2d 866, 868 (1981); *Gutierrez v. Artesia Pub. Sch.*, 92 N.M. 112, 115, 583 P.2d 476, 479 (Ct.App.1978).

Worker testified that the dizziness he experienced from chlorine was the cause of his fall. Employer disputed this contention and points to testimony of Worker which indicated that his dizziness resulted from bronchitis, and that Worker also testified that he reinjured his back subsequent to March 19, 1991. Whether Worker's back injury occurred during his employment and the cause of Worker's dizziness precipitating his fall were the subject of conflicting testimony. On direct examination, Worker testified that his back injury occurred while working on March 19, 1991. On rebuttal, he testified that chlorine he was using that morning to clean the cheese processing equipment made him dizzy prior to his fall. He stated that his supervisor had given him a paper informing about the chemicals he was required to use. Worker also testified that he had been using chlorine to sanitize equipment for about two weeks prior to his fall, and that chlorine can make you dizzy, "I don't know if it makes other people dizzy, but it made me dizzy." Employer contends that lay testimony was insufficient to establish that Worker's fall was caused by a risk incident to his employment, and that expert testimony was required to show that his exposure to chlorine while at work caused him to become dizzy and fall.

Employer advances two arguments in support of this contention. First, Employer raises a statutory ground; it asserts that Section 52–1–28 requires expert testimony to establish that chlorine actually caused Worker's dizziness and fall in light of Employer's express denial that a connection existed between Worker's accident and a risk of his employment. We disagree with this reading of the statute. Section 52–1–28(B) provides in applicable part: "In all cases where the employer ... den[ies] that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider...." We do not interpret the statute as requiring expert medical testimony to establish the cause of Worker's fall under the circumstances presented here. Instead, we think Employer's contention regarding the necessity of expert testimony concerning the cause of Worker's fall more properly is a challenge to the weight of the evidence he presented, not its admissibility. *See Hansen v. Skate Ranch, Inc.*, 97 N.M. 486, 491, 641 P.2d 517, 522 (Ct.App.1982).

The language of Section 52–1–28(B) indicates that proof of causation by a health care provider is required to establish a connection between a worker's injury and disability where the employer denies that the disability resulted from a worker's accident; it does not, however, require expert testimony to establish the cause of the worker's accident. This aspect of proof may be established by either expert or lay testimony. A court will not read into a statute language that is not contained therein, particularly if the statute makes sense as written. *See Perez v. Health & Social Servs.*, 91 N.M. 334, 336, 573 P.2d 689, 691 (Ct.App.1977), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978).

Second, Employer argues that even if the statute does not mandate the use of expert testimony to establish that Worker's contact with chlorine caused his dizziness and fall, the connection between Worker's employment and his claimed injury in the instant case involved facts which were of such a technical nature that expert testimony was required under Section 52–1–28 to prove the claimed fact. Additionally, Employer argues that expert medical testimony is required to be presented where a worker suffers two successive accidents in order to establish the extent of a worker's disability resulting from each accident, and the causal connection, if any, between the two accidents.

We understand Employer's arguments here to be that Worker's resulting dizziness constituted a separate accident apart from the accident which occurred shortly

thereafter resulting in his fall in the locker room. Employer argues that Worker failed to present expert medical testimony showing the nexus between the two falls. In advancing these arguments, Employer points out that Worker's initial testimony indicated that he was not certain why he became dizzy at work. On cross-examination, Employer elicited testimony from Worker indicating that Worker's dizziness was caused by bronchitis. During Worker's case in rebuttal, however, he testified that he became dizzy while using chlorine to sanitize the cheese processing equipment. He also testified that he had been working with chlorine at the plant for the previous two weeks and that the chlorine had made him dizzy.

Employer is correct that opinion testimony of lay witnesses is generally confined to matters which are within the common knowledge and experience of an average person. *See Young v. Burke,* 139 Colo. 305, 338 P.2d 284, 285 (1959) (en banc); *see also* SCRA 1986, 11–701. However, subject to the trial court's discretion, testimony concerning the personal perception of a lay witness may be given where the witness's opinion might be helpful to the fact finder in resolving a material issue. *See Russell v. Russell,* 101 N.M. 648, 649, 687 P.2d 83, 84 (1984); *see also Pavlos v. Albuquerque Nat'l Bank,* 82 N.M. 759, 761, 487 P.2d 187, 189 (Ct.App.1971); *see generally* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 701[02] (1992). Under the record herein, we find no error in the WCJ's admission of Worker's testimony. SCRA 11–701 permits a lay witness to state an opinion if the trial court determines that the opinion is "rationally based on the perception of the witness and [is] helpful to a clear understanding of his testimony or the determination of [the] fact[s] in issue." *See Hansen,* 97 N.M. at 491, 641 P.2d at 522 (lay witness may testify as to his opinion based on personal perceptions); *Jesko v. Stauffer Chem. Co.,* 89 N.M. 786, 788, 558 P.2d 55, 57 (Ct.App.1976) (testimony of lay witness is admissible under Evidence Rule 701 where the opinion is rationally based on his own perceptions and is helpful in determination of basis for damage); *see generally* 31A Am.Jur.2d *Expert and Opinion Evidence* § 31, at 42–43 (1989).

Nor do we believe that the out-of-state statutory authority relied upon by Employer is persuasive regarding this issue. We have reviewed each of the out-of-state cases cited by Employer and conclude that these decisions principally turn upon the issue of whether the claimants presented expert testimony to establish the link between the claimants' alleged disability and their exposure to certain toxic substances. Additionally, we do not find *Tate v. Workmen's Comp. Appeal Bd.,* 8 Pa.Cmwlth. 392, 302 A.2d 862 (1973), cited by Employer, applicable to the present case. In *Tate* the court considered the question of whether a worker's earlier fall at work caused a subsequent fatal fall away from the work place. On appeal the Pennsylvania court held that there could be no recovery in the absence of a showing that the cause of the second accident, which occurred approximately one month later, was related to a disability which arose from the first accident. The court found there was no conclusive evidence that the first accident was compensable, and that there was no conclusive evidence that the second accident was causally related to the first one. The result reached in *Tate* is principally fact related and the court noted that the claimants failed to prove that the worker struck his head in the first fall, causing a compensable head injury, and the claimants failed to prove the existing accidental injury was the proximate cause of the worker's subsequent accident. In contrast, here, the WCJ found, based upon substantial evidence, that Worker proved his claim. We think the evidence supports this result.

Worker in the present case testified regarding his reaction to exposure resulting from his use of chlorine which was being used to clean equipment. He also stated that the chlorine caused him to become dizzy, that this dizziness continued, causing his fall a few minutes later in the locker room. We think that Worker's testimony was sufficient to explain the cause of his fall and that the WCJ could reasonably

determine from this evidence that Worker's fall arose from a risk related to his employment. Although we agree with Employer that the effect of chlorine upon an individual is a matter that may properly be presented by expert testimony, the WCJ did not err in permitting Worker to testify concerning his own personal reaction following his use of chlorine during his work and that his resulting dizziness was the cause of his fall. *Cf. Olsen v. Winter Park Racquet Club,* 142 So.2d 5, 8 (Fla.1962) (chlorine can cause dizziness); *Sparacino v. Andover Controls Corp.,* 227 Ill.App.3d 980, 169 Ill.Dec. 944, 592 N.E.2d 431, 433 (1992) (chlorine is noxious substance and can cause bronchial damage).

Similarly, we think Employer's reliance on *Luvaul v. A. Ray Barker Motor Co.,* 72 N.M. 447, 384 P.2d 885 (1963), is not dispositive here. In *Luvaul* the worker presented expert testimony regarding the effects of carbon monoxide fumes on people. Nevertheless, the trial court found that the worker had dizzy spells for many years prior to his injury and that he failed to prove that his fall arose out of his employment or a risk reasonably incident to his employment. *Id.* at 452, 384 P.2d at 888. The issue there, as here, was whether there was substantial evidence to support the result. In *Luvaul* our Supreme Court determined that the trial court's ruling denying the worker's claim was supported by substantial evidence. We do not read *Luvaul* as requiring expert testimony to prove the causal connection between a worker's accident and his or her employment under the circumstances here presented.

II. *SUFFICIENCY OF EVIDENCE*

Worker testified that prior to his accident he had been using chlorine at the plant for about two weeks. On the morning of March 19, 1991, Worker stated he was using chlorine, that he had been provided with written information by Employer concerning chlorine, and that "it was just bad for you, it starts burning your chest and if it gets on your skin it will burn your skin and started getting me dizzy." Worker also stated that when he went into the locker room he was still having the same effects from dizziness that he had experienced in the cheese room.

Employer contends that even if Worker is not required to present expert testimony concerning the cause of his dizziness and fall, nevertheless, there was insufficient evidence to support a finding that his accident arose out of a risk incident to his employment, and that the WCJ improperly assumed that Worker's exposure to chlorine would cause dizziness. Employer also asserts that Worker's testimony concerning the reason for his fall was contradictory in nature. Our standard of review in workers' compensation cases is upon the whole record. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 127–28, 767 P.2d 363, 366–67 (Ct.App.), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988). Under this standard of review, we consider all the evidence, both favorable and unfavorable, presented to the WCJ and determine whether there is substantial evidence to support the result. *Id.* This review does not, however, allow this Court to weigh the credibility of such testimony. *Id.*

As shown by the record, the initial testimony of Worker was that he did not know what made him dizzy; however, upon further questioning, he stated that the chlorine made him dizzy. It was for the WCJ to weigh the credibility of Worker's testimony. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 89, 428 P.2d 625, 628 (1967). Simply because Worker's testimony was inconsistent or contradictory in part does not require that such testimony be disregarded. The WCJ heard Worker's testimony, observed his demeanor, and determined that his statement that he was required to use chlorine in cleaning the equipment, that the chlorine caused him to become dizzy and prompted his loss of balance and fall, was credible. *Cf. Andrus v. Gas Co.,* 110 N.M. 593, 596–97, 798 P.2d 194, 197–98 (Ct.App.) (sufficient evidence supported finding that Gas Company's acts caused homeowner's carbon monoxide poisoning), *cert. denied,* 110 N.M. 260, 794 P.2d 734 (1990). Based on this testimony

and the reasonable inferences arising therefrom, the WCJ could reasonably find that Worker's injury arose out of and in the course of his employment and was a risk of his employment. *See Ensley v. Grace,* 76 N.M. 691, 695, 417 P.2d 885, 887 (1966) (proof that accident arose out of and in the course of the worker's employment may be established by reasonable inferences drawn from proven facts). Worker's testimony was sufficient evidence to support the finding.

III. *ADMISSION OF REBUTTAL TESTIMONY*

Employer also argues that Worker should not have been allowed to testify on rebuttal regarding the fact that on the morning of the accident, he was using chlorine to sanitize cheese processing equipment and the chlorine had made him dizzy.

The admission of rebuttal testimony is within the WCJ's discretion. *See El Paso Elec. Co. v. Real Estate Mart, Inc.,* 98 N.M. 570, 573, 651 P.2d 105, 108 (Ct.App.), *certs. denied,* 98 N.M. 478, 649 P.2d 1391, *and* 98 N.M. 590, 651 P.2d 636 (1982). Absent a showing of abuse, the trial court's ruling permitting the introduction of rebuttal evidence will not be reversed on appeal. *See Carle v. McChord Credit Union,* 65 Wash.App. 93, 827 P.2d 1070, 1081 (1992); *see also El Paso Elec. Co.,* 98 N.M. at 573, 651 P.2d at 108. Employer contends that Worker's rebuttal testimony was simply an attempt to introduce new evidence unrelated to Employer's case-in-chief. We disagree. During cross-examination, Employer elicited testimony relating to the cause of Worker's dizziness, and indicated it was solely due to his bronchitis. On rebuttal, Worker testified regarding the fact that chlorine was used in the plant for cleaning purposes and that its use made him dizzy. We find no abuse of discretion in the WCJ's ruling allowing Worker to testify during rebuttal regarding the use of chemicals in the plant and their effect upon Worker leading to his accident.

IV. *AWARD OF DISABILITY*

Finally, Employer argues that Worker was not entitled to temporary total disability benefits because he was offered work at his pre-injury wage before he reached maximum medical improvement. NMSA 1978, Section 52–1–25.1(B) (Repl.Pamp.1991), states that "[i]f, prior to the date of maximum medical improvement, an injured worker's health care provider releases the worker to return to work and the employer offers work at the worker's pre-injury wage, the worker is not entitled to temporary total disability benefits." Here, Employer claims that because it offered work at his pre-injury wage, Worker was not entitled to disability benefits. Worker responds that the work offered was more strenuous and entailed more lifting than his pre-injury work; thus, he was justified in declining such position. Worker also notes that Employer did not offer any other position to him.

In construing a statute, this Court seeks to ascertain and give effect to the intent of the legislature. *Giant Indus. Ariz., Inc. v. Taxation & Revenue Dep't,* 110 N.M. 442, 445, 796 P.2d 1138, 1141 (Ct.App.1990). When the legislature revised the Workers' Compensation Act in 1987, it declared its policy and intent "to be that every person who suffers a compensable injury ... should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards." NMSA 1978, § 52–1–26(A) (Repl.Pamp.1991).

The purpose of temporary total disability benefits is to provide compensation to a worker who is unable to perform his job duties until such time as he attains maximum medical improvement; that is, when further recovery from or lasting improvement to an injury can no longer be reasonably anticipated. *See* § 52–1–25.1(A). These benefits are temporary, and once a worker reaches maximum medical improvement, a percentage of permanent disability can be determined. *See* § 52–1–26. If a worker can return to work and earn the same wage he was earning prior to his

injury, there is no reason for him to receive temporary disability benefits.

We think it is implicit in the language of Section 52–1–26 that the legislature intended that where a worker is given a release to return to work, the release anticipates that the worker return to the type of work he was doing prior to the accident or work which he or she is otherwise physically capable of performing. *Cf. Sanchez v. Molycorp, Inc.*, 113 N.M. 375, 379–80, 826 P.2d 971, 975–76 (Ct.App.1992). If the work involves duties which are more strenuous than those involved in his prior work assignment, as in this case, and Worker's back remains injured, the new duties must involve work he is capable of performing. We do not read the statute to mean that Employer can offer any work that has the same pre-injury wage, and thereby make Worker ineligible to receive disability benefits, even though Worker is unable to perform the work. Such interpretation would produce a result contrary to the general purpose of the Act. *Cf. Gonzales v. Lovington Pub. Sch.*, 109 N.M. 365, 370, 785 P.2d 276, 281 (Ct.App.1989) (court will not interpret statute in manner that produces absurd result), *cert. denied*, 109 N.M. 262, 784 P.2d 1005 (1990).

We think it is clear that if Employer reassigns Worker to different duties following a release to return to work, it must be work that Worker is capable of performing. Here, there was evidence that the new job position offered to Worker was more strenuous and entailed more lifting, standing, climbing, and bending than that involved in Worker's pre-injury job. Evidence was also presented that Worker could not perform such work. There was no evidence that when Worker was released the physician who issued the release considered any other work assignment than that which Worker had performed at the time of his initial injury. The decision of the WCJ determining that Worker was entitled to total temporary disability benefits even though he was offered work at this pre-injury wage is supported by substantial evidence.

CONCLUSION

The order awarding compensation benefits is affirmed. Worker is awarded $1,500 for the services of his attorney on appeal.

IT IS SO ORDERED.

MINZNER, C.J., concurs.

HARTZ, J., dissents.

HARTZ, Judge (dissenting).

The parties and the majority opinion assume that whether Worker can recover benefits depends upon whether he adequately established that his dizziness at work was caused by exposure to chlorine. Starting from that assumption, I conclude that Worker cannot recover. Also, I question the propriety of permitting Worker to testify about chlorine on rebuttal.

I. CAUSATION

It is not at all clear to me that the Workers' Compensation Judge (WCJ) found that Worker's dizziness was caused by exposure to chlorine at work. Yet even if he had, the record cannot support such a finding. Worker was not qualified to express an opinion that his dizziness was caused by chlorine. Nothing in the record indicates that the WCJ possessed special expertise to draw the necessary inference. The gaps in the evidence cannot be filled by judicial notice. And the evidence regarding Worker's exposure to chlorine is so vague that any inference that chlorine caused his dizziness would be rank speculation. Although I do not rely on NMSA 1978, 52–1–28(B) (Repl.Pamp.1991)—the majority appears to be correct in ruling that the statute does not apply to the causal relationship at issue in this case—the history of that provision suggests that it was adopted by the legislature precisely to prevent the type of fallacious reasoning condoned in this case.

To begin with, I will summarize the pertinent evidence in the record. The first mention of chlorine in the case was during Worker's testimony in rebuttal. No medical record, accident report, deposition, or memorandum in the record refers to chlorine. On direct examination in his case-in-chief, Worker described his activities as a

cheese operator, his job position on the date of his accident:

A. I'd go in and I'd drain the cheese with its water. I'd open the cheese. That's our—about 1700 pounds of cheese in a vat. I'd open the cheese—a lot of strain is bending and lifting and getting it prepared to run, setting up the lines. After I'd set up the lines, I'd sanitize the lines. I'd cream and I'd pump the cheese over to—

. . . .

Q. When you say sanitize the line, did that involve any lifting or bending?

A. Again, lifting and bending.

Q. How much were you lifting and how often were you bending?

A. I was bending the full time I was there and lifting half the time that I was there.

Q. And when you sanitize these lines, what does that require, you to pick up lines and hoses?

A. Connect lines together and shoot it with iodine, bending and reaching up.

. . . .

A. The lines are the tubing that the cheese goes through to the machine. They're pipes. I'd set up the pipes to the machine. Iodine, we call them lines, but the pipes, we'd iodine the pipes. We'd have everything ready. We'd pump the cheese through the pipes to the machine. And sometimes the pipe would be loose and you would have to tighten it. Reach up to tighten it. And once the machine is filled up with the stuff that it needed, it stopped, and you'd get ready to run it, you check everything.

He also testified to other physical duties, such as lifting boxes and bending over the vat to shovel cheese to the sides. He said that he handled about four vats of cheese a day.

Worker testified that on the day of the accident he punched in at about 9:00 a.m. and went to the cheese room. He continued:

A. And I started getting dizzy about 9:10, real dizzy. So I decided to go to the lab to get a glass of water. So I went to the lab and got a glass of water, drank my water, and returned back to the cheese room. And I started work for about another 10 to 15 minutes, and I got dizzy again. So—my head was hurting, so I decided to go to the lab and get an aspirin. So I got an aspirin. I returned back to work. As soon as I was almost done with that vat that I was opening, I got real dizzy, real, real dizzy. So I decided to take a break and go to the locker room and put a towel over my head.

Q. Was there anyone in the cheese room with you during this time?

A. Yes. Larry Allray.

Q. And what happened?

A. I told Larry Allray I was sick and that go take a break and I was going to go to the locker room.

Worker said that he went to the locker room, where he became very dizzy and fell, injuring his back. He then sat on a chair for approximately 10 minutes before returning back to work "dizzy with my back hurting." When his supervisor, Doug Grimes, came to work about 10:00 a.m., he reported the accident to Grimes. Grimes told him to keep working and Worker "finished out the day." Worker said that he told Grimes at the end of the day that his back was hurting.

The next day, a Wednesday, Worker sought medical attention. The physician's assistant who saw him noted three complaints: (1) "knuckles on right hand started swelling after using screwdriver two days ago, but denied trauma;" (2) "also complained of cough, congestion and fatigue;" and (3) "back pain over past two to three days, has had to increase lifting at work." The physician's assistant diagnosed him as having bronchitis and prescribed an antibiotic. He was excused from work for the rest of the week.

Worker testified that on Monday, March 25, "I returned back to work about 5:30 [a.m.], still with my backache real bad hurting, bronchitis, and I went to do my daily job again into the cheese room. I started opening the cheese again, and started hyperventilating." Other employees tried to assist Worker in the company office, but

they had to take him to an emergency room for treatment, apparently some time between 8:00 and 9:00 a.m.

Employer suggested that Worker's dizziness resulted from physical exertion while suffering from bronchitis. The following exchange occurred during cross-examination of Worker:

Q. Mr. Garcia, in your direct examination, you stated that when you were in the locker room and you fell, you fell because you got dizzy, right?

A. Yes.

Q. You were dizzy because of your bronchitis, right?

A. I don't know. I guess so.

Q. You had been sick with bronchitis recently?

A. Yes.

Q. And you were dizzy and you had been having shortness of breath?

A. Not shortness of breath.

Q. But the dizziness?

A. Yes.

Q. Okay. Is there any reason that you know of for this dizziness, other than the bronchitis?

A. No, I don't.

Worker's wife testified that Worker had no medical problems when he went to work on March 19.

When Worker rested his case, Employer's attorney moved for a "directed verdict," contending that there was no evidence that Worker's dizziness was work-related. He argued:

> If he could show that the dizziness was connected to fumes in the cheese room, for instance, then he would have a case. But he has not got any shred of medical testimony saying that there's any fumes in that cheese room that caused his dizziness. The only thing we have is bronchitis. Therefore, based on that, he has not met his burden of proof to his case-in-chief, and I am entitled to a directed verdict because there is no risk arising out of the employment that has been established.

The WCJ denied the motion without explanation.

Employer called as a witness Steven Walden, a company manager. On cross-examination Worker's attorney questioned him about fumes in the cheese room:

Q. Have you ever worked in the cheese room?

A. That's where I started 10 years ago.

Q. Isn't it true that the, there's a lot there, a heavy fume in there, smells heavy, isn't that correct, smells like cheese?

A. Smells like—like a dairy smells like a dairy, smells like milk products.

Q. Isn't it true that sometimes people get sick while working in that cheese room?

A. It could happen.

Q. Just because the smell is so strong, isn't that correct?

A. Not from the dairy products, I wouldn't think. Not myself, anyway.

Q. Not yourself, but isn't it true that because that strong smell and the fumes in the air?

A. I have never heard of anyone being sick in that plant because of a milk smell. Chemical smells, but not from dairy smells.

Q. All right. Isn't it true there is chemicals being used in that cheese room, in the processing room?

A. Yes.

Q. Isn't it true that those chemical smells can get people sick, and have gotten people sick at Borden?

A. If they were not handled properly, yes.

On redirect, Employer's attorney asked, "Do you know if anyone has ever just been doing their job in the cheese room and has gotten dizzy and fainted from the fumes in the cheese room?" Walden answered, "Not to my knowledge."

Walden's testimony ended the first day of trial. The proceedings were then continued for thirteen days. When the trial resumed, the first witness was Worker, called by his attorney as a rebuttal witness. Over objection by Employer that the testimony was improper rebuttal, Worker testi-

fied about his use of chlorine on the day of his accident. Omitting withdrawn questions, attorney colloquy, and testimony to which objection was sustained, Worker's testimony was as follows:

Q. [Y]ou heard the testimony of Steve Walden.

A. Yes.

Q. Concerning chemical uses and fumes within the plant.

A. Yes.

Q. My question to you ... did you use any chemicals on 3–19–1991?

A. Yes, I did. We switched over from chlorine to iodine because we were getting coli. So we were sanitizing the lines.

Q. With what?

A. With chlorine.

Q. So you were using what chemical on 3–19–91?

A. I was using chlorine.

Q. And had you used that chemical that morning?

A. Yes.

Q. Describe to the court what type of chemicals you had used that particular day.

A. I had used chlorine.

Q. How long had you been using this type of chlorine?

A. About two weeks.

Q. And were you familiar with that particular chemical?

A. Yes.

Q. How were you familiar with it?

A. They give you a sheet on all the chemicals and what they can do to you.

Q. What was your understanding of the content of or the concentrate of this chlorine?

A. It was all chlorine.

Q. And describe to the court the manner in which you used this particular chemical on 3–19–1991.

A. Okay. I was using an airhose to sanitize the pipes with chlorine because we had been getting coli and that had been getting all over me due to the coli.

Q. What had been getting all over you?

A. [A supervisor] had gotten all over me yelling at me about the coli.

Q. What is coli?

A. It's a bacteria that's found in the cheese through incubation, and you get coli, you have to sanitize not to get it. And if you get it, it goes into the, into a record that goes to Lubbock, I think. [Court overrules objection that witness is testifying as an expert chemist and is not qualified to testify on the subject.]

Q. What was the effect of this, of the use of this chemical?

A. When I was iodining with the chlorine, I—it's just bad for you. It starts burning your chest, and if it gets on your skin, it will burn your skin, and it started getting me dizzy after I had started using it for two weeks.

Q. And had it gotten you dizzy on 3–19–1991?

A. Yes.

Q. And was that at what time?

A. Approximately 9:20.

Q. That's the time you testified to previously?

A. Yes. 20, 9.

Q. When you went to your locker room, were you still having these same effects of dizziness as you experienced in the cheese room?

A. Yes.

CROSS EXAMINATION

Q. [Y]ou said you are familiar with different chemicals that you were using?

A. They give us a list on the chemicals we use so we know how to use them.

Q. And those kind of chemicals are the type of chemicals that can make a person dizzy, you're familiar with that?

A. It can make a person sick.

Q. And dizzy?

A. Or you are supposed to use iodine, though, to sanitize, but she got all over me and she told me to use chlorine, so I used chlorine.

Q. But you just testified that you got dizzy, is that right?

A. Due to the chlorine.

Q. So the chlorine is the one that can make a person dizzy, then?

A. I'm not an expert, like you said.

Q. You don't know whether that can make you dizzy or not?

A. It could, it can.

Q. It can make a person dizzy?

A. Yes.

Q. And you know that chlorine makes people dizzy?

A. I guess.

Q. Well, does it, does chlorine—

A. It made me dizzy. I don't know if it makes other people dizzy, but it made me dizzy.

Q. How long had you been working in this cheese room?

A. I think about two years.

Q. Had the chlorine made you dizzy before?

A. I told you I didn't use any for two weeks. We started using it two weeks.

Q. So it's only been for the two-week period—

A. Yes, because they were getting coli.

Q. Did you say Larry Allray was a co-worker of yours in the cheese room?

A. He worked there, yes.

Q. He didn't get dizzy, though, did he?

A. He wasn't there when I—I come in and I get the lines ready. That's my job.

Q. Now, remember when I was conducting my cross-examination in your case-in-chief, I asked you, Are you familiar—Do you have any other reason why you might have been getting dizzy, other than bronchitis? And you said, No. Do you remember that?

A. I didn't know I had bronchitis at the time. No, I don't remember.

This Court could affirm a finding by the WCJ regarding the causal connection between Worker's dizziness and his use of chlorine if the finding is based on either (1) expert opinion testimony, (2) the WCJ's own special expertise, (3) matters subject to judicial notice, or (4) proper inferences from the circumstances surrounding Worker's dizziness. I will consider each possibility.

No expert testimony supports the causal connection. The only witness to testify to that connection was Worker. Worker, however, did not possess any special knowledge, training, experience, or education that would qualify him to express an opinion on the relationship between the chemical he was using and his dizziness. *See* SCRA 1986, 11–702 (rule of evidence regarding qualification of witness as an expert). Although he stated that he had read a warning sheet accompanying the chemical, he did not testify that the warning mentioned dizziness or even breathing problems. Indeed, he testified that he did not know whether the chemical he was using caused dizziness in other people. It may have been within the WCJ's discretion to permit Worker to testify about what happened in language that speaks of causation. *See* SCRA 1986, 11–701. As stated in the advisory committee's note to Federal Rule of Evidence 701 (which is identical to SCRA 11–701), "Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion." 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* 702–03 (1992). But Worker's testimony that the chlorine "caused" his dizziness has no more probative value than if Worker had testified, "I became dizzy around the time that I was using chlorine."

Perhaps the WCJ relied on his own expertise regarding effects of the chemicals being used by Worker. In proper circumstances a WCJ may rely on his or her personal expertise. *See* 2B Arthur Larson, *The Law of Workmen's Compensation* § 79.53 (1989). For example, I suspect that any experienced WCJ has heard enough expert testimony on orthopedic injuries that the WCJ could properly fill in an omission in a report or testimony by an orthopedic surgeon when the omission is an inference that orthopedic surgeons commonly make but was not spelled out in the particular instance at issue. Yet, when a WCJ relies on his or her expertise, the WCJ should refer to that expertise in the find-

ings and conclusions. Otherwise, appellate review is impossible. Nothing in the record in this case suggests that the WCJ relied on his expertise with respect to chemicals being used by Worker. In fact, I question whether the WCJ believed that Worker's dizziness was caused by workplace chemicals. The WCJ made no finding regarding the cause of Worker's dizziness. The absence of such a finding, together with the WCJ's denial of Employer's motion for "directed verdict" at the close of Worker's case-in-chief (the evidence regarding chlorine was not offered until Worker's case on rebuttal), suggests that the WCJ did not believe that Worker's recovery depended on establishing that workplace chemicals caused his dizziness. In the absence of any indication that the WCJ relied on his personal expertise regarding chlorine, an appellate court should not presume such expertise to sustain a determination that Worker's accident arose out of his employment.

The WCJ likewise did not indicate that he relied on judicial notice. Judicial notice, however, can be taken at any stage of a proceeding, SCRA 1986, 11–201(F), even on the court's own initiative, SCRA 11–201(C), and even on appeal. Fed.R.Evid. 201 advisory committee's note 2(f), found in 1 Weinstein, *supra,* at 201–10 to –11. Perhaps every adult has heard that chlorine is poisonous. But the question here is whether the chemical being used by Worker caused *dizziness* in the circumstances of this case. One problem is that Worker did not adequately describe the chemical he was using. Although he stated that it was "all chlorine" and that he "was using an airhose to sanitize the pipes with chlorine," one may doubt that he was simply spraying chlorine gas through the cheese equipment. Worker made no mention of the use of a gas mask or other protective device to avoid breathing chlorine. When he testified that if the substance "gets on your skin, it will burn your skin," he appears to be describing a solid or liquid. Literature regarding dairy operations suggests that Worker may have been using a chloramine solution. *Chlorine: Its Manufacture, Properties And Uses* 515, 527–28 (J.S. Sconce ed., 1962). In any event, a reasonable search of literature on chlorine and chlorine compounds uncovered only one report of toxic effects from the fumes of solutions of chlorine or chloramine. An asthmatic woman suffered asthma after entering a swimming pool area and after using a liquid chlorine rinse. *Chlorine and Hydrogen Chloride* 119 (National Academy of Sciences 1976) (citing J.M. Sheldon & R.G. Lovell, Asthma Due to Halogens, *Amer. Practitioner* 4:43–44 (1949)). Even the literature on chlorine *gas* infrequently describes "dizziness" as a symptom, which at the least makes one question whether the sole symptom is likely to be dizziness. (Eye irritation is a commonly noted symptom). Perhaps the search of scientific literature missed some definitive source supporting Worker's theory of how he became dizzy. Nevertheless, unless such literature is brought to this Court's attention, judicial notice cannot cure the lack of expert evidence at the hearing.

That leaves the possibility that the WCJ could infer simply from the circumstances of Worker's dizziness that it was caused by the chemicals he was using in his job. As I stated at the outset, I do not rely on Section 52–1–28(B) to require that the causal connection be established by expert testimony. Yet, even in the absence of a statutory requirement, proof of a causal connection requires expert testimony when lay persons could only speculate. Thus, in medical malpractice cases "expert testimony is generally required to establish causal connection." *Cervantes v. Forbis,* 73 N.M. 445, 448, 389 P.2d 210, 213 (1964).

No precise formula determines when expert testimony is required. Professor Larson states, "[R]eliance on lay testimony and administrative *expertise* is not justified when the medical question is no longer an uncomplicated one and carries the factfinders into realms which are properly within the province of medical experts." 2B Larson, *supra,* § 79.54, at 15–426.222. The question is what realms are "within the province of medical experts."

When the effect of a substance on the human body is not a matter of common

knowledge, courts generally will not permit fact finders to speculate on a causal connection. *See Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 570 (8th Cir.1988) ("Laymen cannot give opinion as to the causes of disease and death."). In *Hicks v. Vennerbeck & Clase Co.*, 525 A.2d 37 (R.I.1987), the worker claimed that his chest pain had been caused by exposure to sulfuric-acid fumes. The court wrote that the worker's "testimony, even if afforded full credibility and though establishing a contemporaneous experience of chest pain, is insufficient as a matter of law to raise the inference that inhalation of the fumes caused and continues to cause chest pain." *Id.* at 43.

Sheptur v. Proctor & Gamble Distributing Co., 261 F.2d 221 (6th Cir.1958), considered a claim by a worker employed as a dishwasher that her contact dermatitis was caused by Tide. The opinion affirmed the trial court's decision that lay testimony did not suffice to require submission of the case to the jury.

In *Blarjeske v. Thompson's Restaurant Co.*, 325 Ill.App. 189, 59 N.E.2d 320 (1945), two people became ill, vomited, and suffered from diarrhea within 15 to 45 minutes of sharing a sandwich containing roast beef with a green material covering it. The court reversed a verdict in favor of the consumers, holding that in the absence of medical testimony the jury was required to speculate on causation.

In *Payne v. Chandler*, 41 Ga.App. 385, 153 S.E. 96 (1930), the court ruled that a patient's experience of chest pains after swallowing a disagreeable liquid provided by a dentist was insufficient to authorize a causal inference.

Perhaps in some circumstances expert testimony would not be necessary to establish that Worker's employment caused his dizziness. For example, if several healthy workers in the cheese room all became dizzy at the same time, the WCJ could properly infer the causal connection, even without knowing the precise mechanism that induced the dizziness.

But the evidence in this case is far weaker than in the example. What is most striking about Worker's contention that chlorine caused his dizziness is the vagueness of his account. We can only guess as to the form of the chemical he was using (liquid or gas), the manner in which he was using it, the nature of the area (spacious or confined) in which he was working, the mechanism by which he could have been exposed to chlorine, the stage in the cheese-making process at which he experienced symptoms, the number of occasions on which he experienced symptoms, etc. Although Worker suffered a second severe dizzy spell on March 25, he made no attempt to correlate that episode with exposure to chlorine. We know nothing about whether similar symptoms were suffered by other employees present in the cheese room on the days that Worker became dizzy or on the three days that he was off work with bronchitis. Nothing in the record informs us of typical symptoms of exposure to chlorine or whether Worker's symptoms are consistent with such exposure.

The evidence presented at the hearing was so vague that I doubt whether even an expert on the effects of chlorine could infer that Worker's dizziness was probably caused by chlorine. It would be impossible on this record to make a reliable estimate of the concentration of chlorine gas in the air to which Worker was exposed or the duration of Worker's exposure—which are surely data necessary to evaluate the probability that Worker's symptoms were caused by chlorine. It is not as if chlorine gas, regardless of concentration in the air, is always likely to cause illness. This point is illustrated by a brief summary of some facts in the recent case of *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992). The worker seeking compensation benefits worked in a room in which a mist of water and chlorine was sprayed onto food. The chlorine level was ordinarily maintained at 30 to 50 parts per million (ppm). After a day in which the chlorine level rose to 200 ppm for 5½ hours during his shift, the worker began having breathing problems. The court upheld a ruling by the state industrial commission, which denied benefits because it was not

persuaded by the evidence of causation of later-diagnosed lung disease.

In my opinion a reasonable lay person could not infer causation on this record. Any finding that Worker's dizziness was caused by the chemicals he was using in the cheese room would be based solely on speculation. The cases relied on by the majority are not to the contrary.

Moreover, appellate review of the sufficiency of the evidence is more intense in a worker's compensation case. We apply whole record review. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). Thus, it is particularly significant that (1) Worker did not mention to any health care provider or fellow employee that his dizziness was caused by chlorine and (2) on cross-examination in his case-in-chief he stated that he could not think of any cause of his dizziness other than the bronchitis he was suffering at the time. His first mention of chlorine was in his rebuttal testimony, almost two weeks after Employer had moved for judgment on the ground that Worker had failed to establish that his dizziness was caused by his work. One need not doubt Worker's credibility to infer that the temporal correlation between chlorine and his dizziness must not have been so tightly knit as to suggest (at least without considerable cerebration) to a lay person that the dizziness was caused by chlorine.

Although my conclusion in this case is not predicated on Section 52–1–28(B), some history surrounding that statute suggests its pertinence to this decision. Section 52–1–28(B) requires that in workers' compensation cases the causal connection between the worker's disability and an accident must be established by expert medical testimony. This rule was first enacted in 1959. 1959 N.M. Laws, ch. 67, § 7.

I suspect that it is no coincidence that this provision was adopted in the first legislative session after mandate issued in *White v. Valley Land Co.,* 64 N.M. 9, 322 P.2d 707 (1957), *reh'g denied,* 64 N.M. 9, 322 P.2d 707 (1958). The worker in that case severely twisted his leg while helping to lift a 200–pound steel beam. He suffered a muscle strain but no fracture. When he did not improve under treatment, an orthopedic surgeon conducted a thorough examination, which established cancer of the bone arising from metastasis from another organ. He died of cancer less than 10 months after his injury. The jury awarded workers' compensation death benefits to his widow. By a 3–2 majority the Court affirmed the award.

The Supreme Court majority acknowledged that the "[m]edical testimony goes no further than establishing [that the accident caused the spread of cancer to the left leg and hastened the worker's death] as a possibility." *Id.* at 14, 322 P.2d at 710. The majority opinion does not quote the medical testimony establishing a possibility. The dissent responded:

> A fair sample of the type of medical testimony adduced in this case may be given. At the time, counsel on cross-examination was endeavoring to draw from Dr. McIntire an admission that the trauma testified to had either caused, or accelerated, the cancer. It follows:
>
> "Q. And when you say that is very possible that it occurred, or very probable that it occurred, it is just as probable that it accelerated from the injury, is it not?
>
> "A. Not in my opinion.
>
> "Q. But it is possible, in your opinion?
>
> "A. Anything is possible."

Id. at 17, 322 P.2d at 712. What the majority did quote from the record was the following testimony of Dr. John F. Boyd:

> "We know of no relationship between trauma, that is, injury, and cancer. Primarily, this is because we don't know the etiology of cancer."

Id. at 15, 322 P.2d at 711. The majority then went on to say:

> Medical men are justifiably reluctant to make a definite statement as to the relationship in view of the fact that they have no actual knowledge at the present time on which such a statement could in all good conscience be made. Aggravation of cancer or other disease may be inferable despite the lack of medical evi-

> dence establishing indisputable causal connection between trauma and spread of pre-existing cancer *whenever the sequence of events is so strong as to establish a causal connection.*

Id. (emphasis added). The majority stated that it was following the "recent trend" to regard medical testimony that causation was probable as "desirable but not essential." *Id.* at 14, 322 P.2d at 710.

What is the lesson here? One lesson is that the proposition "post hoc, ergo propter hoc" has a seductive power on the human mind. One dictionary contains the following entry on that phrase: "after this, therefore because of this: used in logic to describe the fallacy of thinking that a happening which follows another must be its result[.]" *Webster's New World Dictionary* 1113 (2d college ed. 1984). When courts do not guard against application of this "fallacy of thinking" by the fact finder, they are dispensing justice by speculation. Such decision-making brings discredit, probably deserved, upon the judicial system. For example, I can imagine the discussions in the medical community after physicians learned of the result in *White. See* 1 Larson, *supra,* § 12.24, at 3–453 (1990) (quoting a physician as saying that pathologists do not view trauma as a cause of the initiation or stimulation of cancer); Peter W. Huber, *Galileo's Revenge,* ch. 3 (1991) (discussing the tension between the courts and physicians regarding the relationship between trauma and cancer). The medical community's complaint would not have been that a widow received a workers' compensation award. The complaint would have been that the state's courts were governed by ignorance and even anti-science bias. Such concerns must have contributed to the legislature's enactment of what is now Section 52–1–28(B).

I am not suggesting that courts should be bound by the majority view of the medical profession or of any other scientific group. I am not advocating the *Frye* test. *See Frye v. United States,* 293 F. 1013 (D.C.Cir.1923) (affirming refusal to admit evidence of polygraph examination; scientific evidence inadmissible unless generally accepted in the pertinent scientific field). I am simply suggesting that on matters outside of common knowledge or experience the courts must insist on evidence, not speculation, and post-hoc-ergo-propter-hoc reasoning is generally, as in this case, no better than speculation.

Therefore, I dissent from the majority's opinion that the evidence was sufficient to sustain a finding that Worker's dizziness was caused by chlorine.

II. PROPRIETY OF REBUTTAL TESTIMONY

I should also briefly address Employer's claim that the WCJ erred in permitting Worker's rebuttal testimony regarding chlorine. As the majority notes, we leave to the trial judge's discretion the decision whether to admit rebuttal evidence. Perhaps that discretion is unreviewable. I would hope, however, that other trial judges would not follow the example set in this case. Worker's testimony was not proper rebuttal. The majority suggests that the rebuttal testimony was responding to cross-examination of Worker during Worker's case-in-chief. Redirect examination, not rebuttal, is the appropriate means of rehabilitating a witness whose testimony in the case-in-chief is weakened by cross-examination. In any event, Worker's chlorine testimony was not a response to evidence put on by Employer. It was a response to Employer's contention that Worker had not established an essential element of his claim—that the accident arose out of his employment. Rebuttal is not the proper method of proving an element of the claim omitted in the case-in-chief.

The only rational basis for allowing Worker to testify in rebuttal regarding chlorine would be that the WCJ did not expect the testimony to affect his decision. I have already suggested that the WCJ may have thought (perhaps correctly) that Worker could recover even if no workplace chemical caused his dizziness. Even then, however, admitting the testimony was a mistake. This case illustrates the mischief

that can arise from excessive leniency in enforcing procedural rules.

853 P.2d 753

James E. BRYANT, Jr., Claimant–Appellee,

v.

LEAR SIEGLER MANAGEMENT SERVICES CORPORATION and National Union Fire Insurance Company, Respondents–Appellants.

No. 13486.

Court of Appeals of New Mexico.

April 8, 1993.

Certiorari Denied May 25, 1993.

J. Robert Beauvais, Ruidoso, for claimant-appellee.

Kelly A. Genova, Sarah Curry Smith, C. Christine Osnes, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for respondents-appellants.

Robert M. Aurbach, Albuquerque, for amicus curiae Workers' Compensation Admin.

OPINION

APODACA, Judge.

Lear Siegler Management Services Corporation and National Union Fire Insurance Company (collectively referred to as Employer) appeal the order of the Workers' Compensation Judge (Judge) granting James E. Bryant (Worker) benefits for total disability, vocational rehabilitation, medical expenses, and attorney fees under the New Mexico Occupational Disease Disablement Law, NMSA 1978, Sections 52-3-1 to -60 (Repl.Pamp.1991) (ODDL). Employer raises five issues on appeal: whether (1) the Judge erred in awarding total disability benefits; (2) the Judge erred in awarding benefits for a psychological condition; (3) Worker failed to establish to a medical probability that his symptoms were caused by his employment; (4) the Judge erred in awarding vocational benefits; and (5) the Judge erred in awarding prejudgment interest.

Because the issue of the Judge's authority to award prejudgment interest on awards made pursuant to the ODDL is an issue of first impression in New Mexico, we requested that the parties provide supplemental briefing on the issue and also invited the Workers' Compensation Administration to participate as amicus curiae. The additional briefing was extremely helpful.

We affirm the awards of total disability benefits and vocational rehabilitation benefits. However, we reverse the Judge's award of prejudgment interest and remand for further proceedings consistent with this opinion.

BACKGROUND

We briefly summarize the Judge's findings: Worker was employed from December 1986 until February 1990 by Employer as a sheet-metal fabricator. Worker did highly technical assembly work on military aircraft and had to use industrial solvents. As a result of his work-related exposure to the solvents, Worker developed toxic solvent syndrome, which caused permanent damage to his liver and to his gastrointestinal and neurological systems. Worker's treating physician, Dr. Armando Garcia-Cantu, diagnosed Worker as totally disabled and unable to return to his work as a sheet-metal fabricator because of his exposure and sensitivity to industrial solvents. Employer's consulting physician, Dr. Lee Ettinger, diagnosed Worker as having been exposed to toxic industrial solvents resulting in elevated liver functions, although tests indicated that Worker's liver functions had returned to normal by October 1990. Worker had suffered severe emotional problems as a result of his occupational disease.

Worker was 37 years old at the time of the hearing and, although he had a bachelor's degree in psychology, his only job experience, other than as a sheet-metal and fiberglass fabricator, was as a cashier and in warehouse maintenance. Worker was unable to resume his duties as a sheet-metal fabricator. Two vocational rehabilitation evaluations determined that Worker would not be successful in any of the vocational pursuits for which he had training and experience. Worker would require medical care for his neurological symptoms, and these costs were reasonably and necessarily related to his compensable disability. The rate of compensation was $291.75 per week.

Based on these findings, the Judge concluded that Worker had a compensable occupational disease and was totally disabled. The Judge thus ordered Employer to pay total disability benefits from February 7, 1990; medical costs for treating Worker's physiological and psychological symptoms; vocational rehabilitation; attorney fees; and prejudgment interest. We will discuss additional facts below as necessary.

DISCUSSION

1. *Standard Of Review.*

In reviewing the Judge's decision, this Court applies the "whole record" standard of review. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct.App.), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988). Under this standard, the reviewing court considers the evidence in the light most favorable to the Judge's decision, but must also consider the contravening evidence, *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 107 N.M. 278, 281, 756 P.2d 558, 561 (1988), to determine whether, in light of all the evidence, substantial evidence supports the Judge's decision. *Kennecott Copper Corp. v. Chavez,* 113 N.M. 504, 510, 828 P.2d 416, 422 (Ct. App.), *cert. denied,* 113 N.M. 488, 827 P.2d 1302 (1992). For a conclusion to be supported by substantial evidence, the whole record must contain "sufficient credible evidence which a reasonable mind might accept as adequate to support the conclusion reached." *Estate of Mitchum v. Triple S Trucking,* 113 N.M. 85, 91, 823 P.2d 327, 333 (Ct.App.), *cert. denied,* 113 N.M. 16, 820 P.2d 1330 (1991). The reviewing court does not reweigh the evidence, substitute its judgment for that of the Judge, or seek to determine whether the evidence supports a contrary finding. *Id.* at 90–91, 823 P.2d at 332–33.

2. *Award Of Total Disability Benefits.*

Employer claims that the Judge's award of total disability benefits for the period after July 18, 1990, was error because Worker was no longer physically disabled after that date. Additionally, he had worked as a bookkeeper, a job from which he was fired for reasons unrelated to his physical condition. Relying on the test for total disability formulated under the former relevant statutes of the Workers' Compensation Act, NMSA 1978, Sections 52–1–25 and –26 (Repl.Pamp.1991) (effective until January 1, 1991), Employer contends that Worker's brief employment as a bookkeeper demonstrated that he was capable of working. As a result, Employer argues that Worker did not meet the requirements for total disability and the Judge should have found instead that he was partially disabled.

The ODDL defines "disablement" as:

> (1) the total physical incapacity, by reason of an occupational disease, of an employee to perform any work for remuneration or profit in the pursuit in which the employee was engaged, provided that silicosis, when complicated by active tuberculosis of the lungs, shall be presumed to result in disablement; *or*
>
> (2) the partial physical incapacity of an employee, by reason of an occupational disease, to perform to some percentage extent any work for which he is fitted by age, education and training.

Section 52–3–4(D) (emphasis added). To a certain extent, this language tracks most but not all of the language defining total disability and partial disability under the 1987 version of the Workers' Compensation Act. Sections 52–1–25(A), –26(B) (effective until January 1, 1991). However, we do not agree with Employer that the test for total disability that was applied under the 1987 Act is applicable to the facts of this appeal.

Former Sections 52–1–25(A) and –26(B) referred to the worker's inability to perform "any occupation" for which he or she was fitted. Thus, under the 1987 Act, to be totally disabled, a worker had to prove that he or she was completely unable to perform the tasks comprising the work performed at the time of injury *and* also was unable to perform any work for which he or she was fitted, based upon his or her age, education, and experience. *Sanchez v. Molycorp, Inc.*, 113 N.M. 375, 378, 826 P.2d 971, 974 (Ct.App.1992). In contrast, however, the ODDL expressly provides that, when considering whether an occupational disease has totally disabled a worker, the inquiry is limited to whether the worker is totally unable to perform any work *in the occupation in which the worker was engaged.* Section 52–3–4(D)(1); *see Holman v. Oriental Refinery,* 75 N.M. 52, 58–59, 400 P.2d 471, 476 (1965) (interpreting earlier version of statute, noted that language of ODDL is more definite and specific than parallel provision of workers' compensation law and does not require same interpretation). When interpreting a statute, words are given their ordinary meaning unless a different intent is clearly indicated. *Fahr v. Aaron McGruder Trucking,* 107 N.M. 241, 242, 755 P.2d 85, 86 (Ct.App.1988). Thus, in determining whether a worker is totally incapacitated under the ODDL, we do not consider other occupations for which the worker might be fitted.

We note that there is an apparent inconsistency within Section 52–3–4(D). Subsection 1 requires a determination of total physical incapacity to be based on whether the worker can "perform any work for remuneration or profit in the pursuit in which the employee was engaged," while Subsection 2 requires that, for a worker to be partially physically incapacitated, he must be unable "to perform to some percentage extent *any work* for which he is fitted by age, education and training." (Emphasis added.) Therefore the inquiry under Section 52–3–4(D)(2) is not limited to the worker's capacity to perform the duties of his occupation when injured as it is under Section 52–3–4(D)(1). However, contrary to Employer's apparent assumption, our task as a reviewing court is not to determine whether substantial evidence would support a finding that Worker was partially incapacitated, but rather to determine whether, in light of the whole

record, substantial evidence supports the Judge's finding that Worker was totally disabled. *See Antillon v. New Mexico State Highway Dep't,* 113 N.M. 2, 8, 820 P.2d 436, 442 (Ct.App.1991); *Bowles v. Los Lunas Sch.,* 109 N.M. 100, 104, 781 P.2d 1178, 1182 (Ct.App.), *cert. denied,* 109 N.M. 131, 782 P.2d 384 (1989). Thus, although we recognize the possibility that a worker who is partially disabled under the definition in Section 52–3–4(D)(2) could also be totally disabled under the definition in Section 52–3–4(D)(1), we need not address any potential inconsistency within Section 52–3–4 at this time.

The Judge found that Worker was wholly unable to perform the duties of a sheet-metal fabricator and would not be able to do so in the future. Relying on *Herrera v. Fluor Utah, Inc.,* 89 N.M. 245, 550 P.2d 144 (Ct.App.), *cert. denied,* 89 N.M. 321, 551 P.2d 1368 (1976), Worker contends that substantial evidence supports the Judge's findings. We agree. In that case, the worker, a painter, developed an allergic reaction to paint. This Court addressed the meaning of disablement under NMSA 1953, Section 59–11–4(a) (2d Repl. Vol., pt. 1), which is substantially identical to current Section 52–3–4(A), and rejected the employer's contention that the word "pursuit" should be broadly interpreted so that the possibility of the worker obtaining employment in other occupations should be considered when determining whether the worker was totally and permanently disabled. *Herrera,* 89 N.M. at 248, 550 P.2d at 147. Because *Herrera* held that the lower court's finding that the worker was unable to return to his previous occupation as a painter was supported by substantial evidence, the worker was totally disabled. *Id.* Similarly, substantial evidence supported the Judge's finding in this appeal that Worker was unable to return to his previous occupation as a sheet-metal fabricator. Dr. Garcia–Cantu testified that Worker was "100 percent incapacitated to go back to the same type of work that he was." Thus, we conclude that Worker was totally disabled within the meaning of Section 52–3–4(D).

Employer specifically attacks the Judge's award of benefits for the period after Worker had obtained and left a job as a bookkeeper. However, this Court has previously stated that, even assuming that disablement requires a total physical inability to perform work, "it does not necessarily follow that the performance of work for pay prevents a finding of total physical inability to work." *Salazar v. Kaiser Steel Corp.,* 85 N.M. 254, 257, 511 P.2d 580, 583 (Ct.App.), *cert. denied,* 85 N.M. 229, 511 P.2d 555 (1973). In that case, this Court affirmed the award of benefits to four miners even though they had briefly continued to work past the date on which the trial court determined they were disabled. *Id.* at 258, 511 P.2d at 584; *see also Holman,* 75 N.M. at 58, 400 P.2d at 475; *Vincent v. United Nuclear–Homestake Partners,* 89 N.M. 704, 706, 556 P.2d 1180, 1182 (Ct.App.), *cert. denied,* 90 N.M. 9, 558 P.2d 621 (1976). Thus, the fact that Worker briefly held another job unrelated to his occupation as a sheet-metal fabricator did not affect the determination that he was totally disabled within the meaning of Section 52–3–4(D)(1) because substantial evidence supported the finding that he was completely unable to return to his former occupation as a sheet-metal fabricator.

3. *Award Of Benefits For Worker's Psychological Symptoms.*

Employer argues that the Judge's award of benefits was error because it was for a psychological condition that is not compensable under the ODDL. Relying on *Chadwick v. Public Service Co.,* 105 N.M. 272, 731 P.2d 968 (Ct.App.1986), *cert. denied,* 105 N.M. 290, 731 P.2d 1334 (1987), Employer contends that the benefits were awarded for Worker's depression, which is not an occupational disease peculiar to the occupation of sheet-metal fabricator. Additionally, Employer argues that Worker's psychological symptoms were "secondary effects" of his toxic solvent syndrome and therefore uncompensable under Section 52–3–43. We believe Employer misconstrues both the Judge's award and Section 52–3–43.

In this case, contrary to Employer's contention that benefits were awarded solely for Worker's depression, benefits were awarded for Worker's toxic solvent syndrome and all of its associated symptoms, including the psychological symptoms. An occupational disease is "an ailment which is the result of a distinctive feature of the kind of work performed by claimant and others similarly employed, not an ailment caused by the peculiar place in which [the] particular claimant happens to work." *Chadwick,* 105 N.M. at 274, 731 P.2d at 970 (quoting with approval *Paider v. Park East Movers,* 19 N.Y.2d 373, 280 N.Y.S.2d 140, 227 N.E.2d 40, 43 (1967)); *see* § 52–3–33. This Court has repeatedly affirmed that an allergy may be compensable under the ODDL. *See Chadwick,* 105 N.M. at 274, 731 P.2d at 970. The worker was denied compensation in *Chadwick* because his allergy to airborne substances at his worksite did not prevent him from working at his occupation at a different site. *Id.* at 275, 731 P.2d at 971. However, when a worker develops an allergy to a substance that is peculiar to his or her occupation and, as a result, is prevented from working in that occupation, the allergy is a compensable occupational disease. *See Herrera,* 89 N.M. at 247, 550 P.2d at 146. Thus, because the solvents to which Worker is allergic are peculiar to the occupation of sheet-metal fabricator, we conclude that Worker's allergy to the solvents is a compensable disease under the ODDL.

Employer nonetheless argues that any award of benefits for Worker's "depression" was error under Section 52–3–43 because Worker's psychological impairment was a "secondary effect" of Worker's toxic solvent syndrome. We do not consider Section 52–3–43 applicable to the facts of this appeal. That statute applies when a worker's occupational disease either aggravates or is aggravated by a noncompensable disease. Section 52–3–43; *see also Vincent,* 89 N.M. at 706, 556 P.2d at 1182 (construing former law). Here, the Judge found that, as a result of his exposure to industrial solvents, Worker had sustained damage to his neurological system. Dr. Walter Decker, a toxicologist, testified that "exposure to solvents can produce a wide variety of neurological, psychological and emotional problems" and that a person who had "been exposed over a number of years to solvents, [could] develop brain and nervous system damage which may become permanent." Dr. Decker further testified that common symptoms associated with long-term exposure to solvents included fatigue, bad memory, concentration difficulties, personality changes, irritability, and depression. Additionally, Dr. Garcia–Cantu testified that Worker's central nervous system was "medically implicated." Both doctors also testified to the physiological effects of the exposure to the solvents. Although Employer contends that Worker's psychological symptoms were "secondary effects" of his toxic solvent syndrome and thus uncompensable, we see no indication that a worker is entitled to treatment for only certain aspects of his or her occupational disease. Thus, we hold that substantial evidence supported the Judge's findings that Worker's psychological symptoms were caused by the toxic solvent syndrome. Benefits can be awarded for psychological symptoms of a compensable disease. *See Martinez v. University of California,* 93 N.M. 455, 457, 601 P.2d 425, 427 (1979) (holding that technician who worked with radioactive materials could recover under ODDL for anxiety neurosis); *cf. Marable v. Singer Business Machs.,* 92 N.M. 261, 586 P.2d 1090 (Ct.App.1978) (depression caused by sexual harassment is not an *occupational* disease). The Judge did not find any "other disease" within the meaning of Section 52–3–43 contributed to Worker's disablement.

4. *Medical Causation.*

Employer contends that Worker failed to establish, to a reasonable degree of medical probability, that his disablement was caused by his work environment. Employer argues that only one physician, Dr. Garcia–Cantu, connected Worker's disability with his work environment and thus, under whole record review, causation was not established.

Under the ODDL, when an employer denies that a worker's disability was the result of his or her work environment, "the worker must establish that causal connection as a medical probability by medical expert testimony." Section 52–3–32. When asked whether "to a reasonable medical certainty" he could determine the cause of Worker's condition, Dr. Garcia–Cantu testified that the cause was the chemicals with which he had been working as a sheet-metal fabricator. The other medical evidence did not contradict Dr. Garcia–Cantu's testimony. Although Dr. Decker did not state specifically what had caused Worker's symptoms because he was not a medical doctor, he testified that exposure to the chemicals in the solvents, particularly trichloroethylene, could cause Worker's liver dysfunction and his neurological, psychological, and emotional problems. Dr. Boris Kaim's neurological consultation report noted that Worker's symptoms could be caused by "fumes." This constituted substantial evidence supporting the Judge's determination that Worker's compensable occupational disease was caused by his work environment.

5. *Award Of Vocational Benefits.*

Employer claims that the Judge's award of vocational benefits to Worker was error because Worker was able to return to gainful employment without such benefits. Employer contends that Worker's brief employment as a bookkeeper demonstrates that his current inability to work was not due to his physical inability but rather to the economy and to his response to his employment situation.

The purpose of vocational rehabilitation is to restore a worker to "gainful employment, preferably that for which he has had training or experience." Section 52–3–17(A). If the worker is unable, because of the injury, to return to either the same or a modified position with the same employer, "he shall be entitled to vocational rehabilitation evaluation, counseling and training if necessary to return the employee to either a job related to his former employment or suitable employment in a nonrelated field." Section 52–3–17(C).

To receive vocational rehabilitation benefits, a worker must show that (1) because of the compensable injury, he or she cannot return to his or her former employment or is permanently unable to some percentage extent to perform work for which he or she has previous training or experience; and (2) that he or she is a proper candidate for and in need of such services. *Jaramillo v. Consolidated Freightways,* 109 N.M. 712, 716, 790 P.2d 509, 513 (Ct.App.), *cert. denied,* 109 N.M. 704, 789 P.2d 1271 (1990). If this two-prong test is satisfied, the worker has a right to the benefits. Substantial evidence supported the Judge's determination that Worker was totally incapable of returning to his former occupation. Employer has not proposed any work related to that of sheet-metal fabricator that Worker could safely do. Thus, our inquiry is focused on whether Worker was a suitable candidate for vocational rehabilitation.

The Judge found that Worker's only job experience, other than as a sheet-metal fabricator, was as a cashier and in warehouse maintenance, and that vocational rehabilitation evaluations had shown that Worker would not be successful in any of the pursuits for which he had experience. Employer basically argues that these findings were error because Worker's employment as a bookkeeper demonstrated that he could gain "suitable employment" without vocational rehabilitation. We disagree. The meaning of "suitable employment" was construed in *Jaramillo.* We recognize that that case involved NMSA 1978, Section 52–1–50 (Orig.Pamp.) and the phrase "gainful employment" is now used in the statement of purpose of Sections 52–1–50(A) and 52–3–17(A). However, we do not believe this change is material because vocational rehabilitation services are designed to return the employee to "suitable employment in a nonrelated work field." Section 52–3–17(B)(4). The issue here is whether work as a bookkeeper was, under the facts of this case, "suitable employment in a nonrelated work field."

In *Jaramillo,* this Court stated that:

> [T]he term "restore ... to suitable employment" means to return the worker to employment similar in remuneration to that earned prior to the worker's disability and which is compatible with the worker's age, education, training, general physical and mental capacity, and previous work experience.

Jaramillo, 109 N.M. at 717, 790 P.2d at 514. Additionally, "[t]he fact that an injured worker retains some capacity to perform some type of work does not bar the worker from an award of vocational rehabilitation." *Id.* There was no evidence that Worker's employment as a bookkeeper was compatible with Worker's age, education, training, and previous work experience, and in fact the evidence was that Worker did not have previous experience as a bookkeeper. Thus, under the specific facts of this appeal, the bookkeeping position was not "suitable employment" for Worker within the meaning of Section 52–3–17.

6. *Award Of Prejudgment Interest.*

Whether prejudgment interest can be included in awards made pursuant to the ODDL is an issue of first impression in New Mexico. Originally, Worker and Employer focused on the applicability of NMSA 1978, Section 56–8–4 (Repl.1986) to awards made pursuant to the ODDL. Because the parties did not address another potential source for the Judge's authority, the Administration's Payments and Benefits Rules, N.M. Department of Labor, Workers' Compensation Division, WCD 89–4(V)(A)(3) (June 1989), this Court requested supplemental briefing from the parties and from the Administration as amicus curiae.

In his supplemental brief, Worker argues that Rule WCD 89–4(V)(A) is a valid exercise of the Administration's rule-making authority and that the Judge's award of prejudgment interest was valid under both the rule and the statute.

The Administration argues that Rule WCD 89–4(V)(A) is a valid exercise of its rule-making authority because it is not inconsistent with any statute. Having found no statute authorizing prejudgment interest in NMSA 1978, Chapter 52 (Repl.Pamp.1991), the Administration takes the position that the rule is the only source under the ODDL for the Judge's authority to award prejudgment interest. The Administration takes no position regarding the applicability of Section 56–8–4.

For the reasons that follow, we conclude that promulgation of Rule WCD 89–4(V)(A) was within the Administration's rule-making authority and that the rule is the sole source of the Judge's authority to award prejudgment interest under the ODDL. However, we determine that the award of prejudgment interest must be reversed, and we remand for consideration of whether the rules requirements were met because it is clear the applicability of the rule was not considered below.

The current version of Section 56–8–4 states that:

> B. 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.

Section 56–8–4(B). Worker analogizes to cases decided under the Act to argue that Section 56–8–4 is applicable to all decisions by a workers' compensation judge, including decisions made pursuant to the ODDL. We reject Worker's argument. Awards of post-judgment interest pursuant to Section 56–8–4(A) in workers' compensation cases have been upheld. *See Sanchez v. Siemens Transmission Sys.,* 112 N.M. 236, 814 P.2d 104 (Ct.App.), *rev'd on other grounds,* 112 N.M. 533, 817 P.2d 726 (1991); *Candelaria v. General Elec. Co.,* 105 N.M. 167, 176, 730 P.2d 470, 479 (Ct. App.), *cert. denied,* 105 N.M. 111, 729 P.2d 1365 (1986). This Court has previously relied on analogous cases decided under the Workers' Compensation Act to construe the ODDL. *See, e.g., McDonald v. Kerr McGee,* 93 N.M. 192, 193, 598 P.2d 654, 655

(even though the Workers' Compensation Act does not specifically provide for equitable defenses, nevertheless, an appellate court has considered equitable claims and defenses in workers' compensation proceedings; therefore, by analogy, if the elements of estoppel are established, the doctrine can be applied in a case arising under the ODDL). Similar reasoning would lead this Court to conclude that Section 56-8-4 should apply to cases arising under the ODDL as it does to cases arising under the Act. However, in cases such as *McDonald,* the two acts were comparable. Here, the Act and the ODDL are explicitly different. The previous version of Section 52-1-38 made the laws applicable to civil judgments and executions also applicable to decisions made under the workers' compensation law. *See Gonzales v. Mountain States Mut. Casualty Co.,* 105 N.M. 100, 104, 728 P.2d 1369, 1373 (Ct.App.1986). We note that the statute has since been amended; we do not address the effect, if any, these amendments may have on the applicability of Section 56-8-4 to workers' compensation judgments. However, there is no comparable statute in the ODDL. Thus, the rationale for applying Section 56-8-4 to cases arising under the Act does not apply to cases arising under the ODDL.

Although it may be preferable to treat the Act and the ODDL as similarly as possible, we must also recognize and give effect to the differences between them. The failure of the legislature to include any provision in the ODDL that incorporates the rules applicable to other civil judgments indicates to us that the legislature intended the exclusivity provisions of the ODDL to prohibit looking beyond the ODDL for statutory remedies. *See* § 52-3-7. Thus, we conclude that Section 56-8-4 does not apply to decisions made pursuant to the ODDL.

Nonetheless, there is a basis for granting prejudgment interest in ODDL cases. The Administration has promulgated a rule stating in part:

> **V. Penalties**
>
> A. If at the close of a hearing and after review of the Mediator's recommended resolution, the Workers' Compensation Judge finds that any party has rejected the recommended resolution without reasonable basis or without reasonable expectation of doing better at formal hearing; [sic] the Workers' Compensation Judge may:
>
> * * * * * *
>
> (3) Assess prejudgment interest from the date of issuance of the recommended decision.

R. WCD 89-4(V)(A)(3). The statutory authority for the director of the Administration to adopt rules and regulations is contained in NMSA 1978, Section 52-5-4(A) (Repl.Pamp.1991), which states in part:

> The director is authorized to adopt reasonable rules and regulations, after notice and public hearing, for effecting the purposes of the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law. Such rules and regulations shall include provisions for procedures in the nature of conferences or other techniques to dispose of cases informally or to expedite claim adjudication, narrow issues and simplify the methods of proof at hearings. All rules and regulations shall be published upon adoption and be made available to the public and, if not inconsistent with law, shall be binding on the administration of the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

Employer, in its supplemental brief, argues that Rule WCD 89-4(V)(A)(3) exceeds the scope of the Administration's rule-making authority under the Administrative Procedures Act, §§ 12-8-1 to -25 (Repl.Pamp.1988) (APA). However, the APA applies only to those state agencies that are "specifically placed by law under the Administrative Procedures Act." Section 12-8-2(A); *see also Livingston v. Ewing,* 98 N.M. 685, 687, 652 P.2d 235, 237 (1982). Employer cites no authority, and we know of none, indicating that the Administration has been placed by law under the APA. We thus conclude that the provisions of the APA are inapplicable to the facts of this appeal.

The failure of the ODDL to specifically authorize prejudgment interest does not render the regulation void. " 'It is ... a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom.' " *Wimberly v. New Mexico State Police Bd.*, 83 N.M. 757, 758, 497 P.2d 968, 969 (1972) (quoting *Winston v. New Mexico State Police Bd.*, 80 N.M. 310, 311, 454 P.2d 967, 968 (1969)). Statutes are to be interpreted so as to facilitate their operation and the achievement of their goals. *Griego v. Bag 'N Save,* 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).

Section 52–5–4(A) specifically authorizes the director to develop rules and regulations to dispose of claims informally and expeditiously. If that statutory purpose is to be accomplished, a fair implication is that the Administration has the authority to impose sanctions for activity that actively interferes with the informal dispute resolution process. Rule WCD 89–4(V)(A) is directly related to this statutory purpose by requiring the Judge to find that a party "has rejected the recommended resolution without reasonable basis or without reasonable expectation of doing better at formal hearing" before imposing sanctions. Additionally, Rule WCD 89–4(V)(A)(3) does not conflict with any other provision of Chapter 52. Therefore, we conclude that it is "not inconsistent with law" and is binding. Section 52–5–4(A).

Employer argues that remand to determine whether prejudgment interest was awarded pursuant to Rule WCD 89–4(V)(A) is unnecessary because the Judge expressly rejected Worker's proposed findings that Employer denied with no reasonable basis that Worker suffered from an occupational disease and that there was no reasonable justification for Employer's failure to pay benefits from February 7, 1990. Additionally, Employer argues that the Judge clearly did not make the award pursuant to Rule WCD 89–4(V)(A)(3) because he did not date the award of prejudgment interest from the date of issuance of the recommended decision, as required by the rule. Employer also claims that, under the whole record standard of review, *see Tallman,* 108 N.M. at 127, 767 P.2d at 366, there was no evidence offered to support Worker's proposed findings.

Worker apparently argues in his supplemental brief that Employer rejected the recommended resolution while Worker accepted it. The award granted to Worker after the formal hearing was substantially greater than the recommended resolution. Worker apparently interprets this as a rejection of the recommended resolution "without good reason."

We disagree with both contentions. The findings proposed by Worker and rejected by the Judge did not involve the basis for awarding prejudgment interest under Rule WCD 89–4(V)(A). In fact, it appears that neither the parties nor the Judge considered the applicability of the rule. In situations where "the record on appeal generates doubt concerning the facts found or the law applied by the lower tribunal," it is ordinarily appropriate for this Court to remand to allow the lower tribunal to exercise its discretion. *Lucero v. Yellow Freight Sys., Inc.,* 112 N.M. 662, 667, 818 P.2d 863, 866 (Ct.App.1991). We therefore remand for consideration of whether prejudgment interest should be awarded pursuant to Rule WCD 89–4(V)(A).

CONCLUSION

We hold that substantial evidence supported the Judge's findings that Worker (1) suffered a compensable occupational disease caused by conditions at his workplace; (2) will never be able to work again at his former occupation or in a related position; and (3) is entitled to vocational rehabilitation benefits. We affirm the Judge's award of total disability, medical, and vocational rehabilitation benefits. We also hold that Section 56–8–4 does not apply to cases brought under the ODDL. Finally, we conclude that Rule WCD 89–4(V)(A) is a valid exercise of the Administration's authority, but remand for consideration of whether

awarding prejudgment interest is appropriate under the rule. The Judge may consider legal representation on appeal in granting any award of attorney fees.

IT IS SO ORDERED.

CHAVEZ, J., concurs.

HARTZ, J., concurs in part and dissents in part.

HARTZ, Judge (concurring in part, dissenting in part).

I concur in the result, except for the remand for further proceedings regarding prejudgment interest. Although I agree with much of the majority opinion, I am writing separately because I have several disagreements with the majority and would decide some issues on different grounds. I will discuss the issues in the order in which they appear in the majority opinion.

I. TOTAL DISABILITY BENEFITS

Under the ODDL an employee is totally disabled if he or she is physically unable "to perform any work for remuneration or profit in the pursuit in which the employee was engaged." NMSA 1978, § 52–3–4(D) (Repl.Pamp.1991). The record contains sufficient evidence upon which the workers' compensation judge could properly have found that Worker was not able to perform any work as a sheet-metal fabricator, the pursuit in which he had been engaged at the time of his disability. Worker's capacity to work as a bookkeeper was irrelevant to the determination of whether he was totally disabled under the ODDL, because bookkeeping was not the pursuit in which he was engaged at the time of his disability. Therefore, I join in parts "1" and "2" of the majority opinion, with one reservation.

My reservation is that the opinion appears to misread *Salazar v. Kaiser Steel Corp.*, 85 N.M. 254, 257–58, 511 P.2d 580, 583–84 (Ct.App.), *cert. denied*, 85 N.M. 229, 511 P.2d 555 (1973). As I understand *Salazar*, a worker who performs a job may nevertheless be disabled from performing the job if there are medical reasons why the worker should not be performing the tasks of the job. There is no evidence in the record before us to indicate that Worker was medically incapacitated from performing the job of bookkeeper. Therefore, I fail to see the relevance of *Salazar* to the majority discussion of Worker's employment as a bookkeeper.

II. BENEFITS FOR DEPRESSION

Expert testimony established that the chemicals to which Worker was exposed can cause toxic solvent syndrome, the symptoms of which can include psychological problems. I agree with the majority that the ODDL would provide medical benefits for psychological injury directly caused by the chemicals to which Worker was exposed.

I am not convinced, however, that the evidence relied upon by the majority established to a reasonable degree of medical probability that Worker's psychological problems were caused by his exposure to toxic solvents. For example, Dr. Garcia–Cantu testified only that Worker's central nervous system "possibly" was "medically implicated." Other testimony noted in the majority opinion is, in context, rather ambiguous. Nevertheless, I would not reverse for failure of Worker to prove causation. My review of the record indicates that Employer's briefs on appeal failed to note substantial significant testimony pertinent to the issue of causation. Because of Employer's failure to present this issue properly on appeal, the judgment cannot be reversed on this ground. *See* SCRA 1986, 12–213(A)(3) (Repl.1992); *Martinez v. Southwest Landfills*, 115 N.M. 181, 848 P.2d 1108 (Ct.App.1993).

III. AWARD OF VOCATIONAL BENEFITS

I agree with the majority that we should affirm the Judge's award of vocational benefits to Worker. The fact that Worker was employed for a brief time as a bookkeeper does not necessarily mean that he was qualified for regular employment in that position. For example, he may have deficiencies in his skills that for some reason

did not surface during the brief period of his employment. Employer has failed to establish that the Judge abused his discretion in ordering that "[a] vocational rehabilitation plan shall be developed for [Worker]."

IV. PREJUDGMENT INTEREST

I concur in all of part "6" of the majority opinion, except for the final two sentences. I would reverse the award of prejudgment interest and not remand for reconsideration of that issue.

I agree that Worker did not raise below the contention that he was entitled to prejudgment interest pursuant to Rule WCD 89–4(V)(A). I can think of no reason for Worker not to submit findings necessary for the application of the rule, other than that Worker might have decided as a tactical matter to focus solely on NMSA 1978, Section 56–8–4 (Repl.1986), as a source of authority for prejudgment interest. To remand at this time for a determination of the applicability of the rule would place a substantial burden upon both Employer and the Administration. The Judge who heard this matter has been appointed to the district court. Any further findings in this case would need to be made by a new workers' compensation judge. To rule on the reasonableness of Employer's actions in this proceeding would require the new judge to become familiar with a great deal, perhaps all, of the factual and procedural background of the case. Both parties would be entitled to make presentations to the judge, at least to argue from the evidence of record. I suspect that the attorney's fees for each party would be comparable to the amount of prejudgment interest at stake. I also find it relevant that the Judge who heard the case rejected Worker's requested findings that "[t]here was no reasonable basis for [Employer] to deny that [Worker] suffered from an occupational disease as a result of [Worker's] employment by [Employer]," and "[t]here was no reasonable justification for non-payment of weekly compensation benefits from February 7, 1990 to the present and [Worker] is, therefore, entitled to prejudgment interest." In these circumstances, I think it is inappropriate to remand for the purpose of giving Worker an opportunity to pursue a theory of relief that he did not pursue in the original proceeding.

Finally, one additional observation concerning the efficacy of Rule WCD 89–4(V)(A)(3). Even if we are incorrect in holding that Section 56–8–4 does not apply to proceedings pursuant to the ODDL, Rule WCD 89–4(V)(A)(3) would still control the award of prejudgment interest in this case. Section 56–8–4(B) does not compel the award of prejudgment interest. It permits an award of prejudgment interest by the court "in its discretion." The Administration has the authority to issue a rule regarding the circumstances in which workers' compensation judges should exercise such discretion. The rule would be binding on workers' compensation judges, so that prejudgment interest could be awarded only in accordance with the rule. *See New Mexico State Racing Comm'n v. Yoakum,* 113 N.M. 561, 564, 829 P.2d 7, 10 (Ct.App.1991), *cert. denied,* 113 N.M. 352, 826 P.2d 573 (1992).

853 P.2d 1270

STATE of New Mexico,
Plaintiff-Appellee,

v.

James LANDERS, Defendant-Appellant.

No. 13280.

Court of Appeals of New Mexico.

Dec. 9, 1992.

Certiorari Granted Jan. 22, 1993.

Certiorari Quashed May 27, 1993.

Tom Udall, Atty. Gen., Ann M. Harvey, 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

APODACA, Judge.

Defendant appeals the trial court's judgment and sentence on two counts of criminal sexual contact of a minor (CSCM) under NMSA 1978, Section 30-9-13(A) (Cum. Supp.1990). He argues that: (1) the trial court's failure to instruct on the lawfulness of the touching that formed the basis of the charges was fundamental error; (2) a statement made by the prosecutor was prejudicial error; (3) the admission of evidence of prior "bad" acts was prejudicial error; and (4) the evidence was insufficient to support his convictions. Because we hold that the facts did not place lawfulness at issue, the trial court's failure to instruct on that issue was not fundamental error. We additionally hold that the prosecutor's isolated comment was not prejudicial, that the trial court did not abuse its discretion in admitting evidence of defendant's prior acts with the victim, and that the evidence was sufficient to support the verdict. We thus affirm defendant's convictions.

FACTS

The victim, who was fourteen years old at the time of trial, testified that, when she was between eleven and thirteen years old, when defendant came to her room to wake her for school, he would lift her nightgown and put his hand down her panties. This occurred almost daily. She said that once, when she was in the bathroom, defendant forced her to her hands and knees and rubbed his penis against her vaginal area. The victim was also permitted to testify, over objection, of a long history of other acts of sexual, physical, and emotional abuse for which defendant was not charged with any crime.

Defendant, who testified in his own defense, denied that he sexually touched the victim while waking her up and denied the occurrences of the incident in the bathroom and the other instances of sexual abuse. He testified that the victim was a difficult child and that he disciplined her for her disobedience. He argues on appeal that she had fabricated the allegation of sexual abuse in retaliation for his efforts to discipline her. To the extent that he did touch her, defendant stated that he did so as a father would, i.e., as a disciplinarian or with innocent affection.

During closing argument, the prosecutor told the jury that sexual abuse had to be stopped. Defense counsel objected, stating that the prosecutor's argument placed the blame for society-wide sexual abuse on defendant. The trial court warned the prosecutor to limit her argument to the case at hand. The prosecutor then limited her closing argument to defendant and urged the jury to consider the victim's need for protection and her hope for a normal life. Defendant did not request a curative instruction or a mistrial.

DISCUSSION

1. *Jury Instruction on Lawfulness.*

This case presents a new type of situation to which we must apply our Supreme Court's holding in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991). In that case, the Court held that, when a defendant is charged with CSCM, the jury must receive an instruction requiring it to decide, as an element of the crime, whether the touching was unlawful. *Id.* at 661, 808 P.2d at 631. In determining whether the absence of the lawfulness instruction was reversible fundamental error, "[t]he question is whether there was any evidence or suggestion in the facts, however slight, that could have put the element of unlawfulness in issue." *State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992).

In *Osborne,* the defendant introduced evidence that the acts for which the state charged him with CSCM were lawful. *Osborne,* 111 N.M. at 656, 808 P.2d at 626. In *Orosco,* which consisted of consolidated appeals, no evidence in either case suggested that if the touchings occurred, they were for a lawful purpose. *Orosco,* 113 N.M. at 784, 833 P.2d at 1150. Our Supreme Court concluded that none of the facts in the consolidated appeals placed the element of lawfulness at issue, and thus the trial court's failure to instruct on that element was not fundamental error. *Id.* at 790, 833 P.2d at 1152. The facts of this appeal present a middle ground. On the one hand, defendant denied that he woke the victim in the manner to which she testified and that the incident in the bathroom took place. On the other hand, he stated that if he ever touched her, it was always in a fatherly way. This touching would include disciplining the victim by whipping her with a belt, slapping her on the legs, and pulling her hair, as well as kissing her on the forehead and hugging her. We must determine whether defendant's characterization of this touching as fatherly places at issue the lawfulness of the alleged conduct that formed the basis for the charges. In other words, we must decide if defendant was giving alternative testimony, i.e., that he did not sexually touch the victim *or, alternatively,* that he touched the victim in prohibited places for a lawful purpose.

The state's case, as the jury instructions reflect, was centered on defendant's touching a certain prohibited part of the victim's anatomy when waking her and once in the bathroom. *See* § 30–9–13. These jury instructions were the law of the case and, absent proof conforming to the instructions, the state could not prevail. *See State v. Martin,* 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct.App.) (instructions that are not objected to and that are requested by the state become the law of the case), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977). We believe that, although defendant contended that all touching of the victim was colorably lawful, there was no evidence from which the jury could infer that the particular touchings that the state sought to prove were lawful. The only way to view defendant's evidence is that he did not touch the victim whatsoever in the manner the state alleged *and* that all of his other touchings were lawful. Because defendant did not allege that the particular touchings forming the basis for the charges of CSCM were lawful, we conclude that the issue of the lawfulness of those touchings was not at issue. Thus, we consider the facts of this appeal analogous to *Orosco,* rather than to *Osborne.* Without evidence raising the question of the lawfulness of the particular touchings that made the state's case, we hold that the trial court's failure to give the lawfulness instruction was not fundamental error. *See Orosco,* 113 N.M. at 783–84, 833 P.2d at 1149–50.

2. *Prosecutorial Misconduct.*

Defendant argues that a statement made by the prosecutor during her closing argument was prosecutorial misconduct because it went beyond the evidence to appeal to the jury's normal prejudice against sex crimes and because the prosecutor repeated the statement after the trial court admonished her. Additionally, defendant claims the prosecutor's conduct was particularly egregious because she allegedly

committed similar misconduct in another unrelated trial.

The prosecutor and defense counsel are allowed latitude in closing arguments and the trial court has discretion in controlling closing arguments. *State v. Venegas,* 96 N.M. 61, 63, 628 P.2d 306, 308 (1981). If there is neither abuse of discretion nor prejudice to defendant, there is no error. *State v. Jett,* 111 N.M. 309, 314, 805 P.2d 78, 83 (1991) (quoting *State v. Pace,* 80 N.M. 364, 371, 456 P.2d 197, 204 (1969)). The question presented on appeal when a defendant alleges that the prosecutor in closing arguments made improper comments is whether the comments deprived the defendant of a fair trial. *Id.*

Because the focus of our inquiry is on whether *this* defendant was deprived of a fair trial, *id.,* we do not consider the prosecutor's alleged comments in another case relevant. We consider only the prosecutorial statements made in closing argument in this appeal.

The prosecutor told the jury to "keep in mind that child abuse is something that must be stopped." At this point, the trial court sustained defense counsel's objection to this statement. After an admonishment from the trial court, the prosecutor then stated that "sexual abuse must be stopped on [the victim]." Defendant characterizes this statement as the prosecutor ignoring the trial court's ruling. However, taken in context, the prosecutor's statement was limited to the effect on the victim.

Additionally, even if we were to categorize the statements as misconduct, we do not consider them to be reversible error. Isolated comments made in closing argument are generally not sufficient to require reversal. *See, e.g., State v. Clark,* 105 N.M. 10, 16, 727 P.2d 949, 955 (Ct.App.) (three improper comments made by prosecutor not found to be prejudicial error), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986); *State v. Taylor,* 104 N.M. 88, 96, 717 P.2d 64, 72 (Ct.App.) (isolated comments were not so pervasive or prejudicial as to deprive the defendant of a fair trial), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986); *cf. State v. Diaz,* 100 N.M. 210, 668 P.2d 326 (Ct.App.1983) (prosecutorial misconduct found where, in closing argument, prosecutor repeatedly referred to the authority he represented, made vituperative comments about defendant, and derogated defendant's defense). The prosecutor's comment did not, under the facts of this appeal, deprive defendant of a fair trial. It was a single, isolated comment that, after the trial court's ruling, the prosecutor limited by referring to the victim. We conclude there was no reversible error.

3. *Evidence of Prior Bad Acts.*

Defendant objected at trial to the admission of evidence of prior "bad" acts, including uncharged sexual battery dating back to the victim's early childhood. He argues on appeal that this evidence was admitted merely to prove that he acted in conformity with his prior conduct and was thus inadmissible. *See* SCRA 1986, 11–404(B). Defendant also argues that, even if this evidence was admissible for any other purpose, the prejudicial effect of the evidence outweighed its relevance. *See* SCRA 1986, 11–403. In so arguing, defendant acknowledges the precedent against him. *See State v. Mankiller,* 104 N.M. 461, 722 P.2d 1183 (Ct.App.), *cert. denied,* 104 N.M. 378, 721 P.2d 1309 (1986). However, he contends that we should overrule *Mankiller* because it is contrary to Rules 11–403 and 11–404.

Rule 11–404(B) provides that evidence of a person's prior acts is generally not admissible to prove a person's character in order to show that he acted in conformity with that character. However, such evidence may be admitted for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* This list of purposes is not exclusive. *See State v. Lara,* 109 N.M. 294, 296, 784 P.2d 1037, 1039 (Ct.App.), *cert. denied,* 109 N.M. 262, 784 P.2d 1005 (1989); *but see State v. Gibson,* 113 N.M. 547, 556, 828 P.2d 980, 989 (Ct. App.) (stating that if evidence of prior crimes is not admissible for a specific pur-

pose permitted by the rules of evidence, admission of such evidence can require reversal of the conviction), *cert. denied,* 113 N.M. 524, 828 P.2d 957 (1992).

Even if evidence of a defendant's prior acts is relevant and admissible for a purpose other than proving the defendant acted in conformity with his character, the probative value of the evidence must outweigh its prejudicial effect to be admissible. *State v. Beachum,* 96 N.M. 566, 567–68, 632 P.2d 1204, 1205–06 (Ct.App.1981); R. 11–403. On appeal, the trial court's decision to admit evidence under Rule 11–404(B) is reviewed for abuse of discretion. *State v. Altgilbers,* 109 N.M. 453, 471, 786 P.2d 680, 698 (Ct.App.1989), *cert. denied,* 109 N.M. 419, 785 P.2d 1038 (1990).

In *State v. Minns,* 80 N.M. 269, 454 P.2d 355 (Ct.App.), *cert. denied,* 80 N.M. 234, 453 P.2d 597 (1969), decided before the adoption of our Rules of Evidence, this court held that, in criminal prosecutions for sex offenses, although evidence of similar offenses committed upon persons other than the victim is generally inadmissible, evidence of similar offenses committed upon the victim "if not too remote, is admissible as showing a lewd and lascivious disposition of defendant toward the prosecuting witness and as corroborating evidence." *Id.* 80 N.M. at 272, 454 P.2d at 358. This rule has been affirmed since the Rules of Evidence were adopted in cases involving sex offenses committed upon children. *See State v. Scott,* 113 N.M. 525, 528, 828 P.2d 958, 961 (Ct.App.1991), *cert. quashed,* 113 N.M. 524, 828 P.2d 957 (1992); *State v. Delgado,* 112 N.M. 335, 341, 815 P.2d 631, 637 (Ct.App.), *cert. denied,* 112 N.M. 220, 813 P.2d 1018 (1991); *Mankiller,* 104 N.M. at 469, 722 P.2d at 1191.

Defendant generally argues that such evidence is essentially propensity evidence and thus inadmissible under Rule 11–404(B). We agree that, if such evidence was offered *solely* to demonstrate defendant's "lewd and lascivious disposition" toward the victim, *Mankiller,* 104 N.M. at 469, 722 P.2d at 1191, it would be inadmissible as irrelevant because conviction for criminal sexual penetration of a minor (CSPM) or CSCM does not require proof of a sexual purpose. *State v. Pierce,* 110 N.M. 76, 83, 792 P.2d 408, 415 (1990). Thus, evidence of a defendant's lewd and lascivious disposition is not relevant in such cases. *See Cruz v. State,* 737 S.W.2d 74, 77 (Tex.Ct.App.1987).

In cases involving sexual abuse or other sex crimes, evidence of acts with a third person, i.e., someone other than the victim of the crimes under indictment, is usually not admissible. *State v. Lucero,* 114 N.M. 489, 840 P.2d 1255 (Ct.App.1992), *cert. denied,* 114 N.M. 413, 839 P.2d 623 (1992). In *Lucero,* this Court reversed the defendant's convictions for various sex crimes against a minor and held that the trial court improperly admitted evidence regarding prior sex acts the defendant attempted to have with his former fiancée, an adult.

The defendant in *Lucero* was charged with attempted criminal sexual penetration of a minor, criminal sexual penetration of a minor, criminal sexual contact of a minor, and kidnapping. *Id.* at 491, 840 P.2d at 1257. All the charges arose from a single incident in which the defendant invited a seven-year-old girl to his home where he allegedly molested her. *Id.* at 491, 840 P.2d at 1257. The state attempted to admit evidence that the defendant previously had had disagreements with his ex-fiancée about her unwillingness to have anal and oral sex with defendant. *Id.* at 491, 840 P.2d at 1257. Although the trial court sustained the defendant's objection to the testimony on direct examination of the ex-fiancée, the state was able to introduce the testimony when the state recalled the ex-fiancée as a rebuttal witness. The trial court allowed the evidence because it found that the acts testified to were not prejudicial.

Lucero rejected the "lewd and lascivious disposition" exception to Rule 11–404(B) in situations in which the state desires to introduce evidence concerning a defendant's prior sexual conduct with someone other than the victim named in the indictment. In such cases, "the 'lewd disposition' exception is nothing more than a euphemism for

the character evidence [that] Federal Rule 404(B) and its state counterparts are designed to exclude." *Id.* at 492–93, 840 P.2d at 1258–59. However, *Lucero* did not reject use of the exception when the state wished to introduce evidence of a defendant's prior sexual conduct *with the victim.* In fact, this Court has previously accepted the "lewd and lascivious disposition" exception to Rule 11–404(B) for use in the latter situation. *See Scott,* 113 N.M. at 528, 828 P.2d at 961; *Delgado,* 112 N.M. at 341, 815 P.2d at 637; *Mankiller,* 104 N.M. at 469, 722 P.2d at 1191; *Minns,* 80 N.M. at 272, 454 P.2d at 358.

This distinction is in accord with some jurisdictions, *see State v. Jalette,* 119 R.I. 614, 382 A.2d 526, 533–34 (1978) (adopting California's standard); *Commonwealth v. Rodriguez,* 343 Pa.Super. 486, 495 A.2d 569, 574–75 n. 4 (1985); *see also* 1 *McCormick on Evidence* § 190, at 803–04 & n. 25 (John William Strong, ed., 4th ed. 1992) (Practitioner Treatise Series), but not with others. *See, e.g., Getz v. State,* 538 A.2d 726, 732–33 (Del.1988); *see also McCormick on Evidence, supra,* § 190, at 803–04 & nn. 26–27.

Defendant urges this Court to reconsider *Mankiller* and its progeny because the cases are contrary to Rule 11–404(B). However, the purposes listed in Rule 11–404(B) for which evidence of prior acts may be admitted is not exhaustive. *Lara,* 109 N.M. at 296, 784 P.2d at 1039. Thus, the fact that the "lewd and lascivious" exception is not specifically listed in Rule 11–404(B) is insufficient to convince us to reject the exception.

We recognize that some commentators have criticized the "lewd and lascivious" exception as simply allowing otherwise inadmissible propensity evidence. *See, e.g.,* Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Other Sex Offenses,* 25 UCLA L.Rev. 261, 278–79 (1977); *see also Lucero,* 114 N.M. at 492–93, 840 P.2d at 1258–59. However, we believe the "lewd and lascivious disposition" exception in *Mankiller* is justified in determining whether evidence of prior acts with the complaining witness is admissible, even though use of the exception may not be justified in other situations. Evidence of prior acts with the complaining witness can directly bolster the complaining witness's testimony by providing significant corroboration. For example, in *People v. Bailey,* 103 Mich.App. 619, 302 N.W.2d 924 (1981), the Michigan Court of Appeals affirmed the admission of evidence regarding the defendant's prior acts with the complaining victim, the defendant's daughter. The court based its finding on the belief that such evidence was particularly justified when the acts charged were against a member of the defendant's household. The court explained that, without such evidence, the "[o]therwise ... seemingly isolated incident [would seem] incredible." *Id.* 302 N.W.2d at 927. We conclude that, when used for this purpose, such evidence is not inadmissible propensity evidence. Instead, such evidence may be deemed admissible under an exception to Rule 11–404(B).[1]

We agree that the "lewd and lascivious" exception is subject to abuse and that the phrase with which it is identified arguably could be understood to describe "propensity." We are, however, unwilling to overrule *Mankiller* and its progeny, because we are not yet persuaded that the results we have reached in applying *Mankiller* are inconsistent with the intent of the express exceptions contained in Rule 11–404(B).

1. The victim/non-victim distinction discussed here affects only the "lewd and lascivious disposition" exception to Rule 11–404(B) as announced by case law. It does not affect the admissibility of a defendant's prior sexual conduct with a non-victim if such conduct is properly admissible under Rule 11–404(B) or another Rule of Evidence. Thus, for example, evidence of a defendant's prior sexual conduct with a non-victim might be necessary to the prosecution's case because the victim was unable to effectively testify (for instance, if the victim were a very young child). In such situations, the evidence might be admissible under one of the "other purposes" listed in Rule 11–404(B). For example, the evidence might be admissible under the "absence of mistake or accident" exception. *Cf. Young v. Rabideau,* 821 F.2d 373 (7th Cir.1987) (prior disciplinary infractions admissible to show inmate hitting guard not an accident).

Nevertheless, we caution trial courts to exercise great care in admitting evidence of a defendant's prior acts with the victim, because such evidence is often highly inflammatory and prejudicial. If the evidence is not relevant to an issue in the case or is merely cumulative, it should not be admitted. *See, e.g., Getz,* 538 A.2d at 732–34; *Jalette,* 382 A.2d at 533–34; *Cruz,* 737 S.W.2d at 77–78 (holding that evidence of defendant's prior sex acts with victim not admissible unless defendant denies act or relationship or undermines victim's credibility). Additionally, although not required by the rule to do so, it is helpful when trial courts articulate the basis for the admission of such evidence. Doing so assists us as a reviewing court in determining the propriety of admission.

Under the facts of this appeal, we hold that the trial court did not abuse its discretion in admitting evidence of defendant's physical abuse and exhibitions. We believe the evidence corroborated the victim's testimony and placed the charged acts in context. The evidence of defendant's treatment of the victim was relevant to the issue of credibility and not merely offered to show defendant's character and propensity to commit the crime. Thus, we hold that admission of this evidence was not error.

4. *Sufficiency of the Evidence.*

Relying on *State v. Franklin,* 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), defendant argues that the evidence was insufficient because (1) he did nothing improper; (2) the state's witnesses were not credible; (3) the victim fabricated her claims; and (4) there was no physical evidence of guilt. These claims involve issues of credibility and view the evidence in the light most favorable to defendant's position, an argument that is contrary to established principles of appellate review.

In determining whether there was sufficient evidence to support a jury verdict, we indulge all inferences favorable to the verdict and disregard the contrary ones. *State v. Duran,* 107 N.M. 603, 605, 762 P.2d 890, 892 (1988). We do not second guess the jury's decisions on who to believe and who to disbelieve, weigh the evidence, or substitute our judgment for that of the jury. *State v. Sutphin,* 107 N.M. 126, 130–31, 753 P.2d 1314, 1318–19 (1988). The test we apply when reviewing sufficiency of the evidence is "whether substantial evidence, either direct or circumstantial in nature, exists to support a verdict of guilty beyond a reasonable doubt with respect to each essential element of a crime charged." *Duran,* 107 N.M. at 605, 762 P.2d at 892.

Our review of the record indicates to us that substantial evidence supported the verdict. The victim testified directly regarding defendant's acts that were the basis of the crimes charged, although defendant disputed the victim's version in his testimony. The jury was entitled to believe the victim and disbelieve defendant. Additionally, contrary to defendant's contention, physical evidence is not required to support a conviction for CSCM. *See State v. Orosco,* 113 N.M. 780, 789, 833 P.2d 1146, 1155 (Ct.App.1992) (holding that child's statement of events was "ample direct evidence" to support conviction of CSCM as an accessory even though child's trial testimony contradicted statement), *aff'd,* 113 N.M. 780, 787, 833 P.2d 1146, 1153 (1992).

CONCLUSION

We hold that the trial court's failure to instruct the jury on unlawfulness was not fundamental error because the facts did not place lawfulness at issue, since defendant denied that the specific acts occurred. We also hold that the prosecutor's isolated comment was not reversible error, that the trial court did not abuse its discretion in admitting evidence of defendant's prior acts with the victim, and that the evidence was sufficient to support the verdict. We therefore affirm defendant's convictions.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

854 P.2d 348

The CITY OF ALBUQUERQUE, a municipal corporation, Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Public Service Company of New Mexico, and El Paso Electric Company, Appellees.

No. 20254.

Supreme Court of New Mexico.

April 21, 1993.

David S. Campbell, City Atty., Nann Houliston, Asst. City Atty., Albuquerque, for appellant.

James C. Martin, Santa Fe, for appellee Public Service Com'n.

Keleher & McLeod, Richard B. Cole, Thomas C. Bird, Albuquerque, for appellee Public Service Co.

Cohen & Throne, David S. Cohen, Bruce C. Throne, Jane C. Cohen, Santa Fe, for appellee El Paso Elec. Co.

OPINION

MONTGOMERY, Justice.

In 1989, the citizens of Albuquerque, New Mexico, voted to add an unusual provision to their municipal charter.[1] The pro-

1. Albuquerque is a "home rule municipality" with a municipal charter under the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (Repl.Pamp.1985 & Cum.Supp.1992), as autho-

vision, Article XV of the Albuquerque City Charter, is entitled "Competitive Bidding for Electrical Franchises" and provides:

> The City of Albuquerque shall have no power to grant or extend any franchises, licenses or other rights to provide electricity to the public or to wholesalers unless the franchise, license or right has been awarded by competitive bid to the lowest cost suppliers. The total term of any franchise, license or right shall not exceed 25 years. The City shall have the power and the mandatory duty to implement this Article through legislation. Such legislation shall maximize actual competition in the selection process, in fact as well as form. This Article shall not prohibit the grant of multiple franchises, licenses or rights for all or part of the City.

According to one of the City's briefs, this provision came about because the voting public of Albuquerque was "[f]rustrated with high electric rates, the market monopoly of the local electric supplier and the perceived inability of state regulators to adequately address rates," and thought that "competition was the answer."

This appeal was taken by the City from a "Final Declaratory Order" of the New Mexico Public Service Commission,[2] entered at the conclusion of a proceeding brought by Albuquerque's certificated electric utility, Public Service Company of New Mexico ("PNM"), to determine the validity of Article XV in light of the provisions of the New Mexico Public Utility Act ("the PUA" or "the Act").[3] The Commission's order declared that there was no facial conflict between Article XV and the PUA and that a ruling on any possible conflict between the charter amendment and the Act as applied was premature. 127 P.U.R.4th at 483–84. The order did rule on several other points, mostly concerning the Commission's jurisdiction to entertain PNM's petition and other issues disputed by the parties to the proceeding, only one of which is involved in this appeal. Construing Section 62–6–15 of the PUA, the proper interpretation of which is at the heart of this appeal, the Commission ruled that "there is nothing in the [PUA] . . . that would support a theory that municipalities may, through franchises or contracts with public utilities, negotiate or procure rates for any retail utility customer other than for *the municipal corporation itself.*" 127 P.U.R.4th at 487 (emphasis added).

On appeal from the Commission's order,[4] the City argues for a more expansive interpretation of Section 62–6–15, under which a municipality is authorized to contract with a utility for rates not only to the municipality itself but also to its inhabitants. The City's position is resisted by the Commission, by PNM, and by El Paso Electric Company ("EPE"), an intervenor in the proceeding below ("the appellees"). The appellees argue that the City's position would contravene the Act by converting its scheme of statewide, centralized public utility regulation into one of localized, municipality-by-municipality establishment of rates through individually negotiated contracts.

For the reasons that follow, we hold that Section 62–6–15 does authorize a municipality to enter into contracts for public utility

rized by the home rule amendment to our Constitution, N.M. Const. art. X, § 6. Although this fact is noted in one of the appellees' briefs, the Commission did not rely on it in the order here under review, and its significance, if any, to the issues in this appeal has not been argued by the parties and is therefore not addressed in this opinion. *But see infra* note 11 and accompanying text.

2. The order is published in the *Public Utility Reports, Re Public Serv. Co.,* 127 P.U.R.4th 477, 1991 WL 501931 (NMPSC 1991). Citations to pertinent provisions of the order in this opinion appear simply as "127 P.U.R.4th at ——."

3. The PUA is compiled in various sections of Chapter 62 of the New Mexico Statutes Annotated, 1978 Compilation. *See* NMSA 1978, § 62–13–1 note (Repl.Pamp.1984) (listing statutory provisions that comprise the PUA). Unless otherwise indicated, all references in this opinion to sections of the PUA are to sections as set out in the 1984 Replacement Pamphlet of the statutes.

4. Pursuant to § 62–11–1 (party to proceeding before Commission may file notice of appeal in Supreme Court asking for review of Commission's final orders therein).

rates not only to itself for municipal purposes but also to its inhabitants. In the course of our discussion, however, we seek to make clear that our holding in no way infringes upon or diminishes the Commission's general and exclusive power to establish rates and conditions for the service rendered by a utility certificated under the PUA to provide that service within the municipality's boundaries. We hold, in other words, that the concerns of the Commission and the utility-appellees are misplaced: While Section 62–6–15 permits a municipality to contract for service rates to the municipality's inhabitants, any such contractually established rates must, before they become effective, be approved by the Commission, which retains plenary authority to approve, disapprove, or modify them.

I.

PNM and its predecessor companies have provided electric utility service to the City and its residents since 1882. 127 P.U.R.4th at 479. PNM is therefore the holder of a certificate of public convenience and necessity to render service within the City of Albuquerque under the grandfather clause of Section 62–9–1 (Cum.Supp.1992). 127 P.U.R.4th at 479. Expressing uncertainty about its rights and duties under the PUA and Article XV, PNM filed in December 1990 a petition under the Commission's rules for a declaratory order determining whether Article XV was inconsistent with the PUA in various respects. *Id.* at 477.[5] As previously stated, the Commission declared that Article XV and the PUA are not facially inconsistent and made various other rulings, including the one challenged on this appeal—that Section 62–6–15 contemplates only a contract between a public utility and a municipality for the latter's own purposes, not a contract for the benefit of the municipality's residents.

In making its determination, the Commission relied on the absence of language in Section 62–6–15 expressly authorizing a municipality to contract "on behalf of its inhabitants." It rejected the City's reliance on an earlier, pre-PUA opinion of this Court, *Town of Gallup v. Gallup Electric Light & Power Co.*, 29 N.M. 610, 225 P. 724 (1924), which recognized the power of a municipality to contract with a public utility for electric rates to the municipality's inhabitants. The Commission found *Town of Gallup* inapplicable because it was decided at a time when municipalities possessed the express power to regulate utility rates on behalf of their citizens. 127 P.U.R.4th at 489 & n. 6. The Commission also found that allowing municipalities to contract for rates to their inhabitants would conflict with the PUA's centralized regulatory scheme and would thwart the specific prohibition in Section 62–8–6 (Cum. Supp.1992) against establishment or maintenance by utilities of unreasonable differences in rates of service between localities. *Id.* at 489.

This appeal presents a challenge by the City to the Commission's determination that a municipality does not have the power to contract for utility rates to its inhabitants and the related issue of the impact of this power, if it exists, on the Commission's regulatory authority.

II.

Section 62–6–15, headed "Contract rate with the municipality and utilities; how established," provides in pertinent part:

> Rates and service regulations may be established by contract between the municipality and the utility for a specified term not exceeding twenty-five years, but only by and with the approval of the commission to be expressed by its order. Whenever any such contract shall be made, it shall, before becoming effective, be submitted to the commission. Unless the commission shall find the provisions of any such contract inconsistent with the public interest, the interest of the consumers and the interest of investors, it shall approve the same, otherwise it shall disapprove the same, and, unless

5. The procedural history of the proceeding before the Commission after PNM filed its petition, leading ultimately to entry of the Commission's order, is recounted in the order, 127 P.U.R.4th at 477–79.

and until so approved, such contract shall be of no effect, but if it be approved, it shall be in all respects lawful.... For the purpose of determining whether any such contract hereafter made is consistent with public interest, the commission shall hold such hearings, after notice, as may be necessary to its determination.

The parties submit two different interpretations of this provision. The City argues that Section 62–6–15 expressly preserves a municipality's power, recognized in *Town of Gallup,* to contract for utility rates on behalf of its inhabitants. It maintains that the purpose of Section 62–6–15 was to recognize this power within the PUA and to ensure that contract rates would not take effect until approved by the Commission. Appellees, on the other hand, contend that Section 62–6–15 authorizes municipalities to contract for rates for utility service to *municipal facilities only.* While appellees proffer several arguments, based on the language of the section, to support their interpretation, they rely primarily on the purpose of the Act. They essentially argue that allowing municipalities to contract for utility rates on behalf of their inhabitants would result in a decentralized scheme of utility regulation conflicting with the centralized, statewide regulatory system established by the PUA—even if, as the City acknowledges is true, the contract rates are subject to ultimate approval by the Commission.

None of the parties disputes that prior to enactment of the PUA municipalities in New Mexico had the power to contract on behalf of their inhabitants for utility rates. The issue debated is the effect passage of the PUA had on this power to contract. The appellees argue that the PUA abrogated the power of municipalities to contract for utility rates on behalf of their citizens; the City argues that this contractual power survived passage of the PUA. Our resolution of the issue requires us first to examine the nature and source of the municipal power to contract prior to enactment of the PUA; then we examine whether and to what extent the PUA altered that power.

A.

The leading New Mexico authority before enactment of the PUA on the power of a municipality to contract for utility rates is *Town of Gallup.* In that case, the Town sought an injunction to prevent Gallup Electric Light and Power Company from charging electric rates to customers in excess of rates fixed by an ordinance and franchise under which the Company was supplying electricity to the Town. The Company responded by arguing that the Town had no authority to contract for electric rates, so that the contract or franchise rate was unenforceable.

In considering the Company's argument, this Court first quoted four statutes in the 1915 Code that the Court deemed relevant to the issue. The first provision, Section 3532, authorized a city or town to contract or be contracted with. The second and third provisions authorized a city council or town board of trustees to regulate the use of streets, Subsection 3564(7), and to grant franchises, Subsection 3564(90). The fourth provision empowered cities and towns to regulate rates for gas, electricity, and water service "to such cities or towns of this state or any of the inhabitants resident therein." Subsection 3564(93).[6]

This Court then discussed the power to contract for rates, distinguishing it from the power to regulate:

It is always to be borne in mind that the power to regulate rates is a governmental power and an entirely different and distinct power from the power to contract for rates. While it is true that the state may surrender, temporarily, this governmental power of regulation of rates to be charged the people for public service, either directly, or by granting municipalities power to make binding contracts as to rates for a reasonable time, owing to the importance to the people of the conservation of the regula-

6. Subsection 3564(93) was originally enacted by our territorial legislature in 1897, *see* 1897 N.M.Laws, ch. 57, § 1, and was carried forward in subsequent codifications and compilations of our statutes, *see* NMSA 1897, § 2402(93); NMSA 1915, § 3564(93); NMSA 1929, § 90–402(93).

tory power, its surrender is never to be presumed nor allowed except where so declared in express terms or by necessary implication....

But there are contracts of another class which municipalities may make with public service corporations in regard to rates which are not intended by the parties to withstand the subsequent exercise of the governmental power of regulation, but which are valid as between the parties until the state elects to intervene and regulate rates. It is frequently said that such a contract is made by the municipality in its private or business capacity, not in its governmental capacity. That such contracts entered into by a municipality having the power to contract, and to regulate the use of the streets, and grant franchises, as ours have, are valid and binding upon both parties thereto, see [citations].

Town of Gallup, 29 N.M. at 615–16, 225 P. at 726. The Court then concluded that the Town had the power to make the contract at issue and that both parties were bound by it since the state had not attempted to intervene and exercise its regulatory power. *Id.* at 616–17, 225 P. at 726.

In holding that the Town of Gallup could contract for electric utility rates, we did not rely on the Town's separate power to regulate rates, conferred by Subsection 3564(93). Rather, we relied on the Town's statutory powers "to contract, and to regulate the use of the streets, and grant franchises." *Id.* at 616, 225 P. at 726. The presence or absence of the power to regulate rates was only relevant in determining whether a contract could withstand subsequent governmental regulation. *Id.* at 615–16, 225 P. at 726. Thus, the existence of the Town's statutory authority to regulate meant that the state had not surrendered its regulatory authority and that, had such authority been exercised, the contract would have been subject to regulation. *See id.*

B.

We now consider the PUA's effect on the regulatory scheme envisioned by *Town of Gallup* and the statutes on which it relied. Enacted in 1941,[7] the PUA significantly changed the method of public utility regulation in New Mexico. Prior to that year, New Mexico had followed a localized scheme of regulation, with individual municipalities possessing the authority to regulate public utilities. *See* NMSA 1929, § 90–402(93) (formerly NMSA 1915, § 3564(93), cited in *Town of Gallup*). Under this law, any city or town could regulate, by resolution or ordinance, utility rates for gas, electricity, and water. *Id.*

The PUA abolished this localized regulatory scheme and established a statewide, centralized regulatory system. Section 3 of the Act (presently compiled as Section 62–5–1) repealed Subsection 90–402(93) of the 1929 Code and created the New Mexico Public Service Commission. In Section 17 of the Act (presently compiled as Subsection 62–6–4(A)), the legislature vested the Commission with "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations ... and to do all things necessary and convenient in the exercise of such power and jurisdiction." In discharging this power (as in approving or disapproving a contract under Section 62–6–15), the Commission is to be guided by "the public interest, the interest of consumers and the interest of investors." Subsection 62–3–1(B).

With respect to rates, a public utility files schedules of rates with the Commission, § 62–8–3, and every rate is required to be "just and reasonable," § 62–8–1; § 62–8–7(A) (Cum.Supp.1992). The utility must adhere to the schedules, § 62–8–5, and the Commission must approve any proposed changes to those schedules, § 62–8–7. The Commission has authority to hold hearings on complaints by interested parties that utility rates or services are unjust or unreasonable. Section 62–10–1. The Commission can hold such a hearing, without a complaint, when the public interest or

7. 1941 N.M.Laws, ch. 84.

the interest of consumers and investors so requires. *Id.*

Additionally, the PUA requires a public utility that begins construction or operation of a public utility plant, or that makes an extension to any such plant, unless exempted by the grandfather clause in Section 62–9–1, first to obtain a certificate of public convenience and necessity (a "CCN") from the Commission. Section 62–9–1 (Cum. Supp.1992). The Commission has broad power under the Act to grant or refuse a CCN and to attach conditions to the issuance of a CCN. Section 62–9–6. Before obtaining a CCN, the utility must receive the consent and franchise from the municipality where the service is proposed, *id.*, but a utility may not abandon or discontinue the service for which a CCN has been issued without obtaining the Commission's permission and approval, § 62–9–5.

III.

We agree with the City that in enacting Section 62–6–15 the 1941 legislature preserved the authority of a municipality to contract for utility rates on behalf of its inhabitants that this Court had previously recognized in *Town of Gallup.* In particular, we believe that through Section 62–6–15 the legislature intended to ease the transition for municipalities to the new state regulatory regime. As described above, the PUA repealed municipal ratemaking authority and established a centralized, statewide regulatory system. This significantly changed prior law and divested New Mexico municipalities of an important power. We believe that the purpose of Section 62–6–15 was to preserve to municipalities some involvement in the regulatory process and thereby to provide a voice for ratepaying customers—residential, commercial, or industrial—within the new regulatory scheme. In this sense, a municipality contracting for service rates acts as a representative, or *parens patriae,*[8] on behalf of its inhabitants; it proposes rates that, with the concurrence of the utility, it believes are consistent with the particular needs and circumstances of its residents. While those needs may be subordinated to statewide interests during the Commission's review of the proposed rates (as we discuss *infra*), it is nevertheless significant that the municipality can voice those needs early in the process—provided, of course, that the utility agrees, through a contract, with the municipality's perception of its inhabitants' needs.

In holding that Section 62–6–15 does not authorize municipalities to contract for rates to their inhabitants, the Commission relied on the absence of language in that section expressly authorizing a municipality to contract "on behalf of its inhabitants." It contrasted Section 62–6–15 with the language of NMSA 1915, Subsection 3564(93), which was quoted in *Town of Gallup* and which authorized cities and towns to regulate utility rates "to such cities or towns of this State *or any of the inhabitants resident therein.*" (Emphasis added.) The Commission reasoned that the presence of the latter language in Subsection 3564(93) of the 1915 Code showed that the "[l]egislature knew how to grant a municipality the power to establish rates for itself *and* its citizens" and that the absence of such language from Section 62–6–15 indicated a legislative intent to deny to municipalities the right to contract for rates on behalf of their inhabitants. 127 P.U.R.4th at 487–88.

The Commission erred in relying on Subsection 3564(93). As explained above, that provision authorized cities and towns to *regulate* utility rates; and, as this Court explained in *Town of Gallup,* the power to contract is distinct from and independent of the power to regulate. None of the statutes cited in *Town of Gallup* as authority for the municipal power to contract contained language empowering cities or towns to act "on behalf of their inhabit-

8. *Parens patriae* traditionally refers to the state's role as sovereign and guardian of persons under legal disability, such as juveniles or the insane. *Black's Law Dictionary* 1114 (6th ed. 1990). In modern times, it has become "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." *Id.* (citing *Gibbs v. Titelman,* 369 F.Supp. 38, 54 (E.D.Pa.1973)).

ants." *See* NMSA 1915, §§ 3532, 3564(7), 3564(90). The absence of such language, however, did not prevent this Court from recognizing the municipal power to contract for utility rates on behalf of municipal inhabitants, nor does the absence of such language from Section 62-6-15 lead us to a different conclusion today. *See Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't*, 113 N.M. 593, 598, 830 P.2d 145, 150 (1992) (courts should avoid giving positive legal effect to legislative silence). The statutory powers relied on by this Court in *Town of Gallup* still exist in New Mexico and appear in our Municipal Code. *See* NMSA 1978, § 3-18-1(B) (Repl.Pamp.1985) (power to contract); § 3-49-1(A) (Repl.Pamp.1984) & § 3-18-17(B) (Repl.Pamp.1985) (power to regulate use of streets); § 3-42-1(A) (Repl.Pamp.1984) (power to grant franchises for construction and operation of public utilities).[9] We conclude that *Town of Gallup* correctly reasoned that the municipal power to contract for rates on behalf of municipal inhabitants can be inferred from the foregoing general powers. *See* 12 Eugene McQuillin, *The Law of Municipal Corporations* § 34.151 (3d ed. 1986) (power to fix rates by contract has been inferred from one or more general municipal powers).

We also reject appellees' interpretation of Section 62-6-15 because it would render that provision superfluous. A municipality, like any private corporation, certainly has the power to contract with a utility for service and rates to its own facilities. *See* § 3-18-1(B) (granting municipalities the right to contract) & (E) (granting municipalities other privileges incident to corporations of like character). In fact, the Commission recognizes that such contracts exist and provides in its regulations that any rates set forth in such contracts must be filed by the utility and are subject to modification by order of the Commission. *See* Schedule of Rates, Rules, and Forms, Public Service Comm'n, NMPSC 210.22-.23 (June 30, 1988). The PUA does not expressly authorize private corporations or other entities to contract with utilities for rates, and we can perceive no reason why the legislature would have enacted a special provision to this effect just for municipalities. On the contrary, we believe that the legislature intended by Section 62-6-15 to recognize a special form of contract—one entered into by a municipality on behalf of its inhabitants—that would, like other service rate contracts, be subject to the Commission's approval.

We interpret Section 62-6-15 to allow municipalities to contract with a public utility for *proposed* rates and service regulations for utility service to municipal inhabitants. We emphasize "proposed" because, as Section 62-6-15 itself states, any rates or service regulations set forth in a contract do not take effect until they have been approved by the Commission. As Section 62-6-15 also provides, the Commission shall approve such proposed contract provisions *unless* it finds the provisions "inconsistent with the public interest, the interest of the consumers and the interest of investors." The latter directive does not confine the Commission merely to approving or disapproving proposed rates and service regulations. Rather, it must be read in *pari materia* with Subsection 62-8-7(D) (Cum.Supp.1992), which sets forth the procedure to be followed when the Commission determines that a proposed rate is unjust or unreasonable: The Commission can either determine the just and reasonable rate and fix that rate by order or it can direct the utility to file new rates designed to produce annual revenues no greater than those determined by the Commission in its order to be just and reasonable. Thus, the Commission retains its "exclusive power" under Subsection 62-6-

9. We note that § 3-42-1(A) does not empower municipalities to authorize public utilities to render service to municipal inhabitants. As we explain *infra* at note 12 and accompanying text, such authority resides exclusively with the Commission. We interpret § 3-42-1(A) in *pari materia* with § 62-1-3 of the PUA (cited *infra*) and as only authorizing municipalities to grant to a utility use of municipal rights of way for the utility's distribution system.

4(A) to regulate and supervise public utilities.[10]

The foregoing reasoning also supports our rejection of the Commission's argument that the City, in contracting for utility rates on behalf of its inhabitants, would "bind everyone who lives and works within the Albuquerque city limits" and that the City's contract would "override any utility contracts any such persons may have agreed to on their own." Since a proposed contract rate under Section 62–6–15 does not take effect until reviewed and approved by the Commission, the Commission determines the effect, if any, a proposed rate will have on preexisting utility contracts within the municipality. A proposed rate will not bind "everyone who lives and works" within a municipality, nor will it override other utility contracts, unless and until the Commission so determines.

IV.

Our holding that the Commission retains plenary authority over ratemaking recognizes that ratemaking is a matter of statewide rather than local concern.[11] This—perhaps among other reasons—is because a proposed service rate for one municipality can affect rates to other municipalities in the state. For example, if PNM and the City were to agree to an excessively low service rate, other PNM customers in the state might have to incur higher rates to compensate for PNM's revenue shortfall. Additionally, because ratemaking inevitably affects the financial health of a public utility, the utility's rates are always a matter of statewide concern, at least when a utility serves more than one municipality in the state. By exercising its statutory duty to review all proposed rates between municipalities and utilities, the Commission addresses these statewide concerns.

EPE nonetheless argues that, as a practical matter, chaos will result from allowing municipalities to contract with utilities for proposed rates and will prevent the

10. Our interpretation of the PUA is consistent with the United States Supreme Court's interpretation of analogous regulatory schemes in the Federal Power Act, 16 U.S.C. §§ 791a–825c (1988 & Supp. II 1990), and the Natural Gas Act, 15 U.S.C. §§ 717–717z (1988). Both Acts vest regulatory authority in the Federal Energy Regulatory Commission ("FERC"), which has power to fix rates charged by public utilities and natural gas companies. If the FERC finds that any rate or any contract affecting a rate is "unjust, unreasonable, unduly discriminatory or preferential," the Commission "shall determine the just and reasonable rate ... or contract to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a); 15 U.S.C. § 717d. In two cases decided in 1956, the Supreme Court recognized that, under both Acts, a public utility or a natural gas company can privately contract for rates. *See FPC v. Sierra Pacific Power Co.,* 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.,* 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956). However, the FERC can prescribe changes in contract rates that it finds to be unlawful. *Sierra Pacific,* 350 U.S. at 353, 76 S.Ct. at 371; *Mobile,* 350 U.S. at 341, 76 S.Ct. at 379. In *Sierra Pacific,* the Supreme Court held that, in determining whether a contract rate is unlawful, the FERC's sole inquiry is whether the contract rate meets the public interest, *i.e.,* whether it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory. *Sierra Pacific,* 350 U.S. at 355, 76 S.Ct. at 372. This furthers the FERC's purpose of protecting the public interest. *Id.* The holdings of these cases retain their validity today and are referred to jointly as the "*Sierra–Mobile* doctrine." *See, e.g., Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C.Cir.1987).

11. The distinction between matters of statewide and local concern is pertinent in the context of the home rule amendment to our Constitution, Article X, § 6, cited *supra* note 1. Under that amendment, a municipality adopting a home rule charter and thereby becoming a home rule municipality may "exercise all legislative powers and perform all functions not expressly denied by general law or charter." *Id.* § 6(D). This Court has interpreted a "general law" to be a law that relates to a matter of statewide, as opposed to local, concern. *State ex rel. Haynes v. Bonem,* 114 N.M. 627, 632, 845 P.2d 150, 155 (1992). Thus, in order for a statute to override an enactment of a home rule municipality, the statute must relate to a matter of statewide concern. *Id.* Although, as stated in footnote 1 of this opinion, this case does not directly present an issue of the impact of the PUA on Article XV of the City's municipal charter under the home rule provision of our Constitution, we believe that the distinction between matters of statewide and local concern is helpful in resolving the issues that *are* presented and provides additional support for our holding.

Commission from carrying out its statutory mandate. Specifically, EPE asserts that, if the Commission is only the final arbiter of the validity or invalidity of proposed contracts between utilities and municipalities, a series of Commission review proceedings will be necessary, each occurring at a different time, to consider the validity of each contract; and, according to EPE, the Commission will not be able to conduct such a municipality-by-municipality review while fulfilling its duties under the PUA to serve the statewide interest.

We do not believe that the consequences foreseen by EPE from our holding will necessarily occur; that is, we do not believe that a lengthy hearing will be necessary each time a municipality-utility contract is submitted to the Commission for approval (which we doubt will occur very often). On the contrary, the Commission can fairly easily avoid protracted "municipality-by-municipality" review. For example, the Commission might conduct, as it does now, periodic "generic" rate proceedings to determine a range of presumptively permissible rates for service by a particular utility to municipalities throughout the state. Subsequently, the Commission could approve any proposed rates within the predetermined range and disapprove, after notice and hearing, any rates not within that range. Of course, the Commission need not follow this example; it is offered merely to show that "chaos" is not an inevitable, or even a likely, result of our holding and that our holding need not, in practice, prevent the Commission from fulfilling its statutory duties.

Additionally, we do not believe that our interpretation of Section 62–6–15 conflicts with Section 62–8–6 of the PUA. That section provides, inter alia, that "[n]o public utility shall establish and maintain any *unreasonable differences* as to rates of service either as between localities or as between classes of service." Section 62–8–6 (Cum.Supp.1992) (emphasis added). The Commission in its order reasoned that the City's interpretation of Section 62–6–15 "clearly runs athwart the unambiguous command of Section 62–8–6 because it would seriously interfere 'with the ability of the utility to render equal service to all residing in the area served by it.' " 127 P.U.R.4th at 489 (quoting *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 117 S.E.2d 812, 818 (1961)). Both PNM and EPE seize on this language from the Commission's order, referring to an "equal service" requirement in Section 62–8–6 and stating that the section "prohibits variations in rates as between localities."

Appellees have misread the clear language of Section 62–8–6. The section does not prohibit variations in rates, nor does it require "equal service." Rather, it prohibits "unreasonable differences" in rates of service between localities. Section 62–8–6 thus forbids arbitrary variations in rates, while permitting variations due to differing costs of service to different areas. Allowing municipalities to contract with utilities for service rates to their inhabitants does not, ipso facto, violate Section 62–8–6. On the contrary, because utilities themselves may know more about the cost of service to a particular locality than the Commission, *see* 1 A.J.G. Priest, *Principles of Public Utility Regulation* 342–43 (1969), our holding may actually promote the mandate of Section 62–8–6 by allowing utilities to propose what they presumably believe to be reasonable rates based on the characteristics of the municipalities they serve. Nevertheless, if a proposed rate, even though agreed upon through a contract between a utility and a municipality, does violate Section 62–8–6, our holding recognizes the power of the Commission to disapprove and modify that rate to comply with the statutory directive.

V.

Having said the foregoing, we feel compelled to observe that, to a considerable extent, the parties' positions on this appeal are riddled with misapprehensions and misunderstandings with respect both to their opponents' positions and to the current regulatory scheme under New Mexico law. For example, the Commission in its order stated that the City's interpretation of Sec-

tion 62–6–15 created "the likelihood of a jurisdictional conflict between the [City] and this Commission over the terms of rates and service to the [City] and to other electric utility customers within its municipal boundaries." 127 P.U.R.4th at 484. But we see no likelihood, or even a realistic possibility, of a jurisdictional conflict between the City and the Commission under current New Mexico law. What the City and an electric service provider may agree to as the consideration for the provider's use of the City's streets and rights of way is a matter of strictly local concern to the City and its inhabitants, including the provider; but, as the City acknowledges, any rate for electric service agreed to as part of that consideration is a matter of statewide concern and subject to the Commission's general and exclusive power to approve, disapprove, or modify.

A related misunderstanding surrounds the concept of a rate "fixed" by contract, whether as part of a general negotiation between a utility and a municipality or as part of the bidding process envisioned by Article XV of Albuquerque's city charter. A rate for utility service established in a municipality-utility contract is no more, as we have said in this opinion, than a proposal to the Commission for its approval, disapproval, or modification. It does not tie the Commission's hands in any way, and it does not undermine the Commission's discharge of its regulatory responsibilities to any extent.

This is not to say that negotiations between a municipality and a utility looking toward a proposed rate for the benefit of the municipality's inhabitants would be a meaningless exercise. For one thing, if such negotiations resulted in an agreed-upon set of rates, the utility would be effectively eliminated as a potential adversary to the municipality in the Commission's review of the rates. (This would be true, presumably, unless the utility reneged on its promise to furnish service at the agreed-upon rates.)

A second reason why an agreed set of rates would not be meaningless lies in the concept of "just and reasonable" rates as falling within a zone of reasonableness, in which the rates are designed to produce a return to the utility that is not so low as to amount to utility confiscation nor so high as to constitute ratepayer extortion. We have previously endorsed the "zone of reasonableness" concept, *see Behles v. New Mexico Pub. Serv. Comm'n (In re Timberon Water Co.)*, 114 N.M. 154, 161, 836 P.2d 73, 80 (1992) (citing *State v. Mountain States Tel. & Tel. Co.*, 54 N.M. 315, 338, 224 P.2d 155, 170–71 (1950)), and now recognize it as an approach through which the Commission might choose to approve a set of rates fixed by a municipality-utility contract, if the rates fell within the zone of reasonableness, even though the Commission might prescribe different rates if left to its own devices.

The appellees misperceive this fundamental nature of contractually determined (though proposed) rates, contending that allowing municipalities to contract for utility rates on behalf of their inhabitants would conflict with the PUA's centralized, statewide regulatory scheme. For example, the Commission contends that adopting the City's interpretation of Section 62–6–15 would deprive the Commission of its plenary regulatory authority because the Commission could only turn "thumbs up" or "thumbs down" to a proposed contract rate, and that it would be "barred from undertaking its legislatively-mandated inquiry into whether other rates and service regulations might be just and reasonable." EPE goes further and argues that the City's interpretation of the statute envisions

> a radically different, decentralized scheme under which New Mexico's numerous municipalities act as balkanized city-states with sovereign power to choose the utility provider of electric service for their respective inhabitants as well as establish rates for and conditions of that service based on local considerations, subject to ultimate statewide review by the Commission.

As should be apparent from what we have said thus far in this opinion, appellees have misconstrued the City's position

on appeal, as well as the extent of the Commission's authority under the PUA. The City does not contend that adopting its interpretation would relegate the Commission to a "thumbs-up, thumbs-down"—"yea" or "nay"—role; in fact, it expressly disclaimed this position during oral argument. As we view the City's contentions, and as we hold, allowing municipalities to contract for utility rates on behalf of their inhabitants will in no way reduce the Commission's plenary regulatory authority under the PUA.

EPE's argument also misconceives the extent of the City's authority under Article XV of its charter. Although Article XV does speak in terms of the City's power to grant "rights to provide electricity to the public or to wholesalers," in view of the provisions of Article 9 of Chapter 62 of our statutes, reviewed *supra*, such a grant could hardly be construed to alter the Commission's "general and exclusive power" to authorize a particular provider or providers to furnish service within a given territory, through one or more CCNs, or to revoke that authority in an abandonment proceeding under Section 62–9–5.

It appears that the appellees, and perhaps also the City, are laboring under the misapprehension that a "franchise" constitutes an authorization from a municipality to a public utility to render service to municipal inhabitants. To the contrary, and as we have said in our discussion of Section 62–9–1, such authority resides exclusively with the Commission. A franchise granted by a municipality to a public utility merely entitles the utility to use the municipality's streets and rights of way to construct and operate its facilities and distribution system—that is, to run its pipes, poles, wires, and cables, and to operate its towers, transformer stations, and other necessary structures. *See* § 62–1–3 (Cum.Supp.1992) (authorizing boards of county commissioners and municipal authorities to grant to public utilities, through franchises, use of rights of way for distribution systems); McQuillin, *supra*, § 34.07 (grant of right to use street is a franchise). Obtaining a franchise from a municipality is a prerequisite to obtaining a CCN, § 62–9–6, but it is not the same as obtaining a CCN. In exchange for granting a franchise, a municipality may exact consideration from the utility, usually in the form of a franchise fee. *See* McQuillin, *supra*, § 34.37. This may equal some percentage of the utility's gross revenues or net earnings, or it may equal some other proportion of the utility's income derived from providing service in the municipality. *Id.* If the municipality chooses to forego some or all of this financial remuneration and to obtain instead the utility's agreement to furnish service at a particular rate or rates, that is up to the municipality and the utility and is a matter of local concern. However, when the municipality seeks approval of the rate or rates so negotiated, the decision to place those rates into effect is a matter of statewide concern, as explained above. *See generally id.* § 34.144 (power to regulate rates must not be confused with municipality's contractual power to agree with utility upon the terms of a franchise).[12]

Finally, we believe that the City itself, and some of its citizens, may misperceive the implications of the City's position on this appeal. Although we have upheld the City's ability to contract for electric rates to its inhabitants, we do not intend our holding to foreshadow the replacement of public utility regulation as we know it in this state with competition among would-be suppliers of electricity. It may well be, as the City informs us in its reply brief, that "[t]he long-awaited winds of change are blowing in New Mexico." The City points

12. PNM's franchise with the City expired in early 1992 and has not been renewed. Nevertheless, pursuant to a determination by the Commission (which has not been appealed) in this proceeding, PNM has continued its service to customers within the City. The Commission found that PNM has a statutory duty, independent of any franchise or contract, to continue its service until its duty is modified or terminated by the Commission. 127 P.U.R.4th at 490. The precise relationship between the City and PNM, including the financial and other aspects of that relationship, should PNM continue to operate without a franchise and the parties disagree over those aspects, is an issue not before us and we express no opinion on it.

to efforts in the United States Congress to stimulate or facilitate competition in the electric utility industry, through such devices as "wheeling" electric power from sources of generation to local distribution systems, by means of various competitive arrangements. All of these developments, and more, may occur; we have no crystal ball and can only apply New Mexico law as it is presently written to issues that may arise under arrangements like those contemplated by Albuquerque's Article XV.

PNM points out that this Court and the Commission itself have treated regulation under the PUA as a "surrogate" for competition. *See Public Serv. Co. v. New Mexico Pub. Serv. Comm'n (In re Application of Public Serv. Co.),* 112 N.M. 379, 387, 815 P.2d 1169, 1177 (1991) ("Certification regulates competition within the industry, thereby preventing overinvestment in high fixed costs and encouraging the achievement of economies of scale."); *Farmers' Elec. Coop. v. Southwestern Pub. Serv. Co.,* 125 P.U.R.4th 449, 467, 1991 WL 501885 (NMPSC 1991) ("The [PUA] expresses a clear intent to displace competition with regulation in the area of utility service."). This view of the effect of regulation on competition is almost universally held by economists and other authorities in the field of public utility regulation. *See, e.g.,* James C. Bonbright, *Principles of Public Utility Rates* 10 (1961) ("Public utility regulation, if chosen in preference to outright public ownership, is therefore said to be a substitute for competition."); Charles F. Phillips, Jr., *The Regulation of Public Utilities* 165–66 (1988) ("[R]egulation is a substitute for competition and should attempt to put the utility sector under the same restraints competition places on the industrial sector."); 1 Priest, *supra,* at 348 (" 'The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community....' ") (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 282, 52 S.Ct. 371, 376, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting)). As the City states, the winds of change may be blowing in New Mexico; again, we have no crystal ball. Perhaps the regulatory climate *will* change, and perhaps the panacea apparently hoped for by the City will materialize. Only time, and legislatures around the country, including Congress, will tell.

For the present, however, we are content—indeed, we are duty-bound—to recognize that the subjects of how utility rates paid by New Mexicans are to be determined, and of how providers of utility service are to be selected, remain where the legislature placed them in 1941: in the exclusive domain of the Public Service Commission. At the same time, we believe that this recognition in no way militates against our conclusion that a municipality has the ability under Section 62–6–15 to enter into a contract for utility service on behalf of both itself and its inhabitants, subject always to the Commission's plenary power to approve, disapprove, or modify any rates or service conditions provided for in such a contract.

The Commission having ruled otherwise in its Final Declaratory Order, the order is vacated and annulled; and the cause is remanded to the Commission for such further proceedings, if any, as may be appropriate and consistent with this opinion.

IT IS SO ORDERED.

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

854 P.2d 362

SUPREME COURT OF NEW MEXICO

Denials of Certiorari

Title	Docket Number	Date of Denial
Blakely v. State	21220	5/25/93
Elliott v. Las Tres Gentes	21231	6/7/93
Gallegos v. City of Albuquerque	21209	5/20/93
Jacquez v. State	21228	6/7/93
Jeff H. v. State	21234	6/4/93
Lear Siegler Management Services Corp. v. Bryant	21216	5/25/93
Maynes v. Contract Associates of New Mexico, Inc.	21238	6/7/93
Mhoon v. State	21221	5/25/93
Nardacci v. Hughes	21226	5/26/93
Tagle v. State	21237	5/27/93
Tavarez v. State	21208	5/25/93
Vasquez v. State	21240	6/7/93
Wood v. State	21233	6/4/93
Wright v. State	21224	5/25/93

Writ Quashed

Title	Docket Number	Date of Denial
Landers v. State	20952	5/27/93
McFadden v. Loman	21064	5/27/93

854 P.2d 363

STATE of New Mexico,
Plaintiff–Appellee,

v.

Nathan BACA and Eddie Chavez,
Defendants–Appellants.

No. 13634.

Court of Appeals of New Mexico.

April 7, 1993.

Certiorari Denied May 20, 1993.

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

Sammy J. Quintana, Chief Public Defender and Rita LaLumia Berg, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

OPINION

MINZNER, Chief Judge.

These consolidated appeals arise out of an incident at the New Mexico Boys' School in which Defendants stabbed another resident of the Boys' School. Defendants appeal their convictions for aggravated battery, conspiracy to commit aggravated battery, and possession of a deadly weapon by a prisoner. They raise two issues on appeal: (1) whether the trial court erred in denying their motion for release of the victim's master file; and (2) whether they received effective assistance of counsel. Defendants have expressly waived other issues listed in the docketing statement but not briefed. *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). Regarding the first issue, we determine that the trial court did not err in denying the motion, because the court granted broad discovery of matters within the file and the only limitation Defendants argue as error on appeal concerned inadmissible propensity evidence. In making this determination, we hold that specific instances of a victim's prior conduct are not admissible to prove that the victim was the first aggressor, *see* SCRA 1986, 11–405, and that the Supreme Court opinion in *State v. Baca,* 114 N.M. 668, 845 P.2d 762 (1992), is not to the contrary. Regarding the second issue, we determine that Defendants have not established a prima facie case of ineffective assistance of counsel requiring remand for an evidentiary hearing. Therefore, we affirm.

FACTS.

Correctional officer trainee Charles Howard was on duty in the sleeping area on the night of the incident. After the lights were turned off for the night, Howard heard Baca snap his fingers and call out to him. While the officer looked toward Baca to see what he needed, he caught glimpses of movement to his right. Howard saw Chavez get out of bed and approach the victim's bed. Chavez was hitting the victim in an up and down motion. Howard turned on the lights, and saw both Defendants at the victim's bed. Baca was also hitting the victim in an up and down motion. Each Defendant was carrying a blood-covered knife, or "shank." Howard heard the victim say that he had been stabbed. Defendants went into the day room, refusing to give up their weapons. Chavez said "You fink, you'll never snitch again," apparently referring to the victim. Defendants surrendered themselves and the shanks after about a one-hour standoff with school officials.

The victim testified that he awakened when he felt he was being poked. He realized he was bleeding and had been stabbed. The victim saw both Defendants by his bed holding shanks. He heard Chavez say "That's what they do to rats." Both Defendants testified. Neither denied stabbing the victim, although Baca said he didn't know whether he stabbed the victim. Neither Defendant was injured.

The State's theory of the case was that Defendants stabbed the victim to punish him for "snitching" on them about some stolen keys. There was evidence that, about two weeks prior to the incident, the victim had accused Defendants of stealing his keys. A staff member confronted Chavez about the keys. Chavez denied any involvement.

Defendants claimed that they acted in self-defense, and the jury was so instructed. Chavez testified that he went to talk to the victim "man to man" about the keys. During their conversation, the victim pulled a shank and tried to stab Chavez. Baca then came to Chavez's aid. The victim pulled a second shank, and tried to stab Baca.

Defendants presented considerable evidence tending to show their apprehension of the victim and that he was the first aggressor. The victim admitted on cross-examination that he had been sent to the Boys' School because of an adjudication for aggravated assault with a firearm. He also admitted that he had spent the earlier part of the day of the stabbing in maximum security after a fight with another resident. Julio Rodriguez, another resident, testified that about a week before the stabbing, he heard the victim threaten that he wanted to get Baca by himself.

The victim testified that he told Defendants prior to the stabbing that he would "'get them by themselves and beat the holy shit out of them.'" He claimed Defendants hit him almost every day for no reason. The victim and Defendants also had a dispute prior to the stabbing concerning the victim's refusal to join a gang. Rodriguez testified that he warned Baca about the victim's threats on the day of the stabbing. He told both Defendants to be careful. Chavez testified that he had heard rumors that the victim wanted to fight him over the key incident. On the night of the stabbing, he said that he tried to talk to the victim about the incident, but the victim was abusive and pulled out a knife. Baca testified that he went to Chavez's aid when he heard him yell for help. According to Baca, the victim threatened him and came at him with another knife. Baca claimed that the victim still had one of the knives when he and Chavez retreated to the day room. Baca also related his efforts to defuse the problems before the stabbing. He testified that he approached a staff member prior to the stabbing concerning the victim's threats.

THE MASTER FILE.

During a pretrial motion hearing, Defendants asked that the district judge order the State to release the victim's master file. Defense counsel explained that the Boys' School compiled a "master file" of each boy and that such master file contains "any psychiatrics done, all previous arrests, any forensics that may have been done, any adjudications, any problems he's had at the Boys' School, any problems elsewhere, family's history. It's a complete background of the person."

Defense counsel specifically stated several times that he did not know what was in the file. Additionally, defense counsel did not know specifically how anything in the victim's master file would aid in his clients' defense. The district judge ordered the State to release almost all the records defense counsel requested. In fact, the district judge, explaining that because the victim's character was at issue due to Defendants' self-defense claim, ordered the release of "any kinds of reports or evaluations of the child and his character," in addition to any forensic evaluations of the victim and any investigative reports of the stabbing incident. The district judge, however, did not require the State to release any reports in the master file that detailed specific instances of the victim's prior conduct in which Defendants were not implicated.

Defendants concede that release of a witness's arrest record under SCRA 1986, 5–501(A)(5) (Repl.1992), is discretionary with the trial court. *See State v. Smith,* 92 N.M. 533, 539–40, 591 P.2d 664, 670–71 (1979). Nonetheless, they argue that the State was constitutionally required to produce the information pursuant to SCRA 5–501(A)(6). *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). On appeal Defendants make two arguments that the trial court erred in ruling on their motion. First, Defendants argue that the trial court prevented them from presenting a defense, and second, Defendants argue that the trial court's order was contrary to New Mexico's discovery rule, which requires the State to disclose "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution." SCRA 5–501(A)(6); *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196–97.

In order for either of Defendants' arguments to support reversal, the trial court's order must have prejudiced the defense. SCRA 1986, 5–113(A) (Repl.1992) (harmless error not reversible). Defendants in effect argue that they were prejudiced because the limitations imposed by the trial court excluded exculpatory information that would have been admissible.

The narrow, dispositive issue in this case, then, is whether specific instances of a victim's prior conduct of which the Defendants were not aware would have been admissible to support Defendants' theory of the case. We believe the answer depends on whether Defendants would have been entitled to offer such evidence to prove the victim was the first aggressor in the incident material to this appeal.

The State argues that the trial court properly exercised its discretion in excluding evidence of specific acts of violence by the victim which were not known by Defendants, because that evidence would have been immaterial, cumulative, and more prejudicial than probative. *See Baca,* 114 N.M. at 671, 845 P.2d at 765. We think this argument assumes that the excluded evidence would have been admissible. We hold it would not have been admissible.

A. The Admissibility of Evidence of Specific Incidents of Violence to Prove that the Victim Was the First Aggressor.

The State's argument treats *Baca,* decided while this case was pending on appeal, as holding that Defendants were entitled to offer evidence of specific incidents involving violence other than those of which they were aware. *See State v. Lamure,* 115 N.M. 61, 846 P.2d 1070 (Ct.App.1992) (No. 13,255) (Hartz, J., specially concurring) (under *Baca,* evidence of specific acts to establish violent disposition may be admissible). While the State's view is understandable, *see Baca,* 114 N.M. at 671–72, 845 P.2d at 765–66 (noting confusion in New Mexico law on the question of whether evidence of a victim's prior violent acts is admissible unless they are acts of which the defendant had knowledge); *see also Trujillo v. Sullivan,* 815 F.2d 597, 612 n. 8 (10th Cir.), *cert. denied,* 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987), we do not read *Baca* so broadly.

Where a defendant claims self-defense, and "the conduct is offered to show that the victim was the first aggressor, the defendant's knowledge of the victim's violent conduct is irrelevant and does not need to be shown." *Baca,* 114 N.M. at 671, 845 P.2d at 765; *see also State v. Salgado,* 112 N.M. 793, 796, 819 P.2d 1351, 1354 (Ct.App. 1991); *cf. State v. Ewing,* 97 N.M. 235, 638 P.2d 1080 (1982) (if specific instances of the victim's conduct are offered to prove the reasonableness of the defendant's apprehension, the defendant must have known about those acts). However, the trial court retains "discretion to exclude specific instances of the victim's conduct if the evidence is substantially more confusing, cumulative, or prejudicial than probative." *Baca,* 114 N.M. at 671, 845 P.2d at 765; SCRA 1986, 11–403. "[A]n abuse of discretion may be found only if the exclusion of the evidence precluded the criminal defendant from proving an element of his de-

fense." *Baca,* 114 N.M. at 672, 845 P.2d at 766.

Further, unless character is an essential element of a defense, only reputation and opinion are acceptable forms of proof. *See Perrin v. Anderson,* 784 F.2d 1040, 1045 (10th Cir.1986); SCRA 11–405. The only purpose for the records mentioned in the appellate briefs is to obtain evidence of specific violent conduct by the victim which can be used to establish the victim's violent disposition for the purpose of corroborating Defendants' claim of self-defense. SCRA 11–405 makes clear that character may not be proved through evidence of specific instances of a person's conduct unless the person's character is an essential element of a charge, claim, or defense. The victim's violent disposition is not an "element" of the defense in the strictest sense; rather, it is used circumstantially—that is, to help prove that the victim acted in the particular manner at the time of the incident in question. Therefore, under SCRA 11–405, evidence of the victim's specific violent acts is not admissible to prove that the victim acted violently on the specific occasion. *Perrin,* 784 F.2d at 1044–45.

Nevertheless, the language we have quoted from *Baca* is very broad, and both the State and Defendants appear to have construed *Baca* as allowing the use of specific instances of conduct to show that the victim was the first aggressor on the ground that when that issue is raised, character is "an essential element" of the defense within the meaning of SCRA 11–405(B). While we are conscious of the controlling nature of Supreme Court precedent, *see Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973), we do not believe that the Supreme Court meant to expand the scope of SCRA 11–405(B) in *Baca.*

We note that the language in *Baca* on which Defendants rely was not necessary to the court's resolution of the issues in that case, because the Supreme Court ultimately affirmed the trial court's decision not to admit the evidence of specific instances of conduct in question. In addition, the Court focused on distinguishing the two different purposes of other evidence of violent acts: (a) to explain a defendant's fear and establish that it was reasonable; and (b) to establish a victim's propensity for violence in order to persuade the fact-finder that it is more likely than not that the victim was the first aggressor. *Baca* in fact cites *Perrin* in identifying these very different purposes. *Baca,* 114 N.M. at 672, 845 P.2d at 766.

In *Perrin,* the federal appellate court clearly limits proof of character for purposes of establishing who was the first aggressor to evidence of reputation or opinion. 784 F.2d at 1045. However, the Court held that the limitations on the methods of proving character set out in Federal Rule of Evidence 405 do not apply to proof of habit. *Id.* at 1046; *see* SCRA 1986, 11–406. Under SCRA 11–406, testimony concerning prior specific incidents is allowed. *Id.* In addition, evidence of prior specific incidents may also be admitted under SCRA 1986, 11–404(B). Given the latitude that is available under other rules, we are not persuaded that the Supreme Court meant to modify SCRA 11–405(B). Had the Supreme Court intended that result, we believe *Baca* would have been explicit.

For these reasons, we do not read *Baca* as permitting the introduction of specific instances of conduct under SCRA 11–405(B) to show that the victim was the first aggressor, although evidence of reputation or opinion would be admissible for that purpose under SCRA 11–405(A). We do read *Baca* as clarifying New Mexico law on the issue of whether, when evidence of reputation or opinion is offered under SCRA 11–405(A) to show that the victim was the first aggressor, a defendant must have been aware of that reputation or opinion. Under *Baca,* the answer is no. Because specific instances of conduct are not admissible to show that the victim was the first aggressor, we hold that the trial court did not deprive Defendants of any evidence that would have aided them in their defense. Such evidence would not have been admissible, and therefore its absence could not have been prejudicial to the defense. We do, however, briefly address Defendants' argument based on *Brady.*

B. Materiality under Brady v. Maryland.

For the purposes of this discussion, we assume that specific instances of conduct would have been admissible to show that the victim was the first aggressor. Evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). In evaluating the materiality of the suppressed evidence, "we must place it in the context of the entire record." *Trujillo,* 815 F.2d at 613. "Evidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory." *Id.*

> When evaluating "materiality" in the *Brady* context, the usual legal denotation of the word "material" in the evidentiary sense must be clearly distinguished from the word's meaning in this constitutional sense. The use of the word "material" as the benchmark in both circumstances is unfortunate, for its meaning in the two contexts is radically disparate. Evidence clearly "material" and admissible as a threshold proposition may be deemed to be "immaterial" in retrospect in a *Brady* inquiry.
>
> In the evidentiary sense, we are narrowly looking to whether the proposition toward which the evidence is directed is a necessary element of the crime or a defense. In the constitutional sense, we are looking at the entire trial to determine whether the defendant's conviction was obtained by violating due process, whether his or her trial was tainted with fundamental unfairness because certain evidence was not disclosed to the defense.

815 F.2d at 612–13 n. 9.

The State maintains that any additional evidence would have been cumulative, immaterial, and more prejudicial than probative. It points to evidence presented at trial, cited above, that the victim was in the Boys' School because of an assault with a firearm, that Defendants were aware of a fight between the victim and another boy earlier on the day of the stabbing, and that Defendants knew of threats made by the victim against them. Thus, the State argues that any other evidence of the victim's violent tendencies would not have presented a new issue critical to Defendants' guilt or innocence; it would simply have been cumulative. *See Trujillo,* 815 F.2d at 614. Since the trial court ordered disclosure of any incidents involving the victim and Defendants, further evidence would simply have been circumstantial proof that the victim was the first aggressor. *See id.*

We agree with the State's recitation of the law. However, we would not be able to assess the materiality of the suppressed evidence in the *Brady* context without knowing what evidence was suppressed. In *Trujillo,* both the trial and appellate courts knew what evidence had been suppressed, and the courts could therefore properly conclude that the evidence was both cumulative and immaterial. It could well be the case here that additional evidence of aggressive or violent acts by the victim, if any, would be cumulative in light of the evidence presented at trial. However, the exclusion of even cumulative evidence may be prejudicial if the additional evidence comes from independent sources and not witnesses connected with Defendants or their families. *See Chacon v. State,* 88 N.M. 198, 200, 539 P.2d 218, 220 (Ct.App.1975).

We note that Defendants in this case did not request below or on appeal that the district court review the master file in camera. Therefore, although we believe that the circumstances here are otherwise similar to those in *State v. Pohl,* 89 N.M. 523, 554 P.2d 984 (Ct.App.1976), that case is not controlling.

In *Pohl,* the defendant was convicted of battery on a peace officer. The defendant moved to discover records of investigations concerning allegations of police brutality against the arresting officer. The trial court refused the defendant's motion, as well as his request for an in camera inspec-

tion of the files to determine whether any portion was relevant. The officer was cross-examined concerning the two instances of alleged brutality; thus, the State argued that there was no prejudice. This Court conditionally affirmed, noting that "[i]n the absence of a determination of what the files would have shown we cannot hold there was no prejudice." *Id.* at 525, 554 P.2d at 986. We remanded the case to the trial court for an in camera hearing to determine whether the arresting officer's files contained material matters. We noted that the defendant had shown as specific a need as could be expected under the circumstances. *Id.* at 524, 554 P.2d at 985. As in *Pohl,* we cannot determine whether the suppressed evidence was material to Defendants' claim of self-defense, but, unlike *Pohl,* Defendants neither requested an in camera hearing nor showed "as specific a need as could be expected under the circumstances." *Id.; cf. State v. Roybal,* 115 N.M. 27, 846 P.2d 333 (Ct.App.) (No. 13,094) (defendant failed to make requisite showing of need to inspect internal affairs files of one officer when he relied on a newspaper article suggesting that another officer had provided false information), *cert. denied,* 114 N.M. 550, 844 P.2d 130 (1992) (No. 20,907).

Rather, our review of the argument made during the motion hearing convinces us that Defendants were on a " 'fishing expedition.' " *Pohl,* 89 N.M. at 524, 554 P.2d at 985; *see also State v. Turner,* 81 N.M. 571, 573, 469 P.2d 720, 722 (Ct.App. 1970). Defendants made no showing that their rights would be violated but for full disclosure of the master file, nor do they now argue that the State suppressed material contrary to the trial court's order. *See id.* Further, we believe that Defendants in this case made an even weaker showing that they needed the file than did the defendant in *Roybal. Cf. Roybal,* 115 N.M. at 30, 846 P.2d at 336 (although defendant relied on a newspaper article to cast doubt on an officer's credibility in attempt to get an in camera inspection of that officer's internal affairs files, defendant "did not make any showing that the internal affairs files contained information material to the preparation of his defense."). Thus, even if we were inclined to sua sponte order the district court to review the master file in camera, Defendants have not convinced us that such action is appropriate. The trial court's order is therefore affirmed.

INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendants claim that their trial counsel were ineffective in two instances. They first contend that trial counsel should have arranged a physical examination of the knives. Defendants also argue that their counsel were ineffective in failing to pursue a duress defense. The State responds that Defendants have not made out a prima facie case of ineffective assistance because there were rational bases for trial counsel's decisions.

To demonstrate ineffective assistance of counsel, a defendant must show both that his counsel's performance fell below that of a reasonably competent attorney and that he was thus prejudiced. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). We are reluctant to decide claims of ineffective assistance absent a district court evidentiary hearing on the matter. *State v. Swavola,* 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct.App.), *cert. denied,* 114 N.M. 501, 841 P.2d 549 (1992). We will remand for an evidentiary hearing where the record on appeal establishes a prima facie case of ineffective assistance. *Id.; State v. Powers,* 111 N.M. 10, 800 P.2d 1067 (Ct.App.), *cert. denied,* 111 N.M. 16, 801 P.2d 86 (1990). "[A] prima facie case is not made when a plausible, rational strategy or tactic can explain the conduct of defense counsel." *Swavola,* 114 N.M. at 475, 840 P.2d at 1241; *see also State v. Dean,* 105 N.M. 5, 8, 727 P.2d 944, 947 (Ct.App.) (appellate court will not second-guess tactics and strategy of trial counsel on appeal), *certs. denied,* 104 N.M. 702, 726 P.2d 856 (1986).

A. The Knives.

Before trial, Baca moved the trial court to order the State to have the knives analyzed for blood and fingerprints. The

trial court denied Baca's motion. At trial, Officer Pat Nolan testified that the State did not perform any tests on the knives because the prosecutor thought it unnecessary. Defendants contend that their counsel were ineffective because they failed to arrange independent testing of the knives. They assert that analysis of the weapons "may have revealed exculpatory evidence."

Counsel's reasons for failing to test the knives are not part of the record before us. For that matter, we cannot say from the record that the knives were not tested. Nevertheless, assuming that the knives were not tested, we believe there was a "plausible, rational strategy or tactic" explaining counsel's conduct; hence, Defendants have failed to establish a prima facie case. *See Swavola,* 114 N.M. at 475, 840 P.2d at 1241. The victim bled profusely from the attack while Defendants were uninjured. Thus, an analysis of the blood on the knives would almost certainly have helped the prosecution and hurt Defendants. Defense counsel is not ineffective in foregoing testing when the testing will only assist the prosecution. *See United States v. Baca,* 687 F.2d 1356 (10th Cir. 1982).

We now address trial counsel's failure to test the knives for fingerprints. The victim's fingerprints on the knives would have supported Defendants' theory that he was the initial aggressor. However, the knives were small. Both Defendants held on to the knives for about an hour after the incident. A correctional officer then touched the handles of the knives when he picked them up. We agree with the State that the chance that the victim's fingerprints would have remained on the knives was fairly remote. Again, testing the knives would probably only have helped the State, since it was also almost certain that Defendants' fingerprints would have been found. *See United States v. Baca,* 687 F.2d at 1360–61.

Defendants also argue that they had nothing to lose from the testing. Citing SCRA 1986, 5–502 (Repl.1992), they contend that they would not have had to disclose the test results to the State if they were unfavorable. While a defendant is not required to disclose test results not intended to be introduced at trial, SCRA 5–502(A)(2), this does not mean that the State could not have arranged to have observed the testing or conducted its own independent tests. Besides, the fact that testing "would not have hurt" or "may have helped" is insufficient to establish prejudice, the second prong of the test for ineffective assistance.

B. Duress Defense.

Defendants claimed at trial that they acted in self-defense. On appeal, they contend that their trial counsel were ineffective because they did not tender instructions on duress. Specifically, they argue that (1) a duress instruction was supported by the evidence; (2) the duress instruction, SCRA 1986, 14–5130, emphasizes that they acted under threats, thereby reminding the jury of evidence favorable to them; and (3) the duress instruction explicitly allocates the burden of proof to the state, whereas the self-defense instruction, SCRA 1986, 14–5183, does not.

Trial counsel's strategic choice made as a result of investigation as to what defense to pursue is "virtually unchallengeable." *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Counsel's choice of defenses will not be disturbed unless the choice appears wholly unreasoned or deprives the defendant of his only defense. *See Talley,* 103 N.M. at 38, 702 P.2d at 358 (defense counsel's failure to tender instructions to jury on defense of inability to form specific intent was ineffective where it resulted in no defense being presented to two of the charges); *Capps v. Sullivan,* 921 F.2d 260 (10th Cir.1990) (trial counsel was ineffective in failing to request entrapment instruction where defendant admitted all elements of the crime).

While the duress defense is available to the charge of possession of a deadly weapon by a prisoner, it is extremely limited. *See Baca,* 114 N.M. at 673–75, 845 P.2d at 767–69. The defendant must produce sufficient evidence that he could not have rea-

sonably avoided the criminal conduct in which he engaged, and prove that a direct causal relationship existed between the criminal action and the avoidance of the threatened harm. *Id.* at 674–75, 845 P.2d at 768–69. We believe that it was rational for trial counsel to reject pursuit of a duress defense to the possession charge. While Defendants could have argued duress for the brief time they claim it took to disarm the victim, our Supreme Court precedents suggest that the defense would not have been applicable for the subsequent hour-long standoff with Boys' School officials during which they retained possession of the knives. *See id.; State v. Castrillo,* 112 N.M. 766, 772, 819 P.2d 1324, 1330 (1991).

Moreover, trial counsel might have been unwise to pursue a duress defense regarding the conspiracy charge. Defendants denied any conspiracy under their theory of the case. Chavez said he went to the victim's bed to talk to him "man to man" and was forced to defend himself when the victim pulled a knife. Baca said he went to his friend's defense, and was attacked by the victim. Defendants argued that the victim initiated the incident. In light of Defendants' theory, it would have been inconsistent to argue that they decided to attack the victim because of the threats he had been making. *Cf. Harich v. Dugger,* 844 F.2d 1464, 1470 (11th Cir.1988) (en banc) (it was reasonable for defense counsel to pursue defense of factual innocence rather than defense of intoxication where defendant testified that he was only mildly drunk and did not commit the crimes), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989). Trial counsel was entitled to take action intended to maintain credibility before the jury. The same consideration would justify defense counsel in not raising a duress defense to the charge of aggravated battery.

Counsel's choice of self-defense better fit Defendants' testimony than duress. Although there were elements of a duress defense, particularly the prior threats made by the victim, we will not second-guess counsel's strategy. Defendants have failed to establish a prima facie case of ineffective assistance of counsel entitling them to remand for an evidentiary hearing. *Swavola,* 114 N.M. at 475, 840 P.2d at 1241.

CONCLUSION.

For the foregoing reasons, Defendants' convictions are affirmed.

IT IS SO ORDERED.

BIVINS and HARTZ, JJ., concur.

854 P.2d 872

SUPREME COURT OF NEW MEXICO

Denials of Certiorari

Title	Docket Number	Date of Denial
Acosta v. State	21283	6/17/93
Affsprung v. State	21264	6/14/93
Alvarez v. State	21292	6/24/93
Baca v. State	21198	5/20/93
Baca v. State	21290	6/24/93
DeWaters v. State	21274	6/17/93
Gallegos v. State	21249	6/14/93
Garcia v. State	21280	6/17/93
Gutierrez v. State	21273	6/17/93
Hellums v. State ex rel., Human Services Dept.	21253	6/14/93
Johnson & Lanphere, P.C. v. New Mexico Stud, Inc.	21250	6/17/93
Lewis v. State	21262	6/14/93
Mann v. State	21265	6/14/93
Maurer v. Pool Well Servicing	21275	6/17/93
Newsome v. Human Services Department	21327	6/24/93
Nieto v. State	21304	6/23/93
Padilla v. G.E. Johnson Const. Co.	21298	6/24/93
Quintana v. State	21303	6/24/93
Rivera v. State	21252	6/17/93
Robertson v. State	21297	6/23/93
Salazar v. State	21296	6/24/93
Sanchez v. City of Albuquerque	21248	6/14/93
Sanchez v. Group I: Ramzel	21266	6/14/93
Valenzuela v. State	21255	6/14/93
Washington v. State	21289	6/24/93

Writ Granted

Title	Docket Number	Date of Grant
State v. Koonsman	21134	5/19/93*

Writ Quashed

Title	Docket Number	Date of Denial
Aragon v. State	208114	6/16/93

854 P.2d 873

STATE of New Mexico, Plaintiff–Appellee,

v.

Andrew AFFSPRUNG, Defendant–Appellant.

No. 14027.

Court of Appeals of New Mexico.

April 26, 1993.

Certiorari Denied June 14, 1993.

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

Sammy J. Quintana, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BLACK, Judge.

Defendant appeals the trial court's order denying his motion to suppress. Following the denial of his motion to suppress, Defendant filed an application for interlocutory appeal. The issue on appeal is whether, following a brief visual inspection of a vehicle and limited questioning regarding the occupant's residency and citizenship at a fixed immigration patrol checkpoint near the border, further detention may properly be based on reasonable suspicion of criminal activity. We hold reasonable suspicion is the proper standard, and affirm.

STANDARD OF REVIEW

We view the evidence elicited in the light most favorable to sustain the trial court's finding that the seizure was lawful. *State v. Bolton,* 111 N.M. 28, 801 P.2d 98 (Ct.App.), *cert. denied,* 111 N.M. 16, 801 P.2d 86 (1990); *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983). Furthermore, as the reviewing Court, we must indulge all inferences in support of the ruling and disregard evidence to the contrary. To the extent the witnesses' testimony differs as to the facts, as it does in this case, it is the trial court's prerogative to determine the credibility of the evidence. *See United States v. Prichard,* 645 F.2d 854 (10th Cir.), *cert. denied,* 454 U.S. 832, 102 S.Ct. 130, 70 L.Ed.2d 110 (1981). However, whether the facts are sufficient to satisfy the appropriate standard is a legal question. *State v. Jones,* 114 N.M. 147,

835 P.2d 863 (Ct.App.), *cert. denied,* 114 N.M. 62, 834 P.2d 939 (1992).

We disagree with Defendant's contention that any facts elicited at the preliminary hearing cannot be considered by this Court as the record developed in this case. At the hearing on the motion to suppress, defense counsel played substantial portions of the tape from the preliminary hearing to refresh border patrol agent David Garza's recollection. Defense counsel also cross-examined Agent Garza at length regarding his previous testimony at the preliminary hearing. To the extent that defense counsel played the preliminary hearing tape, and that Agent Garza was cross-examined regarding his prior testimony, such questioning and references to the prior preliminary hearing testimony are a part of the testimony in this case. *Cf. Green v. State,* 223 Ark. 761, 270 S.W.2d 895 (1954) (recognizing the distinction between admitting the transcript of previous testimony and incorporating questioning using prior transcribed testimony to impeach). We therefore may consider any preliminary hearing testimony insofar as it was brought to the attention of the district court at the hearing on the motion to suppress and incorporated in this record.

FACTS

Defendant was stopped at a fixed immigration patrol checkpoint outside Alamogordo, at approximately 9:00 p.m. Although his testimony varied somewhat, Agent Garza testified he smelled alcohol very early in his encounter with Defendant. It was not apparent to the immigration agent whether the odor came from Defendant's person or from the vehicle. Agent Garza proceeded to question Defendant regarding his citizenship and residency status and was satisfied Defendant was a U.S. citizen. Although Defendant seemed "pretty relaxed" and "kicked back," Garza observed that Defendant was avoiding eye contact. It did not, however, appear to Agent Garza that Defendant was intoxicated or impaired. Agent Garza then asked Defendant where he was coming from, where he was going, and to whom the vehicle, a 1983 Cadillac, belonged. Agent Garza thought that Defendant looked too young to be driving that type of vehicle and was concerned that it might have been stolen. Agent Garza indicated that he made the inquiries beyond Defendant's citizenship and residency because of the time of night, the lack of visible luggage, and the odor of alcohol. According to Agent Garza, it was standard policy to ask origin, destination, and ownership questions when a driver is suspected of some type of criminal activity. Agent Garza was generally satisfied with Defendant's responses, but did not believe that the vehicle belonged to Defendant's grandmother.

Agent Garza then asked Defendant if he could look in the back seat of the vehicle. (Agent Garza later testified that he thought he might find empty beer cans under the car seats, resulting in an open-container violation.) Defendant consented and unlocked the car door with the electronic door-opener. Agent Garza then opened the back car door, leaned into the back seat area, and immediately smelled what he perceived to be burnt marijuana. Garza asked Defendant if he had been drinking. Defendant admitted having consumed two beers. Although Garza believed the odor to be stronger than that produced by two beers, no beer cans were found in the back seat. All of the foregoing took place at the primary inspection area within approximately three minutes.

Based on what he perceived to be the smell of burnt marijuana, Agent Garza referred Defendant to the secondary inspection area. Defendant, the vehicle, and the vehicle's trunk were searched. Agents found a cellophane package of raw marijuana under the front seat of the vehicle. In Defendant's pocket, agents found a rolled, but unlit, marijuana cigarette, and rolling papers in a cigarette box. Defendant was then arrested.

THE STANDARD FOR ROUTINE BORDER AREA QUESTIONING

Brief stops for routine questioning conducted at permanent checkpoints need not be authorized by a search warrant. *United States v. Martinez-Fuerte,*

428 U.S. 543, 566, 96 S.Ct. 3074, 3086–87, 49 L.Ed.2d 1116 (1976). Indeed, brief stops at fixed immigration checkpoints for limited inquiry into citizenship and visual inspection of vehicles are constitutionally acceptable even without any individualized suspicion of wrongdoing. *United States v. Sanders,* 937 F.2d 1495 (10th Cir.1991), *cert. denied,* — U.S. —, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992); *State v. Estrada,* 111 N.M. 798, 810 P.2d 817 (Ct.App.1991). These more lenient standards also apply to permanent checkpoints staffed by Immigration and Naturalization Service personnel, such as that involved in the present case, which are close to, but not directly on, the national border. *United States v. Martinez–Fuerte; see also United States v. Benitez,* 899 F.2d 995 (10th Cir.1990); Leonard B. Mandell & L. Anita Richardson, *Lengthy Detentions and Invasive Searches at the Border: In Search of the Magistrate,* 28 Ariz.L.Rev. 331, 345 (1986).

Defendant acknowledges his initial detention at the primary checkpoint was legal. He makes two basic arguments: (1) extended detention must be justified by probable cause, rather than merely reasonable suspicion, and (2) even if this Court adopts a reasonable suspicion standard, Agent Garza lacked sufficient basis to form a reasonable suspicion that a crime had been committed in this case.

ONLY REASONABLE SUSPICION, NOT PROBABLE CAUSE, WAS REQUIRED

"Probable cause" exists when facts and circumstances within the officer's knowledge or on which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been, or is being, committed. *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986). "Reasonable suspicion" requires only articulable facts, focusing on a particular person, place, or thing as judged by a reasonable, experienced law enforcement agent. *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *State v. Lyon,* 103 N.M. 305, 307–08, 706 P.2d 516, 518–19 (Ct.App.), *cert. denied,* 103 N.M. 287, 705 P.2d 1138 (1985). Probable cause is obviously a higher standard than reasonable suspicion. *See Copeland,* 105 N.M. at 31, 727 P.2d at 1346.

The reasonable suspicion standard "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." *U.S. v. Montoya de Hernandez,* 473 U.S. 531, 541, 105 S.Ct. 3304, 3310, 87 L.Ed.2d 381. It is thus well suited for the type of limited intrusions expected at border patrol stations. *Id.* We have previously indicated that, in order to justify detention of a vehicle, beyond routine questioning, law enforcement agents need only have a reasonable suspicion of criminal activity. *See State v. Cohen,* 103 N.M. 558, 711 P.2d 3 (1985), *cert. denied,* 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986) (detention of the defendants' vehicle after the officer received negative information as to whether the defendants were wanted or whether defendants were driving a stolen car was proper when based on reasonable suspicion); *City of Las Cruces v. Betancourt,* 105 N.M. 655, 735 P.2d 1161 (Ct.App.) (in roadblock stop, motorists should be detained only long enough to be informed of the purpose of the stop and to look into the vehicle for signs of intoxication; further detention at a secondary area is appropriate if facts within officer's observation warrant it), *cert. denied,* 105 N.M. 618, 735 P.2d 535 (1987); *cf. State v. Vasquez,* 112 N.M. 363, 365, 815 P.2d 659, 661 (Ct.App.) ("probable cause or other basis" needed for border patrol agent to seize bag from undercarriage of truck), *cert. denied,* 112 N.M. 388, 815 P.2d 1178 (1991). The district court correctly adopted reasonable suspicion as the proper legal standard.

AGENT GARZA HAD REASONABLE SUSPICION

Reasonable suspicion must be judged by the totality of the circumstances. *Estrada,* 111 N.M. at 801, 810 P.2d at 820. In this case, Agent Garza made additional inquiries beyond Defendant's citizenship,

based on: (1) Defendant's "kicked back" demeanor; (2) the initial smell of alcohol; (3) the time of night; (4) the lack of visible luggage; (5) the expensive vehicle seemed inconsistent with Defendant's youth; and (6) after receiving permission to look in the back seat, the smell of burnt marijuana. These are exactly the type of factors from which courts have repeatedly derived sufficient "reasonable suspicion" to sustain more extended investigations at routine fixed points near the border. Mandell & Richardson, *supra,* 28 Ariz.L.Rev. at 350–51.

We agree with the district court that the initial odor of alcohol was especially significant. This was sufficient to justify the request to look in the back seat, which led to the detection of the burnt marijuana smell. There is clear legal precedent indicating that if during a lawful automobile stop an officer smells alcohol or drugs, he has at least reasonable suspicion under the "plain odor" doctrine. *United States v. Johns,* 469 U.S. 478, 486, 105 S.Ct. 881, 886, 83 L.Ed.2d 890 (1985); *United States v. Haley,* 669 F.2d 201, 203–04 (4th Cir.1982), *cert. denied,* 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982); James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks,* 18 U.C.Davis L.Rev. 595, 651 (1985). Indeed this Court has found that the strong odor of marijuana emanating from a vehicle stopped at a routine roadblock provides more than the reasonable suspicion sufficient for further detention and investigation. *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).

Defendant argues that Agent Garza had insufficient training to be able to recognize the odor of marijuana and reinforces this argument by pointing out that while Garza testified that he thought he smelled burnt marijuana, what was actually found under the front seat was raw marijuana. This ignores both Garza's training and the actual facts of this case. Agent Garza testified he had three-and-one-half years of experience with the Border Patrol. Training for the Border Patrol included a sixteen-hour course addressing narcotic characteristics and detection. During this law enforcement course, Agent Garza stated he experienced the smell of raw marijuana. In addition, Agent Garza testified that on five previous occasions he had smelled burnt marijuana and three of those resulted in seizures. This testimony is sufficient to establish Agent Garza's qualifications to detect the smell of burnt marijuana. *State v. Sandoval,* 92 N.M. 476, 478, 590 P.2d 175, 177 (Ct.App.1979). Moreover, the fact that only raw marijuana was found does not negate the fact that Defendant also possessed a rolled marijuana cigarette and a pack of rolling papers in his pocket. This is certainly not inconsistent with Agent Garza's perception the car smelled like burnt marijuana.

Defendant argues that "[a]t the time Garza referred defendant to the secondary area, he had prolonged a valid inquiry into citizenship and a limited visual inspection of the car into a general inquiry about travel and ownership of the car, alcohol consumption, and a search of the interior of the car." While it is true that reasonable suspicion does not provide carte blanche, it does allow detention sufficient to verify or dispel the circumstances giving rise to the suspicion. *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Betancourt,* 105 N.M. at 659, 735 P.2d at 1165. Once Agent Garza smelled the initial odor of alcohol, he had the right to detain Defendant for a sufficient period to investigate the source of the odor. While attempting to trace the alcohol odor, Garza smelled burnt marijuana in the back seat of Defendant's vehicle. He was then, in turn, entitled to investigate the marijuana odor. Directing Defendant to the secondary detention area was an appropriate detention to investigate Agent Garza's reasonable suspicion. *See United States v. Rubio–Rivera,* 917 F.2d 1271 (10th Cir.1990) (referral to secondary checkpoint appropriate when agent has reasonable suspicion that a crime has been committed). The odor of marijuana was also sufficient to provide the probable

cause necessary to search the vehicle. *State v. Goss,* 111 N.M. at 534, 807 P.2d at 232.

CONCLUSION

We hold that, after initially detecting the odor of alcohol, Agent Garza possessed reasonable suspicion of criminal activity and therefore was entitled to further detain Defendant. During this detention, Garza obtained valid consent from Defendant to search the back seat of the vehicle. While searching the back seat, Agent Garza smelled what he perceived to be burnt marijuana. Based on his detection of the odor Garza had correctly identified as burnt marijuana on other occasions, he had at least reasonable suspicion to justify the further detention and investigation in the secondary detention area. *See Goss,* 111 N.M. at 534, 807 P.2d at 232. This in turn led to the discovery of the marijuana and arrest.

We affirm the trial court's denial of Defendant's motion to suppress.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

854 P.2d 878

STATE of New Mexico, Plaintiff–Appellee,

v.

Anthony GUTIERREZ, Defendant–Appellant.

No. 14485.

Court of Appeals of New Mexico.

May 3, 1993.

Certiorari Denied June 17, 1993.

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

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Public Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant pled guilty to the crime of battery on a peace officer. He reserved

the right to appeal the issue of whether a juvenile correctional officer (JCO) is still a peace officer for purposes of the battery on a peace officer statute, despite the fact that JCOs are no longer under the control of the New Mexico Corrections Department. We answer this question affirmatively and thus affirm Defendant's conviction.

In *State v. Tabaha,* 103 N.M. 789, 714 P.2d 1010 (Ct.App.1986), this Court held that JCOs were not peace officers under the battery on a peace officer statute, NMSA 1978, Section 30-22-24 (Repl.Pamp.1984). The legislature subsequently amended the correctional officers statute to provide that crimes against correctional officers and employees of the Corrections Department acting as peace officers were deemed crimes against peace officers. *See* NMSA 1978, § 33-1-10(B) (Repl.Pamp.1990). Recently, the legislature created a Youth Authority and transferred administrative jurisdiction over JCOs to it. *See* NMSA 1978, §§ 9-20-1 to -18 (Repl.Pamp.1991). Defendant argues that by doing so, the legislature removed JCOs from the coverage of Section 33-1-10(B), so that he could not be convicted of battery on a peace officer for his act of battering a JCO. We disagree.

This Court cannot interpret a statute or other legislative action in a way that will produce an absurd result. *See State v. Shafer,* 102 N.M. 629, 637, 698 P.2d 902, 910 (Ct.App.), *cert. denied,* 102 N.M. 613, 698 P.2d 886 (1985). Defendant contends, in effect, that by transferring administrative authority over JCOs from the Corrections Department to the newly created Youth Authority, the legislature stripped JCOs of their status as corrections officers. Defendant specifically points to the language in Sections 33-1-10(A) and (B) that speaks of correctional officers "of the corrections department." Where the literal language of a statute leads to an absurd result, however, we may construe the statute to avoid such a result. *See Wells v. County of Valencia,* 98 N.M. 3, 7, 644 P.2d 517, 521 (1982); *State v. Nance,* 77 N.M. 39, 46, 419 P.2d 242, 247 (1966), *cert. denied,* 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967).

If Section 33-1-10 does not continue to apply to JCOs, there would be no statutory authority allowing JCOs to enforce New Mexico laws or arrest violators of those laws on the grounds of juvenile corrections facilities such as the boys' school in Springer. *See* § 33-1-10(A). Nothing in the act creating the Youth Authority grants any powers to or imposes any duties on JCOs—instead, the act is directed solely at the administrative reorganization of the various divisions consolidated under the Youth Authority. *See* §§ 9-20-1 to -18. To reach the result advocated by Defendant, we would have to hold that the legislature, in creating the Youth Authority, intended to deprive JCOs of the power to prevent violations of law on the grounds of the various juvenile facilities located in this state. This would be an absurd interpretation of the legislature's action, and we reject it. *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) (court interpreting statute must presume that legislature acted reasonably), *cert. denied,* 107 N.M. 16, 751 P.2d 700 (1988); *see also Shafer,* 102 N.M. at 637, 698 P.2d at 910. Our holding is bolstered by the fact that the legislature amended Section 33-1-10(B) subsequent to our holding in *Tabaha* that JCOs were not peace officers.

Defendant also relies on the principle that when a criminal statute is ambiguous, the statute must be construed in the defendant's favor. Where such a construction would lead to an absurd result, however, we cannot apply that principle. *Cf. Shafer,* 102 N.M. at 637, 698 P.2d at 910.

For these reasons, we hold that JCOs are peace officers for purposes of the battery on a peace officer statute. We therefore affirm Defendant's conviction.

IT IS SO ORDERED.

BIVINS and FLORES, JJ., concur.

855 P.2d 127

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
Defendant–Petitioner,

v.

LAGUNA INDUSTRIES, INC., and Raytheon Service Company,
Plaintiffs–Respondents.

No. 20855.

Supreme Court of New Mexico.

June 8, 1993.

Tom Udall, Atty. Gen., Frank D. Katz, Sp. Asst. Atty. Gen., Santa Fe, for petitioner.

Nordhaus, Haltom, Taylor, Taradash & Frye, Wayne Bladh, Santa Fe, for respondents.

OPINION

FRANCHINI, Justice.

By opinion dated October 5, 1992, the Court of Appeals affirmed the trial court's summary judgment in favor of Laguna Industries, Inc. (Laguna) and against the New Mexico Taxation and Revenue Department (Department). *See Laguna Indus., Inc. v. New Mexico Taxation & Revenue Dep't,* 114 N.M. 644, 845 P.2d 167 (Ct.App. 1992). On November 19, 1992, we granted certiorari to determine whether the Indian trader statutes [1] preempt the imposition of gross receipts tax [2] on receipts for non-Indian services rendered to an Indian tribal entity on the reservation.

After a careful review of the majority and dissenting opinions, briefs, and all other pertinent material, we affirm the Court of Appeals. The majority determined that "trade" as used in the Indian trader statutes includes trade in services and therefore, the preemption analysis of *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980), applied to the transaction at issue. *See Laguna Industries,* 114 N.M. at 654, 845 P.2d at 177. We adopt the majority opinion and comment only to emphasize what we consider an important consideration in the majority's analysis: that the purpose of the Indian trader statutes supports the interpretation that "trade" includes trade in services.

1. 25 U.S.C. §§ 261 to 264 (1988).

2. NMSA 1978, §§ 7–9–1 to –82 (Repl.Pamp.1990 & Cum.Supp.1992).

The facts are set forth in detail by the Court of Appeals. *See Laguna Industries,* 114 N.M. at 646–47, 845 P.2d at 168–69. We briefly summarize. Raytheon Service Company (Raytheon) contracted with Laguna, a wholly owned corporation of the Pueblo of Laguna, to perform technical, training, and management assistance to enable Laguna to obtain federal contracts from the Department of Defense (DOD). The underlying case is a claim for refund of state gross receipts tax paid by Raytheon on income received for training and other services it performed at Laguna Pueblo for Laguna. *See* NMSA 1978, § 7–1–26 (Repl.Pamp.1990). Raytheon passed the cost of the gross receipts tax on to Laguna and assigned its right to any tax refund to Laguna.

The Department throughout the litigation has conceded that transactions which come within the scope of the Indian trader statutes are not taxable by the State based on *Warren Trading Post* and *Central Machinery.* The question presented to the Court of Appeals was whether "trade" as used in the statutes includes trade in services. The Department contends that it applies only to trade in goods. In a well reasoned, carefully thought out opinion, the majority rejected the Department's narrow interpretation of "trade" on several interrelated grounds: (1) The Indian trader statutes must be construed broadly and liberally in favor of the Indians; (2) Excluding service transactions from the statutes would not be consistent with the purposes of statutes to protect Indians from fraud and imposition; (3) Service transactions were a significant part of the American economy when the first Indian trader statutes were enacted; (4) The term "trade" in other similar contexts has not been interpreted as limited to goods; (5) The seminal Indian law decision of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 556–57, 8 L.Ed. 483 (1832) interpreted the Indian Trade and Intercourse Acts as regulating all intercourse with the Indians in their territory; (6) The 1834 version included express references to regulation of "boatmen" and "interpreters" who dealt in services; and (7) Department of Interior regulations have expressly interpreted the Indian trader statutes and related acts to include trade in services. *See Laguna Industries,* 114 N.M. at 649–50, 845 P.2d at 172–75.

To the majority opinion we would only emphasize the following on the purpose of the Indian trader statutes. The Indian trader statutes were passed for the benefit of the dependent Indian tribes and must be liberally construed with doubtful expressions being resolved in favor of the Indians. *Ashcroft v. United States Dept. of the Interior,* 679 F.2d 196, 198 (9th Cir.1982). Until they are repealed or amended, "we must give them 'a sweep as broad as [their] language,' and interpret them in light of the intent of the Congress that enacted them." *Central Machinery,* 448 U.S. at 166, 100 S.Ct. at 2596 (citations omitted). Thus, we look to the object sought to be accomplished by the legislatures. *See Lopez v. Employment Sec. Div.,* 111 N.M. 104, 105, 802 P.2d 9, 10 (1990).

One noted scholar has described the trader statutes as shaping, through a series of laws, our government's Indian policy. Francis P. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790–1834,* 2 (Bison Book ed. 1970) (1962). A major aspect of that policy was controlling the problem resulting from the presence of Indians in the "path of aggressive and land-hungry whites." *Id.* at 3.

> The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility.

Id.

The United States addressed the question of trade with the surrounding Indian nations in the very first Congress. *See* Act

of July 22, 1790, ch. 33, 1 Stat. 137 (1856). That statute required a federal license before any person could be "permitted to carry on any trade or intercourse with the Indian tribes." Section 1. From the very beginning, Congress asserted the power to control through licensing all trade and other contacts with the Indians.

The 1790 act had a two-year "sunset" provision, and Congress adopted similar acts again in 1793, 1796, 1799 and 1802.[3] These acts became more detailed as years passed, until Congress adopted the final enactment in the series of Acts "to regulate trade and intercourse with the Indian tribes." Indian Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729 (1850). The 1834 Act demonstrates an attempt by Congress to control every aspect of contact between the United States and the Indian nations. Its detailed and comprehensive provisions manifested the intent of the Federal Government to assert "through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." *Warren Trading Post,* 380 U.S. at 687, 85 S.Ct. at 1244. The objectives of the statutes were "to prevent 'fraud and imposition' upon [the Indians]," *Central Machinery,* 448 U.S. at 163, 100 S.Ct. at 2595. These objectives support the majority opinion's holding that the Indian trader statutes apply to the sale of services as well as the sale of goods. The narrow interpretation of "trade" urged by the Department would tend to defeat these objectives. Thus, for example, under Section 3 of the 1834 Act (25 U.S.C. § 263), if the President declares an embargo on certain goods, no trader to any other tribe "shall, so long as such prohibition may continue, trade with any Indians" of the embargoed tribe. Under the Department's interpretation, both licensed traders and unlicensed individuals would be free to sell "services" to the tribe during the embargo, presumably including gunsmith services. It is more reasonable to conclude that Congress intended to allow the President to cut off all trade with the tribe, including service transactions, in order to enforce an embargo on specified goods.

The Department's narrow reading of Section 4 of the 1834 Act (25 U.S.C. § 264) also would defeat the efforts of Congress to monopolize all contacts with the Indians. Under the Department's interpretation, any person would be free to go into Indian country and engage in business transactions with the Indians without a license as long as those transactions did not involve the sale of goods. Those individuals would not be violating Section 4 because, according to the Department, their activity does not amount to "trade." We disagree because we do not believe Congress intended to leave this category of intercourse with the Indians wholly unregulated.

Nothing in the legislative history of the 1834 Act supports the Department's attempt to interpret "trade" narrowly. The House Report states the relationship between the United States and the tribes "is now that of the strong to the weak, and demands at our hands a more liberal policy, as well directed to promote their welfare as our political interests." H.R.Rep. No. 474, 23rd Cong., 1st Sess., at 11 (1834). The Report noted that if a United States citizen desires "*to trade* or *to reside* in the Indian country for any purpose whatever, a license for that particular purpose is required." *Id.* (Emphasis in original.) The Report further explained that the Indians had been the victims of "fraud and imposition" by licensed traders, and that additional regulations were necessary for the protection of the Indians. *Id.* The proposed bill therefore expanded on the government's power to refuse licenses to persons of bad character or those who should not be permitted to reside in Indian country for any other reason. *Id.* In Section 2 of the 1834 Act, Congress intended to strengthen the regulation of "trade with any of the Indians." The Department has suggested no policy reason to leave all service transactions unregulated in that Act.

3. Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139.

The other two existing Indian trader statutes, 25 U.S.C. §§ 261 and 262, were adopted in 1876 and 1901, respectively. Neither section reveals an attempt by Congress to narrow the scope of the trader statutes. "Courts that have reviewed § 261 confirm that the thrust of the section is to protect Indians from unethical business practices." *Rosebud Sioux Tribe v. United States Bur. of Indian Affairs,* 714 F.Supp. 1546, 1557 (D.S.D.1989). There is virtually no legislative history for the 1901 Act. It is, however, the most recent statement of Congress on the question of Indian trading, and is phrased in the most general and sweeping language. Congress referred broadly to "trade with the Indians," not to "goods," and authorized the Commissioner to adopt regulations limited only by the requirement they be "for the protection of said Indians." 25 U.S.C. § 262.

In light of our comments on the purpose of the trader statutes and the Court of Appeal's exhaustive examination of the text of those statutes, their historical development, the legislative history of amendments and related legislation, Interior Department regulation interpreting those statutes, and judicial opinions establishing the appropriate rules for construing them, we adopt and affirm the district court and the Court of Appeals majority's holding that "trade" as used in the Indian trader statutes includes trade in services. Therefore, the Department's taxation of income received from services rendered to the tribal enterprise on the reservation was preempted by federal law. Affirmed.

IT IS SO ORDERED.

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

855 P.2d 130

The CADLE COMPANY, INC., Plaintiff–Appellant,

v.

WALLACH CONCRETE, INC., Defendant–Appellee.

No. 20734.

Supreme Court of New Mexico.

June 8, 1993.

Cynthia A. Fry, Albuquerque, for appellant.

R.E. Richards, P.A., R.E. Richards, Gary Don Reagan, P.A., Mark Terrence Sanchez, Hobbs, for appellee.

OPINION

FROST, Justice.

The decision filed herein March 23, 1993 is withdrawn and the following opinion is substituted therefor.

Plaintiff-appellant Cadle Company, Inc., a foreign corporation without a certificate of authority to do business in New Mexico, sued defendant-appellee Wallach Concrete, Inc., a New Mexico corporation, to recover on Wallach's alleged guarantee on a promissory note owned by Cadle. The district court dismissed Cadle's complaint for lack of jurisdiction pursuant to NMSA 1978, Section 53–17–20 (Repl.Pamp.1983), which requires foreign corporations that transact business in New Mexico to obtain a certificate of authority as a prerequisite to filing suit in this state. Because we find that Cadle was not required to obtain a certificate of authority under the New Mexico Business Corporation Act, NMSA 1978, Sections 53–11–1 to –18–12 (Repl.Pamp.1983 & Cum.Supp.1992), we reverse and remand for proceedings consistent with this decision.

Cadle is an Ohio corporation in the business of purchasing distressed bank loans from the FDIC, RTC, and other sources. Cadle purchased a large package of loans from the FDIC in California. The notes had originated in New Mexico. The purchase included Pete Garza's promissory note guaranteed by Wallach to First City National Bank of Hobbs.

Garza's loan being in default, Cadle sued Wallach in New Mexico district court to enforce Wallach's guarantee on the note. It is undisputed that Cadle does not have a certificate of authority to do business in this state. Based upon the record and the parties' briefs, Cadle's contacts with New Mexico appear limited to the following: ownership of the right to receive payment on loans to New Mexico corporations or individuals that originated from New Mexico banks, and legal action in New Mexico courts incident to debt collection. There is no evidence that Cadle makes purchases, employs regular personnel, keeps bank accounts, or owns or rents office or other property in this state.

Cadle contends that it is not required to have a certificate of authority to file suit in New Mexico courts because it does not transact business in New Mexico. Cadle argues that its activities do not constitute "transacting business in this state" under NMSA 1978, Section 53–17–1(H) (Repl.Pamp.1983), which exempts debt collection activities from the definition of "transacting business." Cadle argues further that even if Section 53–17–1(H) does not apply, its contacts with New Mexico are too minimal to constitute the transaction of business under the New Mexico Business Corporation Act and New Mexico case law applying its provisions.

In response, Wallach contends that this Court cannot consider Cadle's argument based upon the exception of Section 53–17–1(H) because by neglecting to mention Section 53–17–1(H) specifically in the district court proceeding, Cadle failed to preserve this issue for appeal. Wallach also maintains that the district court's implicit conclusion that Cadle's activities in New Mexico constitute the transaction of business is supported by substantial evidence and must therefore be affirmed. Cadle allegedly transacts business in New Mexico by enforcing numerous debt obligations here.

Under Section 53–17–20(A), sometimes called a "closed-door statute" because it closes the doors of state courts to noncomplying corporations, "[n]o foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state, until the corporation has obtained a certificate of authority." By its own terms, the closed-door statute only applies to corporations "transacting business in this state." Section 53–17–1 restricts the applicability of the closed-door statute by excluding certain

activities from the scope of those pursuits considered "transacting business" under the Business Corporation Act. Section 53–17–1 states in pertinent part:

> [A] foreign corporation shall not be considered to be transacting business in this state, for the purposes of the Business Corporation Act, by reason of carrying on in this state any one or more of the following activities:
>
> A. maintaining or defending any action or suit ... or effecting the settlement thereof or the settlement of claims or disputes:
>
> ....
>
> G. creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interest in real or personal property;
>
> H. securing or collecting debts or enforcing any rights in property securing them[.]

Because Cadle's activities in New Mexico fall within the exception of Section 53–17–1(H), Cadle is not "transacting business" in New Mexico and is not required to obtain a certificate of authority to access New Mexico courts. Since a loan guarantee becomes an enforceable debt upon default of the principal debtor, Cadle's suit to enforce Wallach's guarantee on Garza's defaulted obligation clearly constitutes debt collection within the Section 53–17–1(H) exception to the closed-door statute.

Wallach's claim that Cadle transacts business in New Mexico by enforcing its numerous debt obligations here is invalid because both the isolated acts of debt collection, see Section 53–17–1(H), and filing suit, see Section 53–17–1(A), are excluded from the definition of transacting business under Section 53–17–1. Absent these activities, Cadle's only contact with New Mexico is its ownership of the right to receive payment on loans to New Mexico corporations or individuals that originated from New Mexico banks. Such contact is far too remote to constitute "transacting business in this state" under our precedents assessing whether particular foreign corporations were "transacting business" under our closed-door statute. *See, e.g., Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc.*, 81 N.M. 10, 12–13, 462 P.2d 144, 146–48 (1969), *cert. denied*, 397 U.S. 1076, 90 S.Ct. 1521, 25 L.Ed.2d 811 (1970); *J.H. Silversmith, Inc. v. Keeter*, 72 N.M. 246, 249–50, 382 P.2d 720, 722–23 (1963); *Riblet Tramway Co. v. Monte Verde Corp.*, 453 F.2d 313, 317–18 (10th Cir.1972) (applying New Mexico law).

Wallach's claim that Cadle neglected to preserve for appeal its argument based on Section 53–17–1(H) also fails. *See* SCRA 1986, 12–216 (Repl.Pamp.1992). It is clear that "theories, defenses, or other objections will not be considered when raised for the first time on appeal," *Wolfley v. Real Estate Comm'n*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983), and that our appellate courts will not consider questions on which a ruling by the district court has not been fairly invoked, SCRA 1986, 12–216; *In re Will of Skarda*, 88 N.M. 130, 136, 537 P.2d 1392, 1398 (1975). It is also clear that we must construe statutes in their entirety, reading all parts of an act together. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). These rules mandate our conclusion that because Cadle did argue to the district court that it was not transacting business under the Business Corporation Act and the district court implicitly ruled on this question by dismissing Cadle's complaint, Cadle may argue on appeal that a section of the Act not expressly cited below, Section 53–17–1(H), establishes that it is not transacting business under the Act.

For the foregoing reasons, we reverse the decision of the district court and remand for proceedings consistent herewith.

IT IS SO ORDERED.

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

855 P.2d 133

STATE of New Mexico, Plaintiff–Appellant,

v.

Hope R. ARRINGTON, Defendant–Appellee.

No. 13920.

Court of Appeals of New Mexico.

April 16, 1993.

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

Sammy J. Quintana, Chief Public Defender, David Henderson, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

PICKARD, Judge.

The central issue presented in this case is whether the trial court, in sentencing a habitual offender, may determine that a mandatory prison term is constitutionally impermissible under the Eighth Amendment of the United States Constitution, and Article II, Section 13 of the New Mexico Constitution. We hold that in extremely limited circumstances, a trial court may do so. Because the trial court in the present case could properly make such a determination on the facts presented to it, we affirm.

FACTS

Defendant was originally charged with unlawfully distributing marijuana, a controlled substance, in violation of NMSA 1978, Section 30–31–22 (Repl.Pamp.1989). Defendant pleaded guilty to the charge. The trial court sentenced Defendant to eighteen months' imprisonment, which was suspended except for time served. The State filed a supplemental information, alleging that Defendant had committed the crime of possession of marijuana in Texas in 1991. In a bench trial, Defendant was found to be the same person who committed the earlier offense.

Defendant testified at the habitual-sentencing hearing that she has severe bronchial asthma. She further testified that while she was first in the Lea County Jail on the distribution of marijuana charge, the jail physician lowered the dosage on one of her medications and eliminated another medication. Defendant testified that the physician told her that he had never seen anyone on so much medication and that he thought she did not need it. Defendant was in jail on the charge for twenty-one days. During that time, she saw the jail physician five times, once at his office and the other four times at the jail. In addition to other medications, Defendant was prescribed an inhaler for her asthma and medication for stomach ulcers. Defendant testified that while she was in the Lea County Jail, she was unable to obtain her inhaler when she needed it, such as during the night, because the jail did not have a nurse available twenty-four hours a day. After Defendant bonded out of jail, she was hospitalized for ten days because of her asthma.

Scott Ferris, Defendant's probation officer, testified at the sentencing hearing on Defendant's behalf. Ferris testified that he is a licensed practical nurse and that his wife is asthmatic. Ferris stated that when he visited Defendant for the first time while she was in the Lea County Jail, she was doing satisfactorily. After the jail physician reduced Defendant's medication, Ferris saw Defendant a second time while she was in custody. Ferris testified that he was concerned about Defendant's condition during this second visit because she was breathing with difficulty and was incoherent.

Ferris testified that Defendant would not get adequate medical care for her asthma at the Grants Correctional Facility. He stated that the facility, like the county jail, would not have twenty-four hour medical staff available and that the prison also would not allow Defendant to keep her medication with her. Ferris testified that the physician at the Grants facility was not an asthma expert and that incarceration at the Grants facility could jeopardize Defendant's life. Ferris stated on cross-examination that it would be standard practice for the Grants physician to contact a specialist if necessary and that he knew of nothing to prevent the Grants physician from taking such action. The trial judge stated that he believed that Ferris was qualified to give an opinion concerning Defendant's sentence because of Ferris's experience and training, and he asked Ferris to make such a recommendation. Ferris recommended that Defendant be sentenced to the custody of her family, located out of state. During the course of the hearing, the trial judge acknowledged that he considered himself a "semi-expert" on asthma, and he said that he had experienced an asthma attack that almost killed him.

Although the State argued that the trial court was required to commit Defendant to the Department of Corrections because the habitual-offender statute requires mandatory sentencing, the State presented no factual evidence at the hearing to rebut any of Defendant's claims. Nor does the State argue on appeal that this case should be remanded to give it an opportunity to factually rebut any of Defendant's evidence. Defense counsel argued that the trial court had the discretion to sentence Defendant to some sort of punishment other than incarceration, such as house arrest or the Delancey Street program. The trial court determined that Defendant's medical needs could not be met in prison, that any prison sentence would be life threatening to her, and that a one-year prison sentence would be cruel and unusual punishment in violation of Defendant's constitutional rights. The trial court also determined that it had discretion under the circumstances to specify where Defendant should serve her sentence and ordered her to serve the one-year unsuspended portion of her sentence in the custody of her parents.

ANALYSIS

The State argues on appeal that the trial court was required to impose a one-year sentence pursuant to NMSA 1978, Section 31–18–17(B) (Repl.Pamp.1990), and that the trial court had no discretion to determine where Defendant could serve

her sentence. We agree with the State that the one-year sentence for habitual offenders is indeed mandatory under Section 31–18–17(B), and that the sentence may not be suspended or deferred. *See State v. Davis,* 104 N.M. 229, 719 P.2d 807 (1986). We also agree with the State that in the absence of special circumstances such as a constitutional violation, the trial court does not have discretion to specify the place habitual-offender defendants are to serve their sentences.

Under Section 31–18–17(B), (C), and (D), the basic sentence of habitual offenders is to be increased by one, four, or eight years. The basic sentence is a sentence of imprisonment, NMSA 1978, § 31–18–15(A) (Repl.Pamp.1990), unless the trial court defers or suspends the sentence, NMSA1978, § 31–20–3 (Repl.Pamp.1990). The increase in sentence mandated by the habitual-offender statute may not be suspended or deferred. Section 31–18–17(B), (C), and (D). Thus, persons sentenced under the habitual-offender statute ordinarily must be imprisoned in a corrections facility designated by the corrections department. NMSA 1978, § 31–20–2(A) (Repl.Pamp.1990). No argument is made that the trial court's sentence of Defendant to the custody of her parents is a permissible incarceration pursuant to NMSA 1978, Section 31–20–2(A) and (D) (Repl.Pamp.1990), allowing local incarceration for sentences between one year and eighteen months if there is a joint-powers agreement between the governing authority in charge of the place of incarceration and the corrections department.

However, we disagree with the State's assertion that the trial court must, in all instances, impose a prison term. While we acknowledge that it is a legislature's prerogative to dictate criminal penalties, a mandatory sentence is still subject to constitutional scrutiny. *See State v. Patterson,* 572 So.2d 1144, 1151 (La.Ct.App. 1990) (mandatory sentences fall within legislature's prerogative to determine length of sentence imposed, but constitutional proscription against cruel and unusual punishment overrides legislatively imposed mandatory minimum sentence if, as applied to a given defendant for a given crime, the punishment is constitutionally excessive), *cert. denied,* 577 So.2d 11–12 (1991). Thus, it is possible for a trial court to determine at sentencing that a prison term would violate the prohibition against cruel and unusual punishment as applied to a particular defendant.

In *State v. Augustus,* 97 N.M. 100, 637 P.2d 50 (Ct.App.), *cert. denied,* 97 N.M. 621, 642 P.2d 607 (1981), we stated that in exceedingly rare cases, a term of incarceration may be found to be inherently cruel. *See also State v. Archibeque,* 95 N.M. 411, 622 P.2d 1031 (1981). In arguing that his case came within the "exceedingly rare" exception, the defendant in *Augustus* contended that given his medical condition and the particular circumstances of his case, it would be cruel and unusual punishment to incarcerate him. He relied on *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), for the proposition that "failure to provide needed medical care may constitute punishment that is inherently cruel." *Augustus,* 97 N.M. at 101, 637 P.2d at 51. We stated that under *Estelle,* a defendant may establish an Eighth Amendment violation through showing a "deliberate indifference" to his or her serious medical needs. *Id.; see Wilson v. Seiter,* —— U.S. ——, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *LaFaut v. Smith,* 834 F.2d 389 (4th Cir.1987) (Powell, Assoc. J. (retired)); *Naked City, Inc. v. State,* 460 N.E.2d 151 (Ind.Ct.App.1984). We determined that the defendant in *Augustus* had not shown that the trial court's sentence exhibited deliberate indifference to the defendant's medical needs. *Id.*

To the contrary here, we conclude that, on the unusual facts of the present case, the trial court could find that a sentence of incarceration would constitute a deliberate indifference to Defendant's serious medical needs. The evidence was uncontroverted that incarceration would be life-threatening to Defendant and that adequate medical care would not be available to her in a correctional facility. The State presented no evidence to controvert any of

these facts. Insofar as the State argues that the trial court's decision is not supported by substantial evidence, we reject that argument. The State argues that the testimony of Defendant's probation officer, Mr. Ferris, was the only evidence presented concerning the quality of care Defendant would receive in prison. Based on that evidence, the State suggests the trial court impermissibly speculated and guessed as to the type of medical care Defendant would actually receive while incarcerated.

Ferris testified that he was not confident of the ability of the women's prison in Grants to handle a severe asthma case. He also testified that there was not twenty-four hour coverage in the medical unit and that he believed the prison officials would probably try to keep Defendant from possessing a supply of her necessary medication for fear that other prisoners would steal it. In addition, Ferris testified that the prison would resist allowing Defendant to have immediate access to her medication.

We believe that the foregoing testimony is sufficient evidence to support the trial court's findings. Ferris's status as a probation and parole officer gave him insight into prison operations that an ordinary medical expert would not have. In addition, his experience as a practical nurse and his marriage to an asthma sufferer gave him unique insight into Defendant's medical needs. Thus, we believe that the trial court could have reasonably believed Ferris when he testified that the prison would not or could not provide Defendant with necessary medical care. *See State v. Sparks,* 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct.App.1985) (substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion).

The State asserts that Ferris could not be certain about the prison's willingness to allow Defendant ready access to necessary medication. In addition, the State argues that Ferris never cited to any prison rules or regulations that prevent such an arrangement. Nevertheless, we believe that those are matters of weight and credibility left to the fact-finder's judgment. *See State v. Vialpando,* 93 N.M. 289, 292, 599 P.2d 1086, 1089 (Ct.App.1979) (it is for the trier of fact to determine the weight and sufficiency of evidence, including all reasonable inferences). Contrary to the State's suggestion, we do not believe that the evidence left the trial court in the position of needing to speculate or guess. To be sure, stronger evidence would have made a stronger case. However, the State was free to rebut Ferris's testimony, but apparently would not or could not. In any event, based on the evidence presented to the trial court, we affirm its decision holding that mandatory incarceration in this case would be life-threatening to this Defendant because her serious medical needs would not be handled adequately under customary prison practices and because there was no showing that the prison would make special provisions for Defendant. Such a failure to make provisions, in light of Defendant's experience in the county jail, would amount to deliberate indifference to her medical condition. Accordingly, the trial court did not err in ruling that mandatory incarceration would constitute cruel and unusual punishment. *See State v. Augustus.*

The judgment and sentence is affirmed.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

855 P.2d 136

Domingo RIVERA, Plaintiff–Appellant,

v.

NEW MEXICO HIGHWAY AND TRANSPORTATION DEPARTMENT, Defendant–Appellee.

No. 14283.

Court of Appeals of New Mexico.

April 26, 1993.

Certiorari Denied June 17, 1993.

Mario A. Esparza, Las Cruces, for plaintiff-appellant.

Benjamin Silva, Jr., Earl E. DeBrine, Jr., Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for defendant-appellee.

OPINION

PICKARD, Judge.

Plaintiff appeals from the summary judgment entered in favor of Defendant in this Tort Claims Act case. Plaintiff was injured when he was working as a laborer for a construction company that was engaged in resurfacing a highway. Due to the temporary unavailability of resurfacing material, there was a lull in the work. During this lull, Defendant's employee, who was employed to supervise the highway project, threw a container of water on Plaintiff. Plaintiff either jumped out of the way or grabbed his own container of water to retaliate. In either case, he ran into the roadway and into an oncoming vehicle. Defendant had a strict policy prohibiting horseplay, which its employee violated by throwing the water on Plaintiff. The trial court granted summary judgment because Defendant's employee's act was not within the scope of his duties and, therefore, immunity was not waived under the Tort Claims Act. We agree with that result and affirm.

The general rule is that governmental entities such as the New Mexico Highway and Transportation Department here are immune from liability unless such immunity is waived. NMSA 1978, § 41–4–4(A) (Repl.Pamp.1989). Immunity is waived "for damages ... caused by the negligence of public employees while acting within the scope of their duties in the maintenance of ... any ... highway." NMSA 1978, § 41–4–11(A) (Repl.Pamp.1989). Defendant was engaged in maintaining the highway, and its employee was a public employee. The issue is whether he was acting within the scope of his duties.

"Scope of duties" is defined in the Tort Claims Act as "performing any duties which a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." NMSA 1978, § 41–4–3(F) (Repl.Pamp.1989). Defendant initially contends that the trial court should be affirmed because Plaintiff neither alleged in his complaint nor made any showing that throwing the water was "requested, required or authorized" by Defendant.

We recently had occasion to comment that "scope of duties" as used in the Tort Claims Act may or may not be identical to the "course and scope of employment" test used to determine common-law respondeat superior claims. *Narney v. Daniels,* 115 N.M. 41, 48, 846 P.2d 347, 354 (Ct.App. 1992), *cert. denied,* 114 N.M. 720, 845 P.2d 814 (1993). In this case, as in *Narney,* we find it unnecessary to decide to what precise extent these concepts are similar.

The Tort Claims Act was enacted to ameliorate the harshness of the rule of immunity for certain acts of governmental entities when the same acts by private parties would yield liability. *See* NMSA 1978, § 41–4–2(A) (Repl.Pamp.1989). Liability under the Act is based upon traditional tort concepts of duty and standard of care. *See* NMSA 1978, § 41–4–2(B) (Repl.Pamp.1989). Thus, we infer that governmental entities would not be liable for acts of employees when the entities' private counterparts would not be liable because the private employees were not acting in the course and scope of employment. For this reason, and because there is a relative wealth of law on the issue of course and scope of employment as compared to the issue of "scope of duties" under the Tort Claims Act, we look to authority on course and scope of employment. We find that the virtually unchallenged rule, in New Mexico and elsewhere, would support the conclusion that the horseplay in this case did not take place in the course and scope of Defendant's employee's employment. Thus, we need not decide whether to adopt the narrow definition of "scope of duties" advocated by Defendant.

Generally, whether an employee is acting in the course and scope of employment is a question of fact. *Narney,* 115 N.M. at 48, 846 P.2d at 354. However, when no reasonable trier of fact could conclude that an employee is acting in the course and scope of employment, summary judgment is properly granted. *Id.* at 49–50, 846 P.2d at 355–56; *cf. Edens v. New Mexico Health & Social Servs. Dep't,* 89 N.M. 60, 62, 547 P.2d 65, 67 (1976) (in workers' compensation case, when historical facts are undisputed, issue of whether accident arose out of and in the course of employment is one of law).

In *Narney,* recognizing that "course and scope of employment" has been variously defined, we utilized the test found in the uniform jury instructions as supplemented by the test found in an out-of-state case with facts similar to those in *Narney. Narney,* 115 N.M. at 48–50, 846 P.2d at 354–56. The jury instruction would find an act to be within the scope of employment if it is incidental to the employer's business assigned to the employee and it was done while the employee was working "with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee." SCRA 1986, 13–407. Measured by this standard, it appears that the act of throwing water on Plaintiff would not be within the scope of employment because it was not done with a view of furthering the employer's interest and did arise from purely personal motives.

Cases from other jurisdictions support this result. In *Lane v. Modern Music, Inc.,* 244 S.C. 299, 136 S.E.2d 713, 717 (1964), the court said:

> The general rule is that an employer is not liable to a customer, patron or other person for an assault arising out of acts of mischief or horseplay indulged in by the employee unless it is shown that the employer was or should have been so aware of the propensities of the employee in that direction as to make him negligent for having retained him in the employ, since such acts are not to be considered incidental to the work which he is hired to perform but are of a personal nature, indulged in for the personal amusement of the employee and not in furtherance of the master's interest.
>
> If the servant does a mischievous act merely to frighten or perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of employment, the master generally is not liable therefor.

In *Lane,* the employee released what appeared to be a mongoose from a cage, thus frightening a customer. The court ruled that a directed verdict for the defendant should have been granted. Similar results were obtained for similar reasons in *Prairie Livestock Co. v. Chandler,* 325 So.2d 908 (Miss.1976), in which the injury was caused by the employee's playfully sitting in someone's lap, and in *Beeson v. Kelran Constructors, Inc.,* 43 Colo.App. 505, 608 P.2d 369 (1979), *cert. denied,* (Colo.1980), in which the death was caused by an auto accident caused by the employee's "moon-

ing" the driver of the car that hit decedent. *See also Hollinger v. Jane C. Stormont Hosp. & Training Sch. for Nurses,* 2 Kan. App.2d 302, 578 P.2d 1121 (1978); *Hamilton v. Davis,* 300 S.C. 411, 389 S.E.2d 297 (App.1990); Restatement (Second) Agency § 235 (1958) (servant is not acting within scope of employment if servant is motivated solely by personal concerns).

We are not aware of any cases in the common-law tort area in which the employer was liable when the horseplay, mischief, or assault was not connected in some way to the employment. Thus, we find cases such as *Andrews v. Norvell,* 65 Ga.App. 241, 15 S.E.2d 808 (1941), distinguishable. In that case, the employee worked for a bar that tolerated and perhaps even encouraged the pranks that employees played; they were part of the atmosphere of the establishment.

Hamilton, 389 S.E.2d at 299–300, illustrates the types of assaults that are connected with employment and those that are not. Citing *Jones v. Elbert,* 211 S.C. 553, 34 S.E.2d 796 (1945), and *Crittenden v. Thompson–Walker Co.,* 288 S.C. 112, 341 S.E.2d 385 (App.1986), the *Hamilton* court explained that assaults committed in a dispute over goods delivered to the employer or in the attempt to collect a debt would be in the course of employment because they would be furthering the master's business, although negligently or beyond the employees' authority. *See also Gonzales v. Southwest Sec. & Protection Agency,* 100 N.M. 54, 55–56, 665 P.2d 810, 811–12 (Ct. App.1983). On the other hand, the act at issue in *Hamilton* was pure horseplay. The facts in this case are more like *Hamilton* than *Jones* or *Crittenden.*

There are no facts in this case tending to show that the Defendant's business was being served by its employee's throwing water on Plaintiff. Plaintiff relies on the testimony of one witness who had seen this employee twice before throw water on people and who had seen this employee together with another employee throw firecrackers. These instances do not show that horseplay was furthering the Defendant's interests as in *Jones* or *Crittenden.* Nor do we believe that these isolated instances are sufficient to show the sort of tolerance or ratification present in *Andrews.*

This distinction between those acts that arguably further the employer's interest and those that cannot be seen as remotely furthering the employer's interest answers Plaintiff's reliance on *Silva v. State,* 106 N.M. 472, 745 P.2d 380 (1987). Plaintiff points to the portion of that opinion in which the Supreme Court stated that the failure of the employee to conduct himself in compliance with practices adopted for the purpose of protecting people like the plaintiff constitutes negligence. *See id.* at 478, 745 P.2d at 386. Plaintiff appears to be contending that Defendant's employee's violation of the prohibition on horseplay shows that the employee was acting in the course of his employment. We recently rejected a similar contention. *See Cox v. Chino Mines,* 115 N.M. 335, 339, 850 P.2d 1038, 1041–1042 (Ct.App.1993). Moreover, we find *Silva* distinguishable. In that case, the employee was performing duties of the employment in caring for a prisoner; in not following the standards, he was acting negligently. *Silva* is similar to the assault cases noted above, in which the employees were trying to further the employers' business but were doing it negligently.

Plaintiff finally relies on *Woods v. Asplundh Tree Expert Co.,* 114 N.M. 162, 836 P.2d 81 (Ct.App.), *cert. denied,* 113 N.M. 744, 832 P.2d 1223 (1992). However, *Woods* does not help Plaintiff. *Woods* was a workers' compensation case. The rationale for allowing workers' compensation benefits for accidents arising from horseplay is unique to workers' compensation cases.

The basic purpose of workers' compensation benefits is to ensure that industry carries the burden of injuries suffered by employees in the course of their employment. *Yerbich v. Heald,* 89 N.M. 67, 68, 547 P.2d 72, 73 (Ct.App.1976). Consistent with this purpose, the early horseplay cases explained that the inevitable tensions of the workplace are part of the conditions

that produce the work product. *Woods,* 114 N.M. at 164, 165, 836 P.2d at 83, 84. Thus, injury caused by horseplay that is accepted and expected in response to these tensions may be compensable. *Id.* The same rationale does not apply outside the workers' compensation context.

There being no facts in this case to show that the horseplay was part of the course and scope of Defendant's employee's employment, we hold that Defendant cannot be held liable for the employee's actions in throwing water on Plaintiff. The trial court's award of summary judgment in favor of Defendant is affirmed.

IT IS SO ORDERED.

BIVINS and HARTZ, JJ., concur.

855 P.2d 556

STATE of New Mexico, Plaintiff-Appellant,

v.

Monroe RATCHFORD, Defendant-Appellee.

No. 20592.

Supreme Court of New Mexico.

June 3, 1993.

Tom Udall, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for appellant.

Albert J. Rivera, Alamogordo, Cindi L. Pearlman, Tijeras, for appellee.

OPINION

MONTGOMERY, Justice.

The New Mexico Court of Appeals certified this appeal to us,[1] stating in its order of certification that resolution of the issue on appeal "involves a question of significant public importance and certification of the issue is the most expedient and efficient disposition." As framed by the Court of Appeals, the issue is: "[U]nder what circumstances does a trial court have jurisdiction to grant a new trial in a criminal case when the written order is not filed within thirty days of the motion[?]" [2]

The jurisdictional issue certified by the Court of Appeals arises because of the State's insistence, here and in the Court of Appeals, that the trial court lacked jurisdiction to grant defendant's motion for a new trial because the trial court's action—its "grant" of defendant's motion—did not occur until more than thirty days had passed after filing of the motion. The State's position in this respect is necessarily predicated on its further position that the trial court's oral ruling granting the motion, *before* thirty days had passed from the date the motion was filed, was ineffective as a grant of the motion, so that the court had no jurisdiction to enter the written order once the thirty days had passed.

In our view, the trial court's jurisdiction to grant a new trial was not diminished by the rule on which the State relies, Rule 5-614(C) of our Rules of Criminal Procedure (quoted below). That rule provides that a motion for a new trial is automatically denied if it is not granted within thirty days from the date it is filed. We hold that a trial court's oral ruling granting a motion for new trial satisfies the requirement in Rule 5-614(C) that the court grant the motion within thirty days after the motion is filed to avoid the consequence of an automatic denial if it does not. So holding, and

1. Pursuant to NMSA 1978, § 34-5-14(C)(2) (Repl.Pamp.1990) (Supreme Court has appellate jurisdiction in matters appealed to Court of Appeals if Court of Appeals certifies that matter involves issue of substantial public interest that should be determined by Supreme Court). The statute provides that such a certification is "a final determination of appellate jurisdiction."

2. The Court of Appeals' certification order states that a second issue was raised by the appeal: the propriety of the trial court's issuance of an order *nunc pro tunc* granting defendant's motion for new trial while the case was on appeal. As explained below, we find it unnecessary to pass upon the validity or propriety of the *nunc pro tunc* order.

finding the State's other grounds for appeal without merit, we affirm the trial court's order granting a new trial and remand for further proceedings.

I.

On June 4, 1990, defendant was convicted by a jury of criminal sexual contact of a minor. He timely filed a motion for a new trial on June 8, 1990.[3] The trial court heard and orally granted defendant's motion at a hearing on July 3, 1990. The court subsequently entered a written order granting the motion on August 3, 1990.

In its order, the trial court recited that the motion had been heard on July 3 and found, reiterating most of its oral findings as made at the hearing, that defendant's conviction was the product of "fundamental and cumulative error, including but not limited to the following:"

(1) The State had been guilty of prosecutorial misconduct in its closing and rebuttal arguments because the prosecutor had expressed his own opinion as to the truthfulness of witnesses, had referred to matters outside the evidence, had asked the jury to consider the consequences of its verdict, had invited the jurors to put themselves in the place of the child, and had implied that acquittal of defendant would require conviction of a police officer witness of perjury and of falsifying police reports.

(2) The court had allowed a juror, who said he could not sit fairly on the case, to remain on the panel.

(3) The jury had been repeatedly advised of a videotaped interview of the child, but the videotape was never introduced.

(4) The evidence supporting the conviction was weak, consisting only (in addition to the child's testimony) of unreliable testimony by the police officer concerning an obliquely inculpatory statement by the defendant.

(5) A victim-impact study ordered by the court following the trial revealed additional inconsistencies and contained an opinion that the child was not suffering from trauma associated with sexual abuse.

On August 30, 1990, the State appealed to the Court of Appeals from the trial court's August 3 order granting defendant a new trial.[4] In its docketing statement, the State challenged the court's grounds for granting a new trial. The Court of Appeals responded with a calendar notice proposing summary affirmance of the order granting a new trial, on all but one of the grounds relied on by the trial court. Generally, the Court of Appeals' calendar notice noted that a trial court has broad discretion in granting or denying a motion for a new trial and that an order granting a new trial will not be reversed absent a clear and manifest abuse of that discretion, citing *State v. Gonzales,* 105 N.M. 238, 731 P.2d 381 (Ct.App.1986), *cert. quashed,* 105 N.M. 211, 730 P.2d 1193 (1987).

The State responded with a memorandum in opposition, raising for the first time the argument that eventually led to the Court of Appeals' certification to this Court: that the trial court had lost jurisdiction to grant defendant's motion for a new trial by virtue of the automatic denial provision in Rule 5–614(C). In its memorandum, the State did not challenge any of the grounds on which the trial court had relied in granting a new trial; in fact, the State admitted that it probably could not "carry the burden of demonstrating a clear and manifest abuse of discretion by the district court." The memorandum moved to amend the docketing statement to raise the jurisdictional issue; and the Court of Appeals, in a second calendar notice, granted the motion and proposed summary reversal.

Defendant then brought the proposed summary reversal to the trial court's atten-

3. Pursuant to SCRA 1986, 5–614(C) (Repl.Pamp.1992) (motion for new trial shall be made within 10 days after verdict or finding of guilty or within such further time as court may fix during the 10–day period).

4. According to *State v. Chavez,* 98 N.M. 682, 683, 652 P.2d 232, 233 (1982), the State has the right to appeal from an order granting a new trial in a criminal case. Nothing in this opinion either reaffirms or draws into question this holding in *State v. Chavez.*

tion, whereupon the court entered an order granting a new trial *nunc pro tunc* as of July 3, 1990, or alternatively requesting remand for that purpose. The court noted that defendant's motion had been orally granted from the bench on July 3, 1990; that defendant had not received a fair trial; and that the court was convinced that had defendant received a fair trial he would not have been convicted. The court continued that judicial economy, as well as justice, required entry of a written order formalizing the oral order *nunc pro tunc*; that judgment and sentence had not yet been entered; and that, had they been, defendant could appeal and the appeal "would most likely result in a new trial due to the unfairness of the trial defendant received." The State promptly appealed from this second order, and the Court of Appeals considered the two appeals together, thereby effectively consolidating them.

The Court of Appeals then issued a third calendar notice, reassigning the case to the general calendar and ordering full briefing. In its briefs, the State argued only the validity of the order granting a new trial (as allegedly having exceeded the court's jurisdiction) and the propriety of the later *nunc pro tunc* order. The Court of Appeals then certified the case to this Court as set out in the introduction to this opinion.

II.

Rule 5–614(C) reads in pertinent part: "If a motion for new trial is not granted within thirty (30) days from the date it is filed, the motion is automatically denied." SCRA 1986, 5–614(C) (Repl.Pamp.1992). Whatever may be the jurisdictional effect of failures to comply with time requirements in other rules (or, for that matter, in this particular rule), it is apparent that the first question to be answered, before a jurisdictional question is even reached, is whether a court or a party has failed to comply with an applicable time requirement. As applied to the present case, this means that we must first determine whether the trial court did or did not "grant" defendant's motion for new trial within thirty days from the date it was filed.

In its certification to this Court, the Court of Appeals stated that defendant's position—that the trial court's oral ruling of July 3, 1990, constituted a grant of his motion—sought expansion of the plain meaning of Rule 5–614(C) and a ruling that the rule's automatic denial provision was a housekeeping rule and not jurisdictional. The Court of Appeals cited *Lovelace Medical Center v. Mendez,* 111 N.M. 336, 805 P.2d 603 (1991), in which this Court held that the "deemed denied" provision of our statute governing interlocutory appeals (NMSA 1978, Subsection 39–3–4(B) (Repl.Pamp.1991)) was not jurisdictional, but was a mere "housekeeping" rule designed to assist courts in managing their cases.

We agree with the Court of Appeals that this case presents a question of substantial public interest, but we disagree that the case requires us to determine whether the automatic denial provision of Rule 5–614(C) is either jurisdictional or a *Lovelace*-type housekeeping rule. On the contrary, because we find that the trial court's oral ruling constituted a grant of defendant's motion within the meaning of Rule 5–614(C), it is unnecessary for us to consider any jurisdictional issue (or, as stated *supra* at note 2, the propriety of the *nunc pro tunc* order).

III.

The State argues that the trial court's oral ruling "was not a timely, legally effective order that would comply with Rule 5–614." To support its argument, the State relies on several cases from this Court and the Court of Appeals holding oral rulings ineffective for various purposes: *Smith v. Love,* 101 N.M. 355, 356, 683 P.2d 37, 38 (1984) (appeal does not lie from an oral ruling); *State v. Page,* 100 N.M. 788, 793, 676 P.2d 1353, 1358 (Ct.App.1984) (oral ruling is ineffective to adjudge defendant incompetent to stand trial); *State v. Sanders,* 96 N.M. 138, 142, 628 P.2d 1134, 1138 (Ct.App.1981) (oral ruling is ineffective to deprive defendant of custody of child); and

State v. Rushing, 103 N.M. 333, 334, 706 P.2d 875, 876 (Ct.App.) (court had authority to change orally pronounced sentence before entry of written judgment and sentence), *cert. denied,* 103 N.M. 344, 707 P.2d 552 (1985).

While these cases have held various oral rulings to be ineffective, they do not compel a holding that the oral ruling in the present case was ineffective as a "grant" under Rule 5–614(C). None of the cases cited by the State involves the issue of whether an oral pronouncement constitutes a ruling for the purpose of deciding whether a motion or petition is automatically denied by operation of law. Rather, the cases hold oral pronouncements ineffective for other purposes, such as for triggering the time period for filing a notice of appeal.

It is true that various statements, in other contexts, by both this Court and the Court of Appeals suggest that a trial court's oral ruling is ineffective for any purpose, except perhaps as an indicator of what the trial court may eventually do in a written order. *See, e.g., State v. Morris,* 69 N.M. 89, 91, 364 P.2d 348, 349 (1961) ("An oral ruling by the trial judge is not a final judgment. It is merely evidence of what the court had decided to do but he can change such ruling at any time before the entry of a final judgment."); *State v. Page,* 100 N.M. at 793, 676 P.2d at 1358 ("The trial court's oral ruling ... was not legally effective as to the proceedings herein. Unless written, an oral ruling is merely evidence of what the trial court intends to do."). These statements, however, and others like them, must be read in the context of the decisions in which they were made. There is *no* New Mexico case of which we are aware holding that a trial court's oral ruling is ineffective for any purpose whatsoever except to provide evidence of what the trial court may or may not do in a written order to be entered later. Yet that is the position the State's argument on this appeal essentially advances. Never mind that the trial judge has convened a hearing in open court, on the record, to hear the parties' arguments on a duly filed motion, has listened to those arguments, and has made her ruling and given her reasons; all of this—the essence of an exercise of judicial power [5]—is (the State seems to be arguing) totally ineffective, a nullity. We reject any such extreme, formalistic position.

In some circumstances, it makes perfectly good sense to require a written, filed judgment. For example, we do not dispute the well-accepted principle, embodied in both our case law and Rules of Appellate Procedure, that an appeal lies only from a formal written order or judgment signed by the judge and filed with the court. *Love,* 101 N.M. at 356, 683 P.2d at 38; SCRA 1986, 12–201(A) (Repl.Pamp.1992). The purpose of this rule is to provide certainty as to the kind of judicial pronouncement that will support an appeal, *Malinou v. Kiernan,* 105 R.I. 299, 251 A.2d 530, 532 (1969); *State v. Birmingham,* 96 Ariz. 109, 111, 392 P.2d 775, 777 (1964) (en banc), and to provide the appellate court with a complete, certain record of the trial court's judgment, *see Ray v. City of Brush,* 152 Colo. 428, 383 P.2d 478, 479 (1963). *See generally* 4 C.J.S. *Appeal & Error* § 165 (1957 & Supp.1992) (compiling cases that require entry of judgment or order as prerequisite to appeal). Thus, the rule promotes meaningful appeals.

In contrast, requiring that a ruling be written or filed to constitute a "grant" under Rule 5–614(C) would frustrate, rather than promote, the purposes of the rule. The purpose of the thirty-day time requirement in the rule is to encourage, and perhaps require, courts to rule on a posttrial motion for a new trial within a relatively short period of time, while the court's and the parties' memories of the events at trial are fresh, so that the motion can be disposed of more satisfactorily than if a lengthy period elapsed between completion of the trial and disposition of the motion. *Cf. State v. Peppers,* 110 N.M. 393, 397, 796 P.2d 614, 618 (Ct.App.) (purpose of time limits for filing and disposing of motions

5. *See Maples v. State,* 110 N.M. 34, 39, 791 P.2d 788, 793 (1990) (Montgomery, J., dissenting) ("The essence of judicial power is adjudication....").

under NMSA 1978, § 39-1-1 (Repl.Pamp.1991)), *cert. denied,* 110 N.M. 260, 794 P.2d 734 (1990). That purpose was satisfied in the instant case.

As for the automatic denial provision of Rule 5-614(C), its purpose, or at least one of its purposes, is to assist courts with the management of their cases—that is, to provide courts with a mechanism for disposing of motions for a new trial when they are not acted on within a specified period of time. *Cf. Lovelace,* 111 N.M. at 340, 805 P.2d at 607 (one purpose of § 39-3-4(B) is to provide courts with mechanism for disposing of interlocutory appeal applications when not acted upon within 20 days). If a court acts on a motion by granting it orally within the thirty-day period, as the court did in the present case, a holding that the motion is nevertheless automatically denied if the court does not file a written order within the specified period would not further the purpose of the provision; it would not assist the court in managing its case. To the contrary, it would impede the court's management of its case by effecting a denial of a motion for a new trial when the court had already orally announced that the motion would be granted.

Accordingly, we hold that, by orally granting a motion for a new trial within thirty days of the filing of the motion, a court "grant[s]" the motion within the meaning of Rule 5-614(C) and prevents automatic denial of the motion by operation of law.[6] At least two other state supreme courts considering this issue under provisions similar to Rule 5-614(C) have reached the same conclusion. In *In re Marriage of Forsberg,* 783 P.2d 283 (Colo.1989) (en banc), the Colorado Supreme Court held that a trial court, in orally ruling on all posttrial motions within the time (sixty days) prescribed by the Colorado rules of civil procedure, precluded automatic denial of those motions by operation of law, even though the court did not sign and enter a written order until after the sixty-day period expired. The supreme court reasoned that the lower court, in orally ruling from the bench and entering a minute order, performed a judicial act and therefore "determined" the posttrial motions as required by the rule. *Id.* at 285.

Similarly, the California Supreme Court has held that a statutory provision providing for automatic denial of a motion for a new trial if not determined within a sixty-day period does not require filing or entry of the order within that period. The court explained:

> The language of [the relevant statute] indicates that, so long as the court "passes" on the motion within the sixty-day period, it has lawfully exercised its jurisdiction to determine the motion, and the filing of the formal order or findings and judgment "thereafter," when the time of filing is subsequent to the last day of the sixty-day period, does not amount to a denial of the motion by operation of law.

Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138, 140 (1935) (in bank); *see also Willis v. Superior Court,* 214 Cal. 603, 7 P.2d 303, 304 (1932) (in bank) (same); *Holland v. Superior Court,* 121 Cal.App. 523, 9 P.2d 531, 535 (1932) (same).

The Texas Supreme Court reached a contrary conclusion in interpreting a Texas rule of civil procedure. The supreme court held that a motion for a new trial is overruled by operation of law unless the court issues a written, signed order within forty-five days as required by Texas procedure. *Reese v. Piperi,* 534 S.W.2d 329, 330-31

6. Our holding in no way affects the vitality of the oft-cited propositions that court comments from the bench cannot be substituted for material facts appearing as findings in a court decision, *e.g., Ulibarri v. Gee,* 106 N.M. 637, 640, 748 P.2d 10, 13 (1987); may be used only to aid in understanding a decision that is ambiguous, *id.;* and cannot be relied upon as a formal decision on which error may be predicated, *e.g., Barreras v. New Mexico Corrections Dep't,* 114 N.M. 366, 368, 838 P.2d 983, 985 (1992). These propositions appear in civil cases and are based on a rule of civil procedure stating that findings of fact or conclusions of law not embraced in a single, written document will be disregarded. SCRA 1986, 1-052(B)(1)(g) (Repl.Pamp.1992). Our Rules of Criminal Procedure contain no similar requirement, *see* SCRA 1986, 5-605(D) (Repl.Pamp.1992); and, even if they did, the requirement would not alter our holding, which pertains to a court's ruling on a motion, not its findings and conclusions.

(Tex.1976). It reasoned that an oral pronouncement could not prevent the automatic overruling of a motion because a court could otherwise extend the time for finally disposing of a motion "far beyond the period prescribed." *Id.*

We recognize that our holding leaves the door open to possible delays by trial judges in entering final orders disposing of motions for new trials. However, we do not agree with the Texas Supreme Court that courts can defer entry "far beyond" the prescribed time period. While our Rules of Criminal Procedure do not prescribe a time limitation for entry of an order,[7] we do not believe that the absence of such a limitation means that a trial court has an infinite or indefinite time to enter an order following announcement of its decision. On the contrary, a trial court should enter its order within some reasonable amount of time. *Cf. De Lao v. Garcia,* 96 N.M. 639, 640, 633 P.2d 1237, 1238 (Ct.App.1981) (Under Rules of Civil Procedure, "judgment may be entered on a verdict or decision at anytime thereafter, and a party is entitled to have a judgment so entered unless the lapse of time is unreasonably great, some independent right has intervened, or the court has lost jurisdiction."); *Hayes v. State,* 106 N.M. 806, 808, 751 P.2d 186, 188 (1988) (stating that court must rule on motion to reduce sentence within a reasonable time and suggesting 90 days as a reasonable amount of time) (now codified in SCRA 1986, 5–801(B) (Repl.Pamp.1992)).

If a trial court unreasonably delays entry of a written order formalizing a previous oral ruling, the remedy for such unreasonable behavior is not to punish the victorious litigant, whose motion has been granted, by pretending that the trial court never ruled and that the motion was therefore automatically denied.[8] Appropriate corrective action may be obtained from this Court through a writ of mandamus or some other exercise of our power of superintending control under Article VI, Section 3 of our Constitution. *See* 55 C.J.S. *Mandamus* § 76, at 133 (1948) (higher court, by mandamus, may require a final determination and disposition of a case within a proper and reasonable time). And there may well be other measures to enforce compliance with a trial court's duty to memorialize its oral ruling in a written order within a reasonable time. If the fault lies with counsel who does not comply with a court's direction to prepare and submit a proposed written order, the trial court has ample authority to ensure compliance with its directives.

In the present case, thirty-one days elapsed between the court's oral ruling and entry of its order. While we do not necessarily condone such a delay, we cannot hold that it was unreasonable as a matter of law. Accordingly, we hold that the trial court had jurisdiction to enter the final, written order on August 3, confirming its earlier oral ruling. *See Curbello v. Vaughn,* 76 N.M. 687, 687, 417 P.2d 881, 882 (1966) (trial court retains exclusive jurisdiction of a case until entry of a proper judgment or order).

IV.

As previously indicated, the State all but abandoned its original grounds for appeal in the Court of Appeals, and it has not

7. The Rules of Criminal Procedure also prescribe no time limitation for entry of a judgment. *See* SCRA 1986, 5–701(A) (Repl.Pamp.1992) ("The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed.").

8. This was the situation in another case relied on by the State, *Chavez–Rey v. Miller,* 99 N.M. 377, 658 P.2d 452 (Ct.App.1982), *cert. denied,* 99 N.M. 358, 658 P.2d 433 (1983). There, *after entering judgment,* the trial court *failed to rule* within 30 days after defendant had filed a motion for a new trial or remittitur. A statute (NMSA 1978, § 39–1–1) provided that the court retained jurisdiction over a case for 30 days after entry of judgment, or for such further time as was necessary to rule on a motion attacking a judgment, but that any motion not ruled on within 30 days was denied by operation of law. The Court of Appeals held that the court's failure to rule on the motion within 30 days resulted in denial of the motion by operation of law and that the court thereafter lacked jurisdiction to enter an order granting remittitur. *Id.* at 379–81, 658 P.2d at 454–56. It is obvious that *Chavez–Rey* is altogether different from the case at bar.

pressed them here. In any event, we have reviewed the Court of Appeals' proposed disposition of the State's challenges to the trial court's ruling, as set out in the State's docketing statement and as responded to in the Court of Appeals' first calendar notice. Based on that review, we find no abuse of discretion by the trial court in granting defendant a new trial, for the reasons detailed in the court's oral ruling and subsequent written order, as the Court of Appeals proposed to uphold those reasons (except for the trial court's reliance on the posttrial victim-impact study) in its calendar notice.

Therefore, the order granting a new trial is affirmed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

855 P.2d 562

STATE of New Mexico, ex rel., Sammy J. QUINTANA, Chief Public Defender, and Rebecca Reese, District Public Defender for the Fifth Judicial District, Petitioners,

v.

The Hon. William J. SCHNEDAR, District Judge for the Fifth Judicial District, and the Hon. Billy V. Carpenter, Magistrate Judge for Chaves County, Respondents.

No. 21256.

Supreme Court of New Mexico.

June 23, 1993.

Rebecca Reese, Dist. Public Defender, Carlsbad and Thomas E. Dow, Asst. Public Defender, Roswell, for petitioners.

Tom Udall, Atty. Gen. and Mary Catherine McCulloch, Asst. Atty. Gen., Santa Fe, for respondents.

OPINION

FROST, Justice.

This original proceeding requires us to determine whether New Mexico district and magistrate courts have the statutory power to order the New Mexico Public Defender Department ("Department") to represent a particular "indigent" defendant when the Department decides that a particular defendant is not indigent and therefore not entitled to its legal services. De-

fendant Javier Gurrola was arrested and detained on drug charges. The Department did not designate an attorney to represent the defendant because, according to the Department, he was not eligible for indigent defense services under the Department's eligibility criteria, and he refused to contract to pay for his legal defense by the Department. At the defendant's arraignment, District Judge Schnedar ordered the Department to represent the defendant. Contending that the trial judge exceeded his jurisdiction by ordering it to furnish counsel for the defendant, the Department filed a Petition for Writ of Prohibition to prevent execution of Judge Schnedar's order. For the reasons contained herein, the petition is denied.

The Department contends that district and magistrate judges do not have authority to appoint the Department to represent defendants, primarily because it has exclusive statutory power to determine the indigence of defendants. It argues that the Public Defender Act ("PDA"), NMSA 1978, §§ 31–15–1 to –12 (Repl.Pamp.1984 & Cum. Supp.1992), specifically Section 31–15–7 (Cum.Supp.1992), supersedes conflicting provisions of the Indigent Defense Act ("IDA"), NMSA §§ 31–16–1 to –10 (Repl.Pamp.1984), and gives it this authority. For further support, the Department cites NMSA 1978, Section 34–6–46 (Repl.Pamp.1990), which states that "[t]he district court shall use a standard adopted by the public defender department to determine indigency of persons accused of crimes carrying a possible jail sentence," and identical provisions relating to other courts. *See* NMSA 1978, § 34–8A–11 (Repl.Pamp.1990) (metropolitan court); NMSA 1978, § 35–5–8 (Repl.Supp.1988) (magistrate court); NMSA 1978, § 32–1–56 (Repl.Pamp.1989) (children's or family court division of the district court).

As a backdrop to our discussion of New Mexico's statutory provisions for the legal representation of indigent defendants, we note the constitutional significance and foundation of the PDA and IDA, and the judiciary's role in the enforcement of these statutes. The Sixth Amendment to the U.S. Constitution requires that indigent criminal defendants be provided with legal representation at public expense to ensure the fairness of their trials. *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The New Mexico Constitution embraces and parallels this ideal, stating that "[i]n all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel." N.M. Const. art. II, § 14. There is no doubt that the judiciary has the inherent authority to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions. Accordingly, we have previously recognized that New Mexico courts have the inherent power to appoint counsel for indigent defendants in safeguarding the state and federal constitutional right to counsel. *See Richards v. Clow,* 103 N.M. 14, 16–17, 702 P.2d 4, 6–7 (1985). This consideration carries significant weight in our attempt to harmonize the statutes in question before us.

New Mexico statutes create an administrative system for enforcing the constitutional fundamental right to counsel, primarily through the PDA and the IDA. *State v. Rascon,* 89 N.M. 254, 257, 550 P.2d 266, 269 (1976). Construing these statutes, we must determine and effectuate the intent of the legislature. *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). In ascertaining legislative intent, the provisions of a statute must be read together with other statutes *in pari materia* under the presumption that the legislature acted with full knowledge of relevant statutory and common law. *Incorporated County of Los Alamos v. Johnson,* 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989). We also presume that the legislature did not intend to enact a law inconsistent with existing law. *Quintana v. New Mexico Dep't of Corrections,* 100 N.M. 224, 227, 668 P.2d 1101, 1104 (1983). This rule of statutory construction complements the notion that judicial repeal of legislation by implication is disfavored. *See Clothier v. Lopez,* 103 N.M. 593, 595, 711 P.2d 870, 872 (1985). Thus, two statutes covering the same subject matter should be harmonized and con-

strued together when possible, *Johnson*, 108 N.M. at 634, 776 P.2d at 1253, in a way that facilitates their operation and the achievement of their goals, *Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987). Under these rules of statutory construction, we seek to harmonize the provisions of the PDA and IDA to the fullest extent reasonable, thereby facilitating the operation of our statutory system for providing assistance of counsel to indigent criminal defendants.

There is no indication in the statutes that the PDA supersedes the IDA. Although the PDA was enacted after the IDA,[1] the Department's contention that the PDA supersedes the IDA is without merit. Incongruous language in the two statutes evidencing repeal by implication is entirely absent, and we cannot conclude that the PDA nullifies portions of the IDA simply because it was enacted more recently.

Furthermore, our courts have expressly held that the PDA and the IDA are *in pari materia*. *Rascon*, 89 N.M. at 257, 550 P.2d at 269. In *State v. Rascon*, we stated that the PDA creates the Public Defender Department to provide legal representation for defendants who are judicially determined to be indigent under the IDA. *Id.* at 257, 259–60, 550 P.2d at 269, 271–72. The Court of Appeals has also written, "A reading of the [IDA] and the [PDA] indicates that the two acts together provide a statutory scheme for providing counsel to indigent criminal defendants. The [IDA] gives indigent defendants the right to free counsel.... The [PDA], enacted later, provides an administrative agency for accomplishing this objective." *Herrera v. Sedillo*, 106 N.M. 206, 207, 740 P.2d 1190, 1191 (Ct.App. 1987).

The IDA states that "a needy person who is being detained by a law enforcement officer" is "entitled to be represented by an attorney" who "shall be provided at public expense." Section 31–16–3. The IDA unequivocally directs the courts to determine whether a person is "needy." Section 31–16–5. Section 31–16–5, "Determination of indigence," states:

> A. The determination of whether a person covered by [Section 31–16–5] is a needy person shall be deferred until his first appearance.... Thereafter, *the court concerned shall determine*, with respect to each proceeding, *whether he is a needy person.*
>
> B. *In determining whether a person is a needy person* and the extent of his inability to pay, *the court concerned may consider such factors* as income, property owned, outstanding obligations and the number and ages of his dependents....

(Emphasis added.) The IDA repeatedly refers to the courts as the proper authority for assessing a defendant's indigence. *See, e.g.*, Section 31–16–2(C) ("'needy person' means a person who, *at the time his need is determined by the court*, is unable, without undue hardship, to provide ... expenses of legal representation") (emphasis added). Construction of the PDA or other statutes addressing legal representation of indigent criminal defendants must therefore recognize and support the fact that courts are vested with the statutory authority to evaluate the indigence of criminal defendants in protecting the constitutional right to counsel.

The PDA defines the statutory duties of the Department's district public defenders in Section 31–15–10: "The district public defender *shall represent* every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment." (Emphasis added.) The compulsory nature of the mandate "shall represent" requires the Department to represent defendants who (1) are "financially unable to obtain counsel" and (2) are charged with certain crimes. *Richards*, 103 N.M. at 15–16, 702 P.2d at 5–6 (stating that the duty of the Department to

1. The PDA was enacted in 1973, 1973 N.M.Laws, ch. 156, § 1, and the IDA was enacted in 1968, 1968 N.M.Laws, ch. 69, § 58.

represent indigent criminal defendants is mandatory and clear). Since the charge against a defendant will usually make it clear whether a defendant meets the second requirement for appointment, the operative question concerns who is "financially unable to obtain counsel" and therefore entitled to representation by the Department under Section 31–15–10. Because the legislature is presumed to act with full knowledge of the law, we hold that the legislature, understanding that courts determine indigence under the IDA, enacted this section of the PDA intending "every person without counsel who is financially unable to obtain counsel" to include all persons who courts determine are "needy" under the IDA. Therefore, under the administrative system of the PDA and IDA, when a court determines that a defendant is "needy," the defendant is "financially unable to obtain counsel" under the PDA, and the Department "shall represent" the defendant pursuant to Section 31–15–10, assuming the defendant is charged with a crime carrying a possible sentence of imprisonment.[2]

The Department argues that because it has the power to "adopt a standard to determine indigency," it, rather than the courts, has the power to determine whether a particular defendant will be represented by a public defender. Section 31–15–7, enumerating the powers and duties of the Chief Public Defender, is cited for this language, as well as other sections such as Section 34–6–46, which instructs the district court to use a standard adopted by the Department in determining the indigence of defendants.

As discussed, *Rascon* ruled that the IDA and PDA are *in pari materia,* the IDA unequivocally vests the determination of indigence within the power of the courts, and the PDA directs the Department to provide legal services for indigent defendants. 89 N.M. at 257, 259–60, 550 P.2d at 269, 271–72. *Rascon,* filed in April 1976, was decided under earlier versions of the IDA and PDA, substantially similar to the versions in effect today. *See* NMSA 1953, 2d Repl.Vol. 6 (1972 & Supp.1975), §§ 41–22–1 to –10; NMSA 1953, 2d Repl.Vol. 6 (1972), §§ 41–22A–1 to –12 (Supp.1975). The PDA, Section 31–15–7(B), was amended in June 1987 to grant the Department the authority to "adopt a standard to determine indigency." 1987 N.M.Laws, ch. 20, § 1. The statutes directing various courts to use the Department's standards for determining indigence were also enacted after our decision in *Rascon. See, e.g.,* 1987 N.M.Laws, ch. 20, § 3 (enacting § 34–6–46). But this does not alter our view that the IDA and PDA are *in pari materia,* nor diminish *Rascon*'s precedential value. The legislature was presumably aware of cases such as *Rascon* and *Herrera* when it enacted these provisions, and we must ask what effect these new sections were intended to have on our construction of the IDA and PDA. We cannot hold that the legislature intended the implicit revocation of the IDA through its passage of statutes authorizing the Department to adopt standards for the courts to use in determining indigence. Such interpretations forcing repeal by implication are disfavored, *Clothier,* 103 N.M. at 595, 711 P.2d at 872, and given the state of the law before these changes, we think that the legislature would have more defin-

2. Although neither party made arguments based on § 31–16–8 of the IDA, it is worth brief mention. Section 31–16–8 directs that payment of attorney's fees under the IDA be supplied from court funds, and this section presents the only possible obstacle to ruling that "needy persons" under the IDA are entitled to the services of the Department specifically, rather than the services of other court-appointed private counsel. This section conceivably could be construed to establish two separate systems of public defense, one provided by the Department and the other provided by independent, court-appointed counsel. In our view, however, § 31–16–8 of the IDA can be read consistently with § 31–15–10 of the PDA, and it does not disrupt the statutory scheme. Furthermore, the fact that the legislature has not appropriated court funds for expenditure under the IDA for the appointment of independent counsel indicates its preference for designating public defenders under the PDA rather than independent counsel under the IDA to represent indigent defendants. *See, e.g.,* General Appropriation Act of 1992, 1992 N.M.Laws, ch. 94.

itively and unambiguously revoked the IDA if that were its intent.

Instead, we believe that the legislature enacted these statutes to modify the existing scheme by increasing the role of the Department in determining indigence. The IDA provisions are not supplanted, and we find the IDA and PDA consistent as amended: The IDA obligates courts to determine indigence, the PDA directs the Department to adopt standards for determining indigence, and other statutes instruct courts to employ those standards. Under this comprehensive scheme, the Department's standards for determining indigence are the authoritative general guide. Courts should ordinarily follow the Department's standards and defer to its recommendations in their independent evaluation of whether a defendant is "needy." In the unusual circumstance, however, when the court finds that literal application of the Department's criteria would result in an improper deprivation of counsel to a particular defendant, the court may depart from the Department's decision to deny representation. The court may do so in its sound discretion to ensure the fundamental right to counsel through its inherent authority to safeguard constitutional requirements and the statutory directive to embrace this role.

CONCLUSION

The inherent power of the judiciary to appoint counsel for indigent defendants is within the unique province of the courts to ensure the constitutionality of criminal prosecutions. The PDA and the IDA create the statutory apparatus for providing legal representation to indigent criminal defendants. These statutes and other provisions indicate that the Department will determine under its guidelines whether a particular defendant is indigent and therefore entitled to the legal assistance of a public defender. Courts should give great deference to such determinations by the Department, although they retain the ultimate authority to determine indigence and the discretionary ability to order the appointment of a public defender when it is necessary to protect the defendant's constitutional or statutory rights.

We have reviewed the facts as presented and find that the trial judge did not abuse his discretion in ordering the Department to represent the defendant. Accordingly, the alternative writ is quashed and the Petition for Writ of Prohibition is denied.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

855 P.2d 1043

P.S.G. LIMITED PARTNERSHIP, a New Mexico limited partnership, Cross-Plaintiff-Appellant,

v.

AUGUST INCOME/GROWTH FUND VII, a California limited partnership, et al., Cross-Defendants-Appellees,

and

P.S.G. LIMITED PARTNERSHIP, a New Mexico limited partnership, Third-Party-Plaintiff-Appellant,

v.

AUGUST FINANCIAL PARTNERS, August Management, Inc., a California corporation, et al., Third-Party-Defendants-Appellees.

No. 20431.

Supreme Court of New Mexico.

June 14, 1993.

Crider, Calvert & Bingham, P.C., David G. Reynolds, Albuquerque, Hatch, Allen & Shepherd, P.A., Steven S. Scholl, Albuquerque, for August Income Growth Fund VII.

Modrall, Sperling, Roehl, Harris & Sisk, Martha Brown, Kenneth L. Harrigan, Albuquerque, for August Management, Inc.

Irell & Manella, Sheldon Eisenberg, Paul T. Tsuchiya, Los Angeles, CA, for August Management, Inc.

OPINION

RANSOM, Chief Justice.

On motion of P.S.G. Limited Partnership, we granted this interlocutory appeal, *see* SCRA 1986, 12–203, to decide the extent of damages PSG as successor lessor may recover as liquidated, contractual damages against sublessees of property on which the Radisson Inn was constructed in Albuquerque.

In 1980, PSG's predecessor in interest, Ever Ready Oil Company, leased its property to Gary Willey, doing business as Village Properties, for approximately $1500 per month. In 1984 Willey assigned the ground lease to Hotel Development Corporation, an entity in which he was the principal. HDC immediately entered into a real estate mortgage and security agreement to obtain a construction loan from ITT Commercial Credit Corporation. Ever Ready subordinated its fee and lease interests to ITT, but expressly excepted its right to ground lease rental payments from the subordination agreement. After its acquisition of the lease by assignment in January of 1985, PSG entered into an amended lease with HDC, allowing another corporation in which Willey was the principal, South–West Commercial Leasing Company, to assume the original lease and allowing HDC to become the sublessee of South–West—a novation with the effect, signifi-

cantly, that HDC was no longer in privity of contract with PSG. This agreement was expressly conditioned upon HDC's ability to sell the hotel to August Income/Growth Fund VII (AIGF VII). South-West charged HDC approximately $9000 per month for the sublease even though South-West continued to be obligated for only $1500 per month to PSG. The lease and the sublease both contained a liquidated damages clause for breach of the lease wherein liquidated damages in the same amount as the reserved rents would be due in monthly installments until the premises could be re-leased. HDC and AIGF VII entered into a purchase agreement for the sale of the hotel, and AIGF VII took assignment of the sublease from HDC. HDC and AIGF VII then negotiated a transfer agreement with ITT. Under the transfer agreement, the construction loan obligations of HDC were nonrecourse as against either PSG or AIGF VII, but both had the right to cure a default. PSG assented to the assignment and to the transfer agreement.

At this point, then, *only South-West had a contractual duty to make lease payments to PSG* under the amended lease, and *only HDC had a contractual duty to make mortgage payments to ITT* on the construction loan. AIGF VII stopped making the $9000 ground lease payments to South-West, and South-West then defaulted in making its $1500 payments to PSG. AIGF VII also failed to make mortgage payments to ITT as apparently required in the purchase agreement, and HDC defaulted in its commitment to ITT, resulting in the grant to ITT of a summary judgment of foreclosure against all parties. Just before foreclosure, after terminating South-West's leasehold interest, *PSG succeeded to the rights of South-West as sublessor under the sublease* that had been assigned by HDC to AIGF VII. This gave PSG privity of contract to sue AIGF VII for lost rents and liquidated damages of $9000 per month rather than for only $1500 per month that it could claim against South-West. Willey, South-West, and HDC all failed to answer the foreclosure complaint and PSG's crossclaim (under the lease) against South-West. PSG crossclaimed (under the sublease) against AIGF VII for liquidated damages for lost rents over the balance of the lease term and for consequential damages resulting from loss of its property. PSG also sued AIGF VII's assignees—August Management, Inc. (AMI) and August Managers Associates (AMA). A foreclosure sale was held in October of 1990, the Order approving the sale was entered on January 1, 1991, and the redemption period expired on February 3, 1991.

In a partial summary judgment, the trial court limited PSG's potential damages against AIGF VII for lost rents to the date of the foreclosure sale and denied the claim for consequential damages. Since the only issue before the court was a question of law, the court must have determined that the foreclosure extinguished all liabilities arising after termination of the lease. We reverse the holding of the court on the legal issue, but we affirm the narrow decision denying consequential damages based on the sublease alone. Our reversal is based upon the liquidated damages clause. We hold that contractual damages were recoverable after termination of the lease, continuing until the end of the redemption period in February 1991.

The issue. The question on interlocutory appeal is: When the lessor of a subordinated ground lease is not a party to the mortgage, to what extent, if any, does the foreclosure of that mortgage limit the sublessee's liability to the sublessor for direct and consequential damages caused by breach of its contractual obligations under the sublease?

Sublessee's position. AIGF VII and co-defendants AMI and AMA (collectively, "sublessee") argue, in short, that because the public foreclosure sale of the real estate securing ITT's senior lien extinguished both PSG's subordinate sublease and the status of PSG as landlord, all rights and obligations under the sublease were terminated and there is no factual or legal basis for a claim under the sublease. AMI and AMA also argue that a junior lienholder's entitlement to further rental payments is

cut off once a mortgagee takes possession and perfects its senior lien on the rents, regardless of the expiration of the redemption period. They cite *Boise Joint Venture v. Moore,* 106 Or.App. 83, 806 P.2d 707 (1991) (decided under Idaho law). "[O]nce its status as landlord terminated, BJV lost its right to rely on the agreement between the parties. Idaho law subordinates contract law to the common law landlord-tenant rules...." *Id.* 806 P.2d at 708. They also cite *Dover Mobile Estates v. Fiber Form Products, Inc.,* 220 Cal.App.3d 1494, 270 Cal.Rptr. 183, 186 (1990), which states:

> A lease which is subordinate to the deed of trust is extinguished by the foreclosure sale. A foreclosure proceeding destroys a lease junior to the deed of trust, as well as the lessee's rights and obligations under the lease. As stated in section 15.1 of the Restatement Second of Property, Landlord and Tenant (1977), "[i]f the sale of the landlord's interest is forced by one having a paramount title to that of the tenant, such as a mortgagee whose interest existed at the time the lease was made, the tenant's interest will be defeated by the sale." (*Id.* at p. 90 [cmt. h].)

Id. (citations omitted) (alteration in original).

Contract rights distinguished from leasehold rights. If PSG's claims were based only on its property rights flowing from privity of estate under the sublease, AIGF VII's arguments regarding extinguishment would be dispositive because the foreclosure action destroyed all possessory claims that were junior to the senior lien. *Dover* is not persuasive in the disposition of this case, however, because *Dover* was an action to recover rent based on the leasehold rights and not an action for damages based on contract provisions. This is a crucial distinction because in an action for rents the lease must be in force, but in an action for damages the lease may be terminated. The *Dover* court explained that because the lease had been terminated, there was neither privity of contract nor of estate between the lessee and the foreclosure purchaser and therefore no landlord-tenant relationship. *Id.* The court did not discuss the contract rights of the original lessor and lessee and stated that its decision comported with the basic notions of priorities and notice—both property law concepts. *Id.*

To better understand the distinction between property rights and contract rights in a lease, it must be understood that a lease is both a conveyance and a contract. *See generally* 1 Milton R. Friedman, *Friedman on Leases* § 1.1 (3d ed. 1990) [hereinafter *Friedman on Leases*]. A lease is "both the conveyance of a protected possessory interest to the tenant and a contract specifying numerous rights and duties of the parties...." 2 Richard R. Powell, *Powell on Real Property* ¶ 221(2), at 16–11 (rev. ed. 1993). Two kinds of rights exist under a lease: property rights (which include the right to receive or sue for unreceived rents, the right to occupy the leasehold, and the reversionary right in the leasehold) and contract rights (which include the right to sue for breach of the various express and implied covenants, and the right to consequential damages resulting from breach of the lease contract).

It is apparent that before deciding whether a lessor of a subordinated lease is barred from seeking recovery for damages after a foreclosure action, a court first must determine what kind of action is claimed. If it is a property action for unpaid rent after the foreclosure or for possession of the property the claim is barred as a matter of law because of the termination of the lease by the foreclosure. If it is a contract action for damages for breach of a covenant or to enforce a liquidated damages clause, the claimant may be entitled to relief because, although the foreclosure terminates the property rights (and causes of action) under the lease, it does not vitiate the surviving contract claims.

General Precedent. In *Boise Joint Venture v. Moore,* 106 Or.App. 83, 806 P.2d 707 (1991), the landlord sought two remedies. The first was found by the court to be a property right claim for lost rents accruing after the termination of the lease. The second claim was based on a

contract right for consequential damages resulting from loss of the investment in the property caused by foreclosure. The determinative fact for the denial of the first remedy was that the contract provision on which the landlord based his right did not expressly survive the termination of the lease. Therefore, under Idaho law, once status as landlord terminated, the landlord lost its right to rely on the agreement between the parties. *Id.* 806 P.2d at 708. As Idaho law subordinates contract law to common law landlord-tenant rules, the court therefore had no agreement on which to award recovery for lost rents or lost profits after surrender and acceptance. There was no lease provision nor any other evidence indicating the parties agreed the landlord should recover its investment as consequential damages, so the court determined that the loss was not a foreseeable consequence of the failure to pay rents. In contrast, in *Rodeway Inns of America v. Alpaugh,* 390 So.2d 370, 371–73 (Fla.Dist. Ct.App.1980), the court affirmed the trial court's enforcement of a liquidated damages clause that survived the termination of the lease by its express terms and that required the defendant to continue making mortgage payments after eviction.

Sublessee, at oral argument, claimed that the liquidated damages clause was not intended to apply to termination by foreclosure, but this argument fails. The damages provided for in that clause arose upon default in the payment of rent. AIGF VII defaulted in the rent payments, the damages provision became operative, and the termination by foreclosure was a later event. The liquidated damages provision became effective upon default, not upon termination. The liability before foreclosure was for rent; after foreclosure, the liability was for damages. No party contends that the liquidated damages clause is otherwise ambiguous.

In his exhaustive treatise on leases, Professor Friedman explains that, if a lease does not contain a liquidated damages clause, the termination of the lease terminates the liability of the tenant that would otherwise accrue. This is true whether that termination is a result of tenant insolvency proceedings or termination by other means. 2 *Friedman on Leases* § 16.2, at 971; § 16.3, at 987. He states that "*Hermitage* and other cases are clear—after a lease has been terminated, the landlord's claim under a survival clause is not for rent, but for *damages.*" 2 *id.* § 16.302, at 1009 (footnote omitted). The *Hermitage* case is a New York opinion by Chief Judge Cardozo who wrote, "After the tenant had been ejected in summary proceedings, the lease was at an end. What survived was a liability, not for rent, but for damages." *Hermitage Co. v. Levine,* 248 N.Y. 333, 333, 162 N.E. 97, 97 (1928). In another New York case, the lessee claimed that termination of the lease terminated it for all purposes because it annulled the relationship between landlord and tenant. The court held that termination of a lease does not terminate independent covenants designed to furnish security to the lessor for injury arising out of the tenant's breach. *Michaels v. Fishel,* 169 N.Y. 381, 382, 62 N.E. 425, 426 (1902).

Although no New Mexico case has discussed at length the difference between property and contract claims under a lease, in *Mitchell v. Lovato,* 97 N.M. 425, 640 P.2d 925 (1982), this Court affirmed the plaintiff's assertion that the termination of his lease by foreclosure did not destroy his right to collect damages for breach of express covenants in the lease contract. "[D]espite Mitchell's termination of the lease, he may still maintain an action for breach of covenants contained in the lease." *Id.* at 427, 640 P.2d at 927. In *Mitchell,* the lessor sought damages for breach of a terminated commercial lease. Specifically, he sought damages for breach of the express covenant not to transfer a liquor license and for breach of the express covenant to return the property in its original condition. As defendants AMI and AMA noted in their brief, Mitchell could not collect damages for future rent (which was a property right under the lease) because the lease had been terminated. *Id.* Further, however, Mitchell was denied damages for breach of contract only because he had not satisfied his burden of

proving damages with reasonable certainty. *Id.* at 428, 640 P.2d at 928.

Foreclosure does not affect contract rights that do not relate to property rights. A foreclosure action is one in which property rights concerning land are determined. In contrast, PSG's claims are all based upon its contract rights for damages against AIGF VII, and none of these rights were destroyed by the property foreclosure action. In fact, PSG expressly excepted its rights to ground lease payments when it subordinated its property rights to the mortgage. Subordination agreements are used to adjust the priorities between commercial tenants and the mortgagee of the real estate. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 12.9, at 911 (2d ed. 1985). A lease may be terminated in a foreclosure, and as a result, the lease provisions relating to the property rights are extinguished. However, independent contract provisions relating to the liabilities of the parties may survive. *See Speckner v. Riebold,* 86 N.M. 275, 277, 523 P.2d 10, 12 (1974) (explaining that foreclosure judgment only operates to declare the property rights of the parties in the mortgaged premises); *Cal–Am Corp. v. Spence,* 659 F.2d 1034, 1037 (10th Cir.1981) (construing New Mexico law and stating that all general rules regarding leases are subject to the overriding proposition that parties are at liberty to control the terms of their relationship by contract); *Burns Trading Co. v. Welborn,* 81 F.2d 691, 695 (10th Cir.) (stating that the general rule is that a tenant is not liable for damages arising after termination of a lease, but parties may contract otherwise), *cert. denied,* 298 U.S. 672, 56 S.Ct. 936, 80 L.Ed. 1394 (1936); *Central Trust Co. v. Wolf,* 255 Mich.. 8, 237 N.W. 29, 31 (1931) (parties to lease may contract that provisions of the lease for damages due to default shall survive the restitution of the premises). A foreclosure judgment has no effect upon contract rights that survive the termination and do not affect the foreclosing party. The contractual rights and obligations arising from leases are governed by the law of contracts. *See Boss Barbara, Inc. v. Newbill,* 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982) (a lease is a contract and is governed by general contract principles of good faith and commercial reasonableness).

Clauses for liquidated damages survive. Despite the fact that general terms of a lease are no longer operative upon termination, clauses for liquidated damages survive.

> The obligation of the tenant to pay rent does not arise for any period after the lease is terminated. *The parties to the lease may provide that the tenant will continue to make payments in an amount equal to the rent he had been paying, or in some other amount, when the lease is terminated prematurely. Under such an agreement, the landlord may collect these payments, but the payments due will not be rent ....*

Restatement (Second) of Property, Landlord & Tenant § 12.1 cmt. g, at 389 (1977) (emphasis added). "A survival clause may apply during the existence of a lease, as well as thereafter." 2 *Friedman on Leases* § 16.303, at 1009. AIGF VII clearly agreed to a liquidated damages clause, and the trial court erred in granting partial summary judgment denying PSG's claim for liquidated damages.

Application of the liquidated damages clause. Paragraph 25(e) of the sublease provides:

> Tenant ... shall also pay Landlord as liquidated damages, for the failure of Tenant to observe and perform Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the Demised Premises for each month of the period which would otherwise have constituted the balance of the term of the lease.... Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease.... Landlord agrees to use its best efforts to mitigate all damages and to relet the Demised Premises in the event of any default specified herein.

The liquidated damages clause in every lease and sublease in this case is limited by the covenant that the "[l]andlord agrees to use its best efforts to mitigate all damages *and to relet the Demised Premises* in the event of any default specified herein." (Emphasis added). When PSG failed to cure the mortgage default and the foreclosure resulted in termination of PSG's leasehold estate, PSG could no longer perform that covenant. The clause providing that "[a]ny such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease" indicates that the intent of the parties was not that the total rents due under the lease became due upon termination. Therefore, damages under the liquidated damages clause must be limited to the rents reserved to the date PSG could no longer relet the premises, or February 3, 1991. This was the date that the foreclosure sale became final, and PSG could no longer cure the default and exercise its right of redemption. *See Plaza Nat'l Bank v. Valdez,* 106 N.M. 464, 465, 745 P.2d 372, 373 (1987).

Consequential damages. Having determined that PSG has a valid contract claim for liquidated damages, we now turn to the question of whether PSG has a claim against AIGF VII for consequential damages arising either from the breach of the express covenant to return the leased property or from any implied covenant to maintain PSG's reversionary interest. Section 8(e) of the sublease provided:

> On the last day or sooner termination of the lease, tenant shall quit and surrender the Demised Premises, and the buildings and permanent improvements then thereon, broom clean and in good condition and repair (ordinary wear and tear excepted).

PSG claims that this provision requires return of the property to it upon termination of the lease and that even if it does not, damages for loss of the property are nonetheless recoverable as consequential damages.

The non-recourse provisions. Sublessee stands on the fact that the parties agreed that the mortgage obligations were nonrecourse against AIGF VII and that neither the sublease nor any other written contract ever imposed any obligation on the subtenant to prevent foreclosure on the mortgage. Under nonrecourse provisions in the transfer agreement, neither AIGF VII nor PSG had an obligation to cure any default by HDC, though AIGF VII made the mortgage payments and both had the right to cure. Sublessee also claims that by voluntarily making its interests in the property subordinate to the mortgage, PSG assumed the risk of losing that interest if it allowed the property to go to foreclosure. It further claims that it satisfied section 8(e) of the sublease by surrendering the premises to the foreclosure purchaser.

The contract claim for consequential damages for loss of the reversionary interest in the *fee* based on a covenant to pay ground rents can only be made against South–West, which held the ground lease and was ultimately responsible for returning the fee to PSG. Neither South–West nor PSG evicted AIGF VII; nor did PSG cure the default in mortgage payments. When the termination of the sublease occurred by operation of law, AIGF VII was obliged to vacate the premises and surrender them to ITT because the sublease was no longer in effect.

Without covenant to preserve the reversionary estate, consequential damages not foreseen. There were no provisions in the sublease for the tenant to make mortgage payments, and none for tenant's failure to do so. The parties could have agreed to some sort of liquidated damages agreement, as they did for failure to pay rent, but they did not. The failure of AIGF VII to pay ground rents to South–West did not result in foreclosure of HDC's mortgage. The mortgage payments and mortgage foreclosure were contemplated by neither an express nor an implied term of the sublease. "[C]onsequential damages must be damages that were or should have been reasonably contemplated by the parties." *Terrel v. Duke City Lumber Co.,* 86 N.M. 405, 424, 524 P.2d 1021, 1040 (Ct.App. 1974), *aff'd in part and rev'd in part on*

other grounds, 88 N.M. 299, 540 P.2d 229 (1975). Under these circumstances, we will not imply a covenant to preserve the reversionary estate upon the sublessee.

Third-party beneficiary claim preserved but not decided. At oral argument, PSG raised a theory of recovery for consequential damages against AIGF VII based on PSG's position as third-party beneficiary to the purchase agreement between HDC and AIGF VII, wherein AIGF VII did expressly covenant to pay the mortgage payments. It should be noted that in its response to the motion for summary judgment, PSG alluded to the fact that AIGF VII was "further obligated to see that the land which PSG owned and which had been subordinated to ITT's mortgage, along with all buildings and improvements, were returned to PSG as soon as the lease terminated." PSG also requested that this Court limit its decision on AMI/AMA's Motion for Summary Judgment to the only issue raised—whether the mortgage foreclosure absolved AIGF VII of any liability for damages for breach of the sublease. In its response to the motion for summary judgment, PSG noted that there were factual issues as to the intent of the parties on the issue of preservation of the reversionary interest. We believe that these objections preserved PSG's right to raise that theory of recovery and to go forward with proof. PSG is not precluded from raising at trial its theory of recovery for consequential damages based on its status as third-party beneficiary to the purchase agreement.

Conclusions. For the above reasons, we reverse the district court's grant of partial summary judgment and hold that while foreclosure of a mortgage does terminate all junior lease rights and obligations for future rent and for possession of the mortgaged property, it does not terminate liability for breach of express or implied covenants, prevent enforcement of independent liquidated damages clauses, or eliminate consequential damages for breach of the underlying contract for a lease or sublease. We further hold that AIGF VII and its assigns are liable for the amount agreed to in the liquidated damages clause. That amount is the reserved rents which were to be received as liquidated damages until February 3, 1991. We remand this issue to the district court for evidence and a finding as to the exact amount. We affirm the district court's decision denying PSG's claim for consequential damages based upon the sublease and remand to the trial court for further disposition.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

855 P.2d 1050

Andres VARELA, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 20170.

Supreme Court of New Mexico.

June 15, 1993.

Robert T. DeVoe, Albuquerque, for petitioner.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

RANSOM, Chief Justice.

Andres Varela appealed to the district court from his metropolitan court conviction on a charge of driving while intoxicated. When the appeal had not been resolved within the six-month time limit set by SCRA 1986, 7–703(J) (Repl.Pamp.1990), Varela petitioned this Court for an extension and was denied. The district court dismissed and Varela appealed to the Court of Appeals, which affirmed—refusing to consider an ineffective assistance of counsel claim because it believed that this Court already had decided that claim in reviewing the petition for extension. Under writ of certiorari, we reverse the Court of Appeals and the district court, and we remand to the district court.

Facts. On August 1, 1990 Varela filed his notice of appeal to the district court along with an affidavit of indigency. The district court entered an order granting free process, and in accordance with his right to counsel, *see Peralta v. State,* 111 N.M. 667, 667, 808 P.2d 637, 637 (1991), the public defender entered an appearance on Varela's behalf. Appeals from the metropolitan court to the district court are de novo. SCRA 7–703(I). Four times the case was set for trial and four times the trial was postponed. On September 13 the trial was continued when Varela's court-appointed counsel failed to subpoena a necessary witness. A November 15 setting was vacated on motion of the court because it was presiding over another trial. On December 6 the district attorney requested a continuance; and on December 27 the trial could not be held because a defense witness, who had been subpoenaed, failed to appear. A fifth trial date was set for February 7, 1991. February 2 marked the passage of six months since filing of the notice of appeal, and at the February 7 hearing the court told Varela that it was going to dismiss because the court was without jurisdiction to hear the case. Varela responded with a claim of ineffective assistance of counsel based on the public defender's failure to take action to get an extension of the six-month time limit. The court advised Varela that it would allow him to file a motion for a hearing on his ineffective assistance claim if he filed it by February 15. Varela filed the motion and a hearing was set for March 20.

The lone exception to the six-month limit is a one-time extension of up to ninety days that may be requested by petition to a justice of the New Mexico Supreme Court.

SCRA 7–703(K). A petition requesting such an extension must be filed within the six-month time period and may be granted upon a showing of good cause. *Id.* On February 18, Varela filed a petition for an extension with this Court. However, since Varela's petition for an extension was not filed within the six-month limitation period, it was denied.

By the time of the March hearing, the district court was faced not only with the expired time period for the appeal, but also with this Court's denial of an extension. The district court refused to consider the ineffective assistance claim on the grounds that it lacked jurisdiction. The district court dismissed and remanded to the metropolitan court pursuant to Rule 7–703(J). Varela appealed the dismissal to the Court of Appeals, which affirmed in a memorandum opinion.

Habeas corpus is not the appropriate remedy for this case. The attorney general argues that a state habeas corpus action is Varela's appropriate remedy. The United States Supreme Court has said:

> If ... a state court chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client's due process rights. For instance the Kentucky Supreme Court itself in other contexts has permitted a post-conviction attack on the trial judgment as "the appropriate remedy for frustrated right of appeal,"; this is but one of several solutions that state and federal courts have permitted in similar cases.

Evitts v. Lucey, 469 U.S. 387, 399, 105 S.Ct. 830, 838, 83 L.Ed.2d 821 (1985) (citation and footnote omitted). New Mexico recognizes habeas corpus as appropriate for making a record on ineffective assistance claims, *see State v. Stenz,* 109 N.M. 536, 539, 787 P.2d 455, 458 (Ct.App.), *cert. denied,* 109 N.M. 562, 787 P.2d 842 (1990); but, while a threat of incarceration under the metropolitan court conviction probably would support such a proceeding, we do not believe it comports with judicial economy to require collateral proceedings in this case. We already have before us the question of whether the district court had jurisdiction to decide the ineffective assistance question.

The six-month rule is not jurisdictional. Varela argues, and the State and Court of Appeals have acknowledged, that expiration of the six-month time limit is not a jurisdictional bar to commencement of a trial de novo. While this particular point has not been decided by this Court under Rule 7–703, the Court of Appeals has twice held that rules governing the time for de novo appeals to district courts from inferior courts are not jurisdictional. *See State v. Hrabak,* 100 N.M. 303, 305, 669 P.2d 1098, 1100 (Ct.App.1983) (holding six-month magistrate court rule should not be asserted where delay was not defendant's fault); *Village of Ruidoso v. Rush,* 97 N.M. 733, 734, 643 P.2d 297, 298 (Ct.App.1982) (holding six-month municipal court rule not mandatory where state agreed not to assert rule). Rather than being a jurisdictional limitation, the six-month limit for appeals to the district courts is, like the time constraints of our rules of appellate practice, a "mandatory precondition" to the exercise of the court's jurisdiction. *See Govich v. North Am. Sys., Inc.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991).

In most circumstances, a district court must adhere to the rules of procedure and dismiss a case where a mandatory precondition has not been met. Exceptions to the enforcement of the six-month rule have been made, however, where enforcement of the mandatory precondition would not be just and fair. *Hrabak,* 100 N.M. at 305, 669 P.2d at 1100 (affirming district court's refusal to dismiss where delay was due to court's failure to set a hearing date); *Rush,* 97 N.M. at 734, 643 P.2d at 298 (reversing dismissal where state agreed to not assert the six-month rule); *see Govich,* 112 N.M. at 230, 814 P.2d at 98 (facilitating right of first appeal by liberally construing a procedural rule). The district court retained jurisdiction over the appeal from metropolitan court, including jurisdiction to hear the ineffective assistance claim, even though Varela had not met the mandatory

precondition that the appeal be heard within six months.

Ineffective assistance of counsel claim not considered in denial of extension. The most important distinction between this case and *Hrabak* and *Rush* is the additional fact that this Court denied Varela's request for an extension of the six-month time limit. We note that the district court initially announced that it intended to dismiss Varela's appeal, but, prior to the petition for extension, the court agreed to hear Varela's ineffective assistance claim. It was only after the extension was denied by this Court that the court refused the hearing.

In affirming the dismissal, the Court of Appeals stated that it was "not persuaded that the supreme court would automatically deny a petition as untimely when defendant claims that the untimeliness was a consequence of ineffective assistance of counsel." The record of the Rule 7–703(K) petition to this Court reflects the following argument by Varela:

a. Mr. Varela received ineffective assistance of counsel when the Public Defender failed to provide an attorney to review hearing notices that come into the metropolitan division to check for settings outside the rule deadline. At present, no attorney reviews the file upon receipt of a hearing notice, and there is thus no institutional check upon settings outside the rule. Instead, a letter about the hearing date is sent to the client; this notice is generated by secretarial staff and a computer which prints the letters overnight.

b. An appellate court has the inherent power and the duty to guard against a denial of a defendant-appellant's right to an appeal which is caused by ineffective assistance of counsel. The Appellate Defender presented to the court and counsel copies of *State v. Duran,* 105 N.M. 231, 731 P.2d 374 (Ct.App.1986) and *State v. Peppers,* 110 N.M. 393, 796 P.2d 614 (Ct.App.1990).

c. There is a conflict of interests in the Public Defender Department's continued representation of Mr. Varela, as his effective representation requires that his counsel raise a meritorious claim of ineffective assistance of counsel against the department. Bob Cooper was present to assist and to explain to Mr. Varela what was happening, but he was not prepared to question witnesses and make a record.

The Court of Appeals declined to decide the identical issue that it believed was presented to and necessarily decided by this Court. In the State's memorandum in response to Varela's motion, the only substantive argument raised in opposition to an extension was that Varela filed the petition requesting an extension after the time for filing it had run. In point of fact, the denial of the request for an extension was based solely on the fact that the extension was requested after the expiration of the time limitation of Rule 7–703(K), and this Court did not consider whether ineffective assistance of counsel may have overcome the mandatory precondition to the district court's exercise of jurisdiction. We do so now.

Ineffective assistance of counsel claim should be heard on the merits. What is at issue is the tension between a mandatory precondition to the district court's exercise of jurisdiction and Varela's constitutional right to effective assistance of counsel. *Compare Lowe v. Bloom,* 110 N.M. 555, 798 P.2d 156 (1990) and *Govich,* 112 N.M. at 230, 814 P.2d at 98 *with Peralta,* 111 N.M. at 668, 808 P.2d at 638.

In *Lowe,* the appellant in a civil case did not make a bona fide attempt to timely invoke appellate jurisdiction. While noting that our appellate courts liberally construe appellate rules when their jurisdiction has been invoked, this Court stated that discretion cannot be exercised concerning rules that govern proper invocation of appellate jurisdiction. *See Lowe,* 110 N.M. at 555–56, 798 P.2d at 156–57. In *Govich,* we explained that, except when sought to excuse or justify an improper attempt to invoke our jurisdiction with respect to the mandates for time and place of filing a notice of appeal, discretion may be exercised in the grant of an exception to a mandatory precondition to the exercise of jurisdiction. *See Govich,* 112 N.M. at 230,

814 P.2d at 98 (deferring to the policy that courts should facilitate the right to one appeal and recognizing that the purpose of the notice rule was vindicated in that case). In *Peralta,* the trial court dismissed an appeal at trial de novo solely because the appellant's appointed counsel was not prepared to proceed. We held that the appellant could not be charged with his court-appointed counsel's lack of preparedness and that justice and fairness precluded dismissal of the appeal based upon that lack of preparedness. Mandatory preconditions to the exercise of the court's jurisdiction were not at issue, but rather at issue was the constitutional right to counsel in either a trial of guilt or on first appeal. *See Peralta,* 111 N.M. at 668, 808 P.2d at 638.

When the state purports to satisfy a criminal defendant's constitutional right to counsel, we are inclined to believe that ineffective assistance of the appointed counsel may overcome the mandatory precondition to the district court's exercise of jurisdiction under Rule 7–703(J). We hold the district court did have jurisdiction to hear evidence and resolve the tension between the mandatory precondition to the exercise of its jurisdiction and Varela's constitutional right to effective assistance of counsel. It was, therefore, error for the district court to dismiss the appeal on that basis.

We remand this case to the district court for a hearing on Varela's ineffective assistance claim. If the claim is found to be meritorious, his appeal on the driving while intoxicated charge may be heard immediately by the district court.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

855 P.2d 1054

DONA ANA SAVINGS AND LOAN ASSOCIATION, F.A., a federally chartered savings and loan association, Plaintiff–Appellant,

v.

James DOFFLEMEYER, a single man, et al., Defendants–Appellees.

No. 20561.

Supreme Court of New Mexico.

June 22, 1993.

Miller, Stratvert, Torgerson & Schlenker, Joel T. Newton, Las Cruces, for plaintiff-appellant.

Lloyd O. Bates, Jr. Law Firm, Kyle W. Gesswein, Las Cruces, for defendants-appellees.

OPINION

FROST, Justice.

This matter comes before us on appeal from an order granting summary judgment in favor of the defendants/appellees and against the plaintiff/appellant Dona Ana Savings & Loan Association ("DASL"). DASL held deficiency judgments against James Dofflemeyer, and it attempted to execute on the judgments by garnishing his funds in two annuities. In the district court, Dofflemeyer claimed that the annuity funds were exempt from attachment under NMSA 1978, Sections 42–10–2 and –3 (Cum.Supp.1992). The district court found that the funds were exempt and dismissed DASL's writ of garnishment. DASL appeals, and we reverse and remand with instructions.

FACTS

In the return of DASL's initial writ of execution, Dofflemeyer attached a Claim of Exemptions form listing a certificate of deposit in the amount of $54,000.00. Before DASL could garnish this asset, however, Dofflemeyer liquidated it and used the proceeds to purchase one of his two annuities. In addition, he sold certain real estate to his sister and used the proceeds to purchase the other annuity. The record shows that Dofflemeyer purchased the annuities in contemplation of bankruptcy and in furtherance of his need for an immediate source of monthly income. He listed his sister, who was also his business partner, as beneficiary under both annuities.

ISSUES

While he expressed concern about whether Dofflemeyer's claim of exemption on the annuities was legitimate, the trial judge found that the clear language and plain meaning of the statutes compelled him to allow the exemptions and to dismiss DASL's writ of garnishment with regard to the two annuities. On appeal, DASL claims that the annuities are not exempt from garnishment under Sections 42–10–2 and –3. DASL argues that the district court erred by not going beyond the face of the statutes to construe their purpose. A strict or literal reading of the statute, according to DASL, defeats the intended object of the legislation and operates an injustice. DASL claims that going beyond a cursory review of the statute, it is apparent that the statutes do not allow a debtor to shield funds from creditors on the eve of execution.

Dofflemeyer, on the other hand, claims that he simply was providing himself with retirement funds as a self-employed person, which is proper under the statutes. According to Dofflemeyer, the statutes clearly provide exemptions for annuities and retirement funds, and thus it is unnecessary to look beyond the plain meaning of the statute.

In addition to the annuities, DASL notes that it filed a writ of garnishment against monies owed to Dofflemeyer by a third party to which he also claimed exemption. While pointing this out, however, DASL does not allege any error in this claimed exemption, nor does it request any relief as to this claim by Dofflemeyer. In addition, the district court did not address this issue in its decision to allow the exemptions. Accordingly, we will consider only the issue of whether the annuity funds are exempt under Sections 42–10–2 and –3.

DISCUSSION

Section 42–10–2 states that:

> any interest in or proceeds from a pension or retirement fund of every person supporting only himself is exempt from ... attachment, execution or foreclosure by a judgment creditor.

NMSA 1978, § 42–10–2 (Cum.Supp.1992). Section 42–10–3 states:

> The cash surrender value of any life insurance policy, the withdrawal value of any optional settlement, annuity contract or deposit with any life insurance company, all weekly, monthly, quarterly, semi-annual or annual annuities, indemnities or payments of every kind from any life, accident or health insurance policy, annuity contract or deposit heretofore or hereafter issued upon the life of a citizen or resident of the state of New Mexico, or made by any such insurance company with such citizen, upon whatever form and whether the insured or the person protected thereby has the right to change the beneficiary therein or not, shall in no case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or who is protected by said contract, or who receives or is to receive the benefit thereof, nor shall it be subject in any other manner to the debts of the person whose life is so insured, or who is protected by said contract or who receives or is to receive the benefit thereof, unless such policy, contract or deposit be taken out, made or assigned in writing for the benefit of such creditor.

Section 42–10–3. In this case, DASL claims that Dofflemeyer essentially transmuted one form of nonexempt funds into another form of nonexempt funds, or that he fraudulently converted nonexempt funds into exempt funds. Dofflemeyer asserts that the district court found that there was no evidence of abuse or fraud on his part and that the plain meaning of the statutes allows for the exemptions.

[redacted] In interpreting a statute, a court not only looks to the plain meaning of the language employed, but also to the object of the legislation. *See Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 254, 741 P.2d 1374, 1375 (1987); *see also D'Avignon v. Graham*, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct.App.1991) (noting that formalistic and mechanistic interpretations of statutes have been rejected). Our interpretation of statutes must be consistent with

legislative intent, and our construction must not render a statute's application absurd, unreasonable, or unjust. *City of Las Cruces v. Garcia,* 102 N.M. 25, 26–27, 690 P.2d 1019, 1020–21 (1984).

We hold that the object of the exemption statutes quoted above is to allow for exemptions in certain funds, but that it does not allow a debtor to find shelter in these statutes by perpetrating a fraud upon his or her creditors. On their face, the statutes allow for unlimited exemptions for life insurance, annuities, and pension and retirement funds. At least one judge, however, has noted the potential for abuse of the legitimate exemptions under the statutes. *See In re Zouhar,* 10 B.R. 154, 157 (Bankr.D.N.M.1981). The legislature did not intend "that these generous provisions should be prostituted to the encouragement of extravagance, and the evasion of just indebtedness...." *New Mexico Nat'l Bank v. Brooks,* 9 N.M. 113, 129, 49 P. 947, 952 (1897). We believe, and the record shows, that DASL presented evidence that demonstrates the possibility of abuse and which at least escapes dismissal on summary judgment. *See* SCRA 1986, 1–056 (Repl.Pamp.1992); *Koenig v. Perez,* 104 N.M. 664, 665, 726 P.2d 341, 342 (1986) (summary judgment is proper only if there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law).

To determine whether a debtor fraudulently converted nonexempt assets into exempt assets, we turn to the Uniform Fraudulent Transfer Act. *See* NMSA 1978, §§ 56–10–14 to –25 (Cum.Supp.1992). The Uniform Fraudulent Transfer Act is a revision of the Uniform Fraudulent Conveyance Act[1] with "conveyance" being replaced with "transfer" in recognition of the Act's applicability to transfers of personal property as well as real property. *See* 7A *Uniform Laws Ann.,* Business & Financial Laws at 640 (1985) ("ULA"). Sections 56–10–18 and –19 of our Uniform Fraudulent Transfer Act[2] are essentially a recodification of Sections 56–10–7 and –4 of our Uniform Fraudulent Conveyance Act, which voided transfers made as a result of either constructive or actual fraud. *See Western Prod. Credit Ass'n v. Kear,* 104 N.M. 494, 495, 723 P.2d 965, 966 (1986) (construing Uniform Fraudulent Conveyance Act); *First Nat'l Bank in Albuquerque v. Abraham,* 97 N.M. 288, 292, 639 P.2d 575, 579 (1982) (same). Accordingly, the noninclusive enumeration of factors contained in Sections 56–10–18 and –19 are to be considered when determining whether the funds that ordinarily would be exempt from attachment under Sections 42–10–2 and –3 should be set aside as the result of a voidable transfer.

Our statutes were not meant to be construed in isolation, but in conjunction with the general body of the law as a whole. *Reese v. Dempsey,* 48 N.M. 417, 423, 152 P.2d 157, 161 (1944). The fact that different statutes are found in different parts of our New Mexico Statutes Annotated does not mean that they cannot or should not be construed together. When two statutes can be construed together to preserve the purposes to be obtained by both, they should be so construed as long as no contradiction would result. *State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth.,* 76 N.M. 1, 29, 411 P.2d 984, 1004 (1966). We believe that the Uniform Fraudulent Transfer Act and the exemption statutes should be construed together to obtain the purposes of both.

Dofflemeyer's purchase of the annuities when his creditors were in "hot pursuit," his apparent admission to his broker that the purchase was a preliminary step into bankruptcy, and his request for an immediate source of income from his threatened nonexempt funds all raise a genuine issue of material fact as to whether his conversion of nonexempt funds, which were in imminent danger of attachment, was done with the intent to defraud

1. *See* NMSA §§ 56–10–1 to –13 (Repl.Pamp.1986) (the old Uniform Fraudulent Conveyance Act).

2. Sections 4 and 5 of the Uniform Act were codified as Sections 56–10–18 and –19 in our Code. *See* ULA at 652–58.

DASL. On the other hand, it may very well be true that Dofflemeyer legitimately sought a source for retirement funds or life insurance. In any event, it is our holding today that the conversion of nonexempt funds into funds that are ordinarily exempt under Sections 42–10–2 and –3 are not automatically protected from attachment by creditors without an analysis of whether the transfer served the underlying purpose of the exemption statutes and was not in furtherance of an intent to defraud creditors.

DASL makes two additional arguments against Dofflemeyer's claim of exemption. First, DASL claims that Dofflemeyer created what amounts to a self-settled spendthrift trust, which is contrary to the common law governing trusts. As noted above, however, the legislature provided for virtually unlimited exemptions for funds qualifying under Sections 42–10–2 and –3. We decline to incorporate the common law on trusts into the exemption statutes as that would effectively amount to rewriting the statutes, thus usurping the legislature's function. "Courts will not add words except where necessary to make the statute conform to the obvious intent of the legislature, or to prevent its being absurd." *State v. Nance,* 77 N.M. 39, 46, 419 P.2d 242, 247 (1966), *cert. denied,* 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967); *see also State ex rel. Barela v. Board of Educ.,* 80 N.M. 220, 222, 453 P.2d 583, 585 (1969) (courts not permitted to read into statute language that is not there, especially when statute makes sense as written).

Second, DASL claims that the exemptions fail because Dofflemeyer's annuities did not originate from a recognized retirement or pension fund. DASL asserts that only an "interest in or proceeds from a pension or retirement fund ... is exempt from ... attachment, execution or foreclosure by a judgment creditor." Section 42–10–2. Simply calling the annuities "retirement funds," DASL argues, does not entitle them to protection under the exemption statutes. We do not adopt DASL's restrictive view that Dofflemeyer's annuity funds must originate from some designated employment-related retirement or pension fund to qualify for exemption under Section 42–10–2.

CONCLUSION

A debtor may buy annuities and claim that they are exempt, but a debtor may not claim an exemption that is a result of fraud and thus avoid creditors' claims by using Sections 42–10–2 and –3 as a guise or ruse. To hold that a debtor automatically may find refuge in these statutes on the eve of execution would render the statutes' application absurd, unreasonable, and unjust. We emphasize, however, that the purposeful conversion of nonexempt funds into exempt funds immediately prior to bankruptcy or threatened execution by a creditor is not fraudulent *per se;* it is only one indicium of fraud and does not necessarily by itself make out a claim of fraudulent conversion. *See Zouhar,* 10 B.R. at 156. To defeat the exemptions under the statutes here, there must be a showing of an intent to defraud creditors and that showing must be consistent with the provisions of the Uniform Fraudulent Transfer Act.

We conclude that the district court's interpretation of the exemption statutes is consistent with their plain meaning, but that a genuine issue of material fact exists as to whether Dofflemeyer engaged in acts of fraudulent conversion under the Uniform Fraudulent Transfer Act. Accordingly, we reverse the summary judgment and remand this case to the district court for a determination consistent with this opinion of whether Dofflemeyer fraudulently converted his annuity funds from nonexempt to exempt status.

IT IS SO ORDERED.

BACA, MONTGOMERY and FRANCHINI, JJ., concur.

RANSOM, C.J., dissenting.

RANSOM, Chief Justice (dissenting).

I respectfully dissent. Upon careful study of Dona Ana's briefs and exhibits supporting the allegation of Dofflemeyer's intent to defraud, I fail to find sufficient

evidence to raise a genuine issue of material fact. Clearly, in anticipation of Dona Ana's attempt to attach the nonexempt funds, Dofflemeyer simply transferred assets into exempt annuities for no purpose other than retirement. *In re Mueller,* 71 B.R. 165 (D.Kan.1987), *aff'd,* 867 F.2d 568 (10th Cir.1989), is instructive as to whether such a transfer of assets was fraudulent as to Dona Ana. There, the court alluded to the common-law judicial exemption (developed before the bankruptcy act) that was applied whenever a creditor challenged a transfer as a fraudulent conveyance. The exception arose only for a creditor who had a "peculiar equity" in the assets converted to exempt property. "Peculiar equities" exist either when converted funds are fraudulently procured from the creditor or when the creditor has a lien on the assets used to procure the exempt property. *Id.* at 167. Dona Ana has provided no evidence that the funds were fraudulently procured or that the annuities were procured directly or indirectly by the sale of property on which it held a lien.

It is now true that *any* creditor may challenge a transfer of assets under the Fraudulent Transfer Act, but in determining intent to defraud, consideration must be given to the status of the creditor seeking to challenge the transfer. If the creditor does not have a peculiar equity or the transferor does not have an ulterior fraudulent purpose, more is required than just the fact that the debtor acquired exempt retirement annuities in anticipation of a lien. *See, e.g., In re Reed,* 700 F.2d 986, 991 (5th Cir.1983) (noting that converting nonexempt assets into exempt assets is frequently motivated by the intent to put those assets beyond the reach of the creditors (which is the function of an exemption) and giving as an example of actual intent to defraud, a debtor who on the eve of bankruptcy borrows money that he then immediately converts into exempt assets); *In re Barash,* 69 B.R. 231 (Bankr.D.Kan. 1986) (holding that because none of the nonexempt assets used to reduce exempt homestead mortgage were obtained with funds procured from or secured to a creditor and no other extrinsic evidence was shown of actual intent to defraud, transfer was not fraudulent even though made just prior to filing of bankruptcy). *But see In re Schwingle,* 15 B.R. 291 (W.D.Wis.1981) (holding that actual intent to place property beyond reach of creditors is fraudulent).

The trial court already has made several uncontroverted findings that support Dofflemeyer's claim that his transfer of nonexempt assets into exempt retirement annuities was legitimate and with the intent to provide for his retirement rather than for some ulterior purpose:

5. Defendant Dofflemeyer is 77 years old and retired.

6. Dofflemeyer was self-employed and put aside for his retirement the funds that Dona Ana seeks to garnish.

7. Dofflemeyer derives his income from Social Security and the annuities that Dona Ana seeks to garnish.

8. Dofflemeyer's Social Security income is $700 per month and is not sufficient to pay his medical expenses, taxes, auto expenses, food, clothing and utility expenses.

9. Dofflemeyer receives $710 per month from the annuities that Dona Ana seeks to garnish.

10. Without the income from the retirement fund/annuities, Dofflemeyer would lack the resources to continue his independent living existence.

11. Without the income from the retirement fund/annuities, Dofflemeyer would either be forced on the public dole or would increase the likelihood of his becoming a public charge.

The Legislature has expressed clearly its intent to protect the retirement income of individuals. This Court has long held that exemption statutes are to be liberally construed in favor of the debtor. *See In re Spitz Bros.,* 8 N.M. 622, 635, 45 P. 1122, 1125 (1896). Like the homestead exemption statute, the retirement 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." *See Hewatt v. Clark,* 44 N.M. 453,

457, 103 P.2d 646, 649 (1940). "By permitting the debtor to keep those assets necessary for his economic survival, state exemption laws fulfill important social policies which must be balanced against the need for creditor protection." Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy,* 31 Rutgers L.Rev. 615, 615 (1978). "[I]t is consistent to permit the debtor to ... purchase new exempt property on the eve of bankruptcy, so long as the items ... purchased will at least partially relieve the debtor of the need for governmental assistance." *Id.* at 627.

The trial court had before it evidence that Dofflemeyer's intent in transferring his assets from certificates of deposit to retirement annuities was to provide retirement income in order to pay for necessities. There was no extrinsic evidence that Dofflemeyer's intent was to defraud his creditors. "Fraud can never be predicated on an act which the law permits." *In re Tveten,* 402 N.W.2d 551, 553 (Minn.1987). Therefore, I would affirm the trial court.

855 P.2d 1060

Ralph ERWIN, as next friend of his son Albert Erwin, a minor, Plaintiff-Appellee,

and

Ralph ERWIN, Individually, Plaintiff,

v.

The CITY OF SANTA FE, A Municipal Corporation, Defendant-Appellant.

No. 13620.

Court of Appeals of New Mexico.

May 21, 1993.

Steven K. Sanders, Albuquerque, for plaintiff-appellee.

R. Galen Reimer, Paul L. Civerolo, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendant-appellant.

Kenneth C. Downes, Mark Patrick Geiger, McClaugherty, Silver & Downes, P.C., Albuquerque, for amicus curiae State of N.M., Risk Management Div.

William H. Carpenter, Michael B. Browde, Albuquerque, for amicus curiae N.M. Trial Lawyers Ass'n.

OPINION

BLACK, Judge.

Defendant City of Santa Fe ("the City") brings this interlocutory appeal from the district court's denial of the City's motion for summary judgment. On July 12, 1990, fourteen-year-old Albert Erwin was hit by a car while riding his bicycle; on March 5, 1991, Plaintiffs, Albert and his father, Ralph Erwin, brought suit against the City on a theory of negligent maintenance and inspection of the street where the accident occurred. The Tort Claims Act requires notice of a claim to the governmental entity involved within ninety days of the occurrence. NMSA 1978, § 41-4-16 (Repl.Pamp.1989). The City received notice 125 days after the accident. The district court dismissed the father's claim because of the late notice, but denied the City's motion for summary judgment against the child on the ground that the time limitation of Section 41-4-16 was tolled because Albert was a minor. The City filed a motion seeking interlocutory review of the denial of its motion for summary judgment against the child. We find the present record raises questions of material fact as to the City's motion and affirm.

SECTION 41-4-16 DOES NOT VIOLATE DUE PROCESS ON ITS FACE

Plaintiffs' action against the City is governed by the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (Repl.Pamp.1989 & Cum.Supp.1992) (the Act). The public policy of New Mexico is that a governmental entity, which includes the City, shall only be liable within the limitations of the Act. Section 41-4-2(A); § 41-4-3(B), (C); *see Cole v. City of Las Cruces,* 99 N.M. 302, 305, 657 P.2d 629, 632 (1983) (a city is a governmental entity under the Act).

Section 41-4-16(A) provides:

> Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented ... within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

Appellee argues *Tafoya v. Doe,* 100 N.M. 328, 670 P.2d 582 (Ct.App.), *cert. quashed,* 100 N.M. 327, 670 P.2d 581 (1983), "held that application of the ninety (90) day notice requirement of the New Mexico Tort Claim Act to a child 'is unreasonable and violates due process.'" We think this reads *Tafoya* too broadly. A statute may violate due process on its face, or as applied to a particular litigant. *New Mexico State Racing Comm'n v. Yoakum,* 113 N.M. 561, 829 P.2d 7 (Ct.App.1991), *cert. denied,* 113 N.M. 352, 826 P.2d 573 (1992). A statute which is facially constitutional may, then, be unconstitutional as applied. *Id.; Jiron v. Mahlab,* 99 N.M. 425, 426, 659 P.2d 311, 312 (1983).

The application of the notice requirements of the Act has been challenged on due process grounds and we have held the application of the Act to be both constitutional and unconstitutional, depending on the facts presented. In *Ferguson v. New Mexico State Highway Comm'n,* 99 N.M. 194, 656 P.2d 244 (Ct.App.1982), *cert. denied,* 99 N.M. 226, 656 P.2d 889 (1983), the plaintiffs argued the notice requirements

of Section 41–4–16 violated due process both on the face of the statute and as applied to them. Speaking for this Court, Chief Judge Walters considered the facts relevant to whether the notice provisions of the Act, as applied to incapacitated or deceased victims, violated due process:

> Appellants contend that the period of giving notice denies an incapacitated victim due process of law. Here, however, Schlueter and the David Chavez Estate had retained counsel before the six-month limit for giving notice had run. There is no showing that counsel, acting on their behalf, could not have given notice within the time provided by the statute. Without a showing that notice could not be given within the statutory period, plaintiffs necessarily urge that the additional time for notice to be given on behalf of an incapacitated person or on behalf of the estate of a deceased violates due process as a matter of law. Our answer to this contention is the same as our answer to the following issue.

Ferguson, 99 N.M. at 196, 656 P.2d at 246. Chief Judge Walters then rejected the argument that the ninety-day notice limitation was unreasonably short per se, and concluded, "The notice provisions of the Act are not unconstitutional on either ground urged by plaintiff." *Id.* at 197, 656 P.2d at 247.

In *Tafoya,* this Court was called upon to determine whether the ninety-day notice requirement violated due process guarantees when applied to a different set of facts. In that case, the plaintiff mother received a transfusion of Rh positive blood at Carrie Tingley Hospital in March 1972. *Tafoya,* 100 N.M. at 330, 670 P.2d at 584. It was undisputed the mother was in fact Rh negative. After she became pregnant, her physician discovered the Rh sensitization in her blood and alerted her to the likelihood of a blood immunization problem in the child. *Id.* In August 1979, the baby was born with a severely involved blood immunization condition which required numerous transfusions. *Id.* This Court, again speaking through Chief Judge Walters, found there was a fact question sufficient to preclude summary judgment as to when the mother knew she was injured and thus when she had a duty to give notice of her tort claim to Carrie Tingley. Chief Judge Walters analyzed how the notice requirement of Section 41–4–16 would apply to the infant:

> It cannot be doubted that the baby in this case, from the date of her birth until she was a mere eleven months old, was infinitely less able to comply with the statutory 90–day notice requirement of § 41–4–16 than were any of the minor plaintiffs in the above cited cases, or those in *McCrary v. City of Odessa,* 482 S.W.2d 151 (Tex.1972); *Turner v. Staggs,* 89 Nev. 230, 510 P.2d 879 (1973); *City of Barnesville v. Powell,* 124 Ga. App. 132, 183 S.E.2d 55 (1971); *Lazich v. Belanger,* 111 Mont. 48, 105 P.2d 738 (1940). All of these cases reflect the view that one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitutions.
>
> ... There is nothing suggesting the baby was incapacitated from giving notice by reason of injury, § 41–4–16(B); thus the baby was required to give notice under § 41–4–16(A) within 90 days after the occurrence giving rise to the baby's claim. In this case, the claim arose when the baby was born, and the baby was required to give notice not later than the 91st day of her life. In the absence of a provision, *compare* § 41–4–16(C), providing for notice on the baby's behalf, application of the notice provision to the baby is unreasonable and violates due process.

Id. at 332, 670 P.2d at 586.

Contrary to Appellee's assertion, then, we do not believe *Tafoya* held that application of the notice provision of Section 41–4–16(A) to any minor, whatever the circumstances, would violate due process. Nor would such a broad reading of *Tafoya* be consistent with our decision in *Howie v. Stevens,* 102 N.M. 300, 694 P.2d 1365 (Ct. App.1984), *cert. quashed,* 102 N.M. 293,

694 P.2d 1358 (1985). In *Howie,* the plaintiff was fifteen years old at the time he was injured in an on-the-job accident in February 1977. His employer paid the minor's medical bills but did not provide workmen's compensation benefits. *Id.* at 301, 694 P.2d at 1366. The plaintiff enlisted in the Navy and was discharged based on the discovery of his permanent back damage. The plaintiff then sought tort damages and workmen's compensation benefits in December 1980, more than three years after the accident. *Id.* This Court held that the application of the one-year statute of limitations to bar the minor's workmen's compensation claim did not violate the plaintiff's right to due process:

> A material fact to the issue of a denial of due process would be that plaintiff *could not* file suit prior to the expiration of the limitation period. Plaintiff's minority does not create an issue as argued by plaintiff.... Unlike the 90–day old infant in *Tafoya v. Doe,* 100 N.M. 328, 670 P.2d 582 (Ct.App.1983), there are no facts in the record to show that plaintiff, employed since the age of fourteen, was unable to file suit. (*Tafoya* involved giving notice for purposes of the Tort Claims Act; however, it is analogous because notice was jurisdictional and would have defeated the infant's claim.) Application of the limitation period does not deprive plaintiff of his right of action without due process.

102 N.M. at 304, 694 P.2d at 1369.

Due process is not a technical abstraction unrelated to time, place, and circumstances, but rather an embodiment of fundamental ideas of fair play and justice. *Lassiter v. Department of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981); *In re Oliver,* 333 U.S. 257, 282, 68 S.Ct. 499, 512, 92 L.Ed. 682 (1948) (Rutledge, J., concurring). Due process, then, is a malleable principle which must be molded to each situation, considering both the rights of the government and the rights of the individual. *In re Valdez,* 88 N.M. 338, 341, 540 P.2d 818, 821 (1975). Application of due process principles is therefore intensely practical and the nature of due process negates inflexible procedures. *Goss v. Lopez,* 419 U.S. 565, 578, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975); *Gonzalez v. Gonzalez,* 103 N.M. 157, 163, 703 P.2d 934, 940 (Ct.App.1985).

In the instant case, the district court found that Albert was hospitalized and incapacitated for sixteen days. The district court also recognized there was "a fact question regarding when Plaintiffs retained counsel for this claim."

While the district court went on to conclude that "any minor solely because of his 'minor' status is not required to give any notice within ninety days under the Tort Claims Act," we are not persuaded that the district court erred in denying the City's motion. As we have noted, interpretation and application of due process principles are founded upon an intensely practical process. Under SCRA 1986, 1–056(C) (Repl.1992), the City as the moving party was required to show that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." The City relied on Albert's failure to comply in a timely fashion with the notice provisions of Section 41–4–16(A). As we have construed that provision, there are factual issues in this case that preclude summary judgment. They include the question of when Albert retained counsel, whether he was otherwise able to comply, and whether, based on the facts, application of the notice provision to him would violate due process. Because of these factual issues, we conclude that, although the district court construed *Tafoya* too broadly, the district court did not err in denying the City's motion for summary judgment. *See Naranjo v. Paull,* 111 N.M. 165, 170, 803 P.2d 254, 259 (Ct.App.1990) (district court will be affirmed when result correct for a reason not relied on below).

While we disagree with the district court's broad reading of *Tafoya,* on this record we affirm the denial of the City's motion for summary judgment.

IT IS SO ORDERED.

MINZNER, C.J., concurs.

APODACA, J., specially concurs.

APODACA, Judge, specially concurring.

Although I concur in the majority's conclusion that the trial court's denial of summary judgment should be affirmed, I disagree with both the majority's analysis and its interpretation of *Tafoya v. Doe,* 100 N.M. 328, 670 P.2d 582 (Ct.App.), *cert. quashed sub. nom. Carrie Tingley Hosp. v. Tafoya,* 100 N.M. 327, 670 P.2d 581 (1983). The majority, in my view, has adopted an unworkable, fact-based interpretation of *Tafoya* that will lead eventually to confusion for the trial courts and bar, as well as unnecessary appeals. This is so because neither the courts nor trial bar would have any guidance or criteria concerning the question of whether sufficient facts are present in a particular case to toll the limitations period. Rather, I would hold that the trial court correctly determined that, under *Tafoya,* minors are excused from complying with the notice requirement contained in NMSA 1978, Section 41–4–16(A) (Repl.Pamp.1989).

I disagree with the majority's conclusion that *Tafoya* did not hold that application of the notice requirement to any minor would violate due process. *Tafoya* stated:

> All of these cases reflect the view that one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitutions.

Tafoya, 100 N.M. at 332, 670 P.2d at 586. Although not discussed by the majority, the cases relied on in *Tafoya* involved minors as old as nineteen years of age. *McDonald v. City of Spring Valley,* 285 Ill. 52, 120 N.E. 476 (1918) (age seven); *Grubaugh v. City of St. Johns,* 384 Mich. 165, 180 N.W.2d 778 (1970) (age nineteen); *McCrary v. City of Odessa,* 482 S.W.2d 151 (Tex.1972) (age eighteen); *Cook v. State,* 83 Wash.2d 599, 521 P.2d 725 (1974) (en banc) (age thirteen). Additionally, *Tafoya* noted:

> It is axiomatic that the constitutional provision of due process extends to protect that "property" construed to be a vested right and that generally an accrued right of action is a vested property right which may not be arbitrarily impinged.
>
> ....
>
> To take away [plaintiff's] cause of action ... because [being under legal disability] he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law.

Tafoya, 100 N.M. at 331, 670 P.2d at 585 (quoting *Grubaugh,* 180 N.W.2d at 781, 783). As observed in *Tafoya,* minors are incapable of appointing an agent or an attorney, and therefore a minor should not be left to the " 'whim or mercy of some self-constituted next friend to enforce its rights.' " *Id.* at 332, 670 P.2d at 586 (quoting *McDonald,* 120 N.E. at 478). Additionally, I point out that, in the time since *Tafoya* was decided, the legislature has not chosen to make the notice requirement explicitly applicable to minors, with or without limitation.

The majority believes that reading *Tafoya* as barring application of the notice requirement to any minor is inconsistent with *Howie v. Stevens,* 102 N.M. 300, 304, 694 P.2d 1365, 1369 (Ct.App.1984), *cert. quashed,* 102 N.M. 293, 694 P.2d 1358 (1985). I respectfully disagree. First, *Howie* was a workers' compensation case, and as such, did not directly address the notice requirement of the Tort Claims Act. *Tafoya* was mentioned only as a case with facts "analogous" to those in *Howie.* I myself would not draw that analogy. Second, when *Howie* was decided, it was well established that minors did not receive any extension to limitation periods for workers' compensation actions. *Howie,* 102 N.M. at 304, 694 P.2d at 1369. Finally, I believe that *Howie* misconstrued *Tafoya* as being fact-based. In my view, the majority perpetuates the error by continuing that reading of *Tafoya.* Indeed, to the extent that *Howie* may be interpreted as the majority suggests, I would limit its application

strictly to its facts in workers' compensation cases, or overrule it altogether.

In summary, because I would hold that, under *Tafoya,* minors are excused as a matter of law from complying with the 90-day notice requirement, I concur in the result only and do not join in the majority's analysis and discussion.

856 P.2d 251

Mary COWAN, Plaintiff–Appellee,

v.

David POWELL, Defendant–Appellant.

No. 13522.

Court of Appeals of New Mexico.

June 24, 1993.

John W. Reynolds, Silver City, for plaintiff-appellee.

Anthony F. Avallone, Thomas R. Figart, Law Systems of Las Cruces, P.A., Las Cruces, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant David Powell (Defendant) appeals from a jury verdict for Plaintiff Mary Cowan (Plaintiff) in which the jury awarded Plaintiff zero dollars in damages in a defamation case. Although Defendant raises four issues on appeal, he fails to indicate in his brief-in-chief how two of these issues were preserved below. Thus, we do not address them. *See* SCRA 1986, 12–213(A)(3) (Repl.1992) (brief-in-chief required to contain argument stating how each issue was preserved below). We consolidate the remaining two issues and rephrase them as one issue—whether a verdict for Plaintiff but awarding Plaintiff no damages is, as a matter of law, a verdict for Defendant. The answer to this question determines which party was the prevailing party and therefore entitled to an

award of costs in the trial court. We hold that, under the two-step process established for defamation suits under New Mexico's uniform jury instructions, *see* SCRA 1986, 13–1002 and 13–1010 (Repl.1991), the jury's verdict was one in favor of Plaintiff and was not inconsistent. We thus conclude that the trial court did not err in refusing to grant Defendant's motion for judgment notwithstanding the verdict and in awarding costs to Plaintiff.

FACTS

Plaintiff, an administrator at Western New Mexico University (University), sued Defendant, a University professor, for defamation. Among other instructions, SCRA 13–1002 and SCRA 13–1010 were given to the jury. Additionally, two verdict forms were submitted to the jury. One stated, "We find for the Plaintiff in the sum of $____ for actual damages and award $____ for punitive damages." The other verdict stated, "We find for Defendant Powell." The jury verdict entered stated, "We find for the Plaintiff in the sum of $0 for actual damages and award $0 for punitive damages. Signed, Jim Matthews, Foreman."

After the jury was excused, Defendant moved for judgment notwithstanding the verdict, requesting the trial court to enter judgment for Defendant. The trial court denied the motion and rendered a judgment on the verdict, awarding Plaintiff $1,620.10 as costs.

DISCUSSION

Generally, when a jury verdict is contradictory or confusing, the trial court has a duty to point out the inconsistency to the jury and send the verdict back with appropriate instructions to agree on the correct form of a verdict. *See Marr v. Nagel,* 59 N.M. 21, 32, 278 P.2d 561, 567 (1954); *Waisner v. Jones,* 103 N.M. 749, 750, 713 P.2d 565, 566 (Ct.App.1986). If the jury fails to reach an agreement on the verdict, the appropriate remedy is to grant a new trial. *Waisner,* 103 N.M. at 750, 713 P.2d at 566. This procedure was not followed in this case. Instead, Defendant moved for judgment notwithstanding the verdict, requesting the trial court to enter judgment for Defendant. Defendant argues on appeal, as he did in the trial court, that, as a matter of law, the jury verdict was essentially a verdict for Defendant because it indicated that Plaintiff failed to prove damages.

SCRA 13–1002(B), which outlines the various elements of a cause of action for defamation, states in part:

> To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:
>
> ....
>
> (8) The communication proximately caused actual injury to plaintiff's reputation....

SCRA 13–1010 states in part:

> If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury proximately caused by the defamatory communication.
>
> Plaintiff claims and has the burden of proving that the defamatory communication proximately caused one or more of the following injuries:
>
> ....
>
> In determining the amount of damages, you may only award money to compensate for the above-listed actual injuries proved by the plaintiff to have been suffered by [him] [her]. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries. In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

These jury instructions clearly establish a two-step process for reaching a verdict: the jury first determines, under SCRA 13–1002, whether the plaintiff was defamed and then, under SCRA 13–1010, determines the amount of compensation, if any, the plaintiff should receive. SCRA 13–1010 does not expressly prohibit, should the jury decide in favor of the plaintiff, the

award of zero dollars in damages. Additionally, SCRA 13–1002 required Plaintiff only to prove that she suffered actual injury to her reputation as one of the elements of the cause of action; it did not require that she prove that the injury was for monetary damages. *Cf. Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1989) (actual injury in defamation action not limited to out-of-pocket loss). Although the issue raised in this appeal may have been avoided had the jury awarded Plaintiff some nominal amount such as one dollar or one cent in damages, common sense would tell us that that is exactly what the jury was attempting to do by its verdict—find that Plaintiff had indeed been injured but that she sustained very little or nominal damages. In either case, it is ultimately a symbolic gesture indicating both a moral and legal victory of sorts. We thus determine that the portion of the verdict finding Defendant liable to Plaintiff was not nullified by the award of zero dollars in damages. This determination is reinforced by the jury's rejection of the form of verdict stating "We find for Defendant Powell."

We believe our holding is supported by well-established New Mexico law that jury instructions are to be considered as a whole. *State v. Duncan*, 113 N.M. 637, 644, 830 P.2d 554, 561 (Ct.App.1990), *aff'd*, 111 N.M. 354, 805 P.2d 621 (1991). Additionally, since the uniform jury instructions were adopted, trial courts must give them without substitution or substantive modification. *Id.* Here, the trial court presented SCRA 1986, 13–2002 (Repl.1991), which directs the jury to consider the instructions given as a whole, without emphasizing one instruction or disregarding others. There is a presumption that jurors will follow the instructions they are given. *State v. Clark*, 108 N.M. 288, 310, 772 P.2d 322, 344, *cert. denied*, 493 U.S. 923, 110 S.Ct. 291, 107 L.Ed.2d 271 (1989). Thus, we presume the jury here applied the analysis set out in the instructions: first, determining whether Plaintiff had established Defendant's liability, and next, determining the amount of damages that would compensate her.

The New Mexico cases relied upon by Defendant, *Marr*, 59 N.M. at 31–33, 278 P.2d at 567–68, and *Callaway v. Olguin*, 83 N.M. 767, 497 P.2d 978 (Ct.App.1972), do not compel reversal. First, they were decided before the adoption of the Uniform Jury Instructions.

Second, the fact situations in both *Marr* and *Callaway* are distinguishable. In *Marr*, a personal injury case, special interrogatories were submitted to the jury. One asked the jury to determine whether the defendants were negligent in causing the auto accident. The jury answered this interrogatory affirmatively. The jury was then asked to assess damages, if any, in favor of Marr, Russell, and J.V. Russell. They awarded damages to Marr and Russell, who were involved in the accident, but wrote "none" next to the name of J.V. Russell, Russell's husband. The jury was not asked whether it found in J.V. Russell's favor and against the defendants on his claim for deprivation of the services of his wife. Consequently, the jury's verdict was confusing because it was not clear whether the jury intended to find for J.V. Russell on his cause of action. *Marr*, 59 N.M. at 30–31, 278 P.2d at 567–68.

In *Callaway*, the trial court had directed a verdict for the plaintiff on the issue of liability, and the only issue submitted to the jury was the amount of damages. *Callaway*, 83 N.M. at 768, 497 P.2d at 979. The jury's only option, if it wanted to find for the defendant, was to award the plaintiff zero dollars in damages. *Id.* at 769, 497 P.2d at 980. On the other hand, under the facts of this appeal, the jury had the option under the instructions of finding for Defendant. It clearly rejected that option under the form of verdict it elected to adopt. Thus, unlike in *Marr*, the verdict was not ambiguous, and, unlike in *Callaway*, the verdict was not intended to be a verdict for Defendant.

The other cases relied upon by Defendant are also unpersuasive. *Schiavone Construction Co. v. Time, Inc.*, 646 F.Supp. 1511 (D.N.J.1986), *aff'd in part and rev'd in part*, 847 F.2d 1069 (3d Cir.

1988), is inapplicable to the facts of this appeal because the case concerned the trial court's determination that the plaintiff was "libel-proof." As a result, the plaintiff could not maintain a cause of action for libel. *Bytner v. Capital Newspaper, Div. of Hearst Corp.*, 112 A.D.2d 666, 492 N.Y.S.2d 107 (1985), *aff'd*, 67 N.Y.2d 914, 501 N.Y.S.2d 812, 501 N.Y.S.2d 812 (1986), involved the dismissal of the plaintiff's cause of action because the plaintiff, a public figure, had failed to prove the malice or reckless disregard required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 286–88, 84 S.Ct. 710, 729–730, 11 L.Ed.2d 686 (1964). *Bytner*, 492 N.Y.S.2d at 109. Neither case included facts analogous to this appeal.

Although *Lakian v. Globe Newspaper Co.*, 399 Mass. 379, 504 N.E.2d 1046 (1987), appears similar to the facts of this appeal in that the jury, seemingly contradictorily, determined that portions of an article about the plaintiff were defamatory but nonetheless did not award the plaintiff any damages, *Lakian* also does not require reversal. In that case, the trial court entered a judgment that the plaintiff would recover nothing and awarded the defendants their token statutory costs. *Id.* 504 N.E.2d at 1047. The plaintiff argued he was entitled to nominal damages as a matter of law. *Id.* The court rejected his argument because he had allowed the jury to be instructed that the plaintiff had to prove actual injury and that the jury "may" award nominal damages if actual but insignificant injury was proven. *Id.* at 1048. The jury was not required to award nominal damages. *Id.* In this circumstance, the plaintiff accepted that he would receive nominal damages only if actual injury was found. *Id.* at 1049. Additionally, the court disapproved of the plaintiff's taking an appeal when the most he could gain was nominal damages of $1.00. *Id.* *Lakian* did not hold that, as a matter of law, the jury's verdict was a verdict for the defendants.

Finally, none of these cases apparently involves jury instructions similar to New Mexico's uniform jury instructions. We thus decline to follow them.

CONCLUSION

We hold that SCRA 13–1002 and 13–1010, read together, establish a two-step process under which the jury first determines whether the defendant is liable for defamation and then decides the amount of damages to be awarded. We also hold that the jury instructions do not require a plaintiff to prove that her injuries have a monetary value as part of her case. We thus conclude that, under the peculiar procedural facts of this appeal, the trial court did not err in refusing to grant Defendant's motion for judgment notwithstanding the verdict and in entering a judgment awarding costs to Plaintiff. We therefore affirm.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

856 P.2d 569

STATE of New Mexico, Plaintiff–Appellee,

v.

George UNGARTEN, Defendant–Appellant.

No. 14039.

Court of Appeals of New Mexico.

June 10, 1993.

Michael Casey, Albuquerque, for defendant-appellant.

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

OPINION

DONNELLY, Judge.

Defendant appeals his conviction of child abuse (no death or great bodily harm) following a jury trial. Two issues are presented on appeal: (1) whether the charge of child abuse was supported by substantial evidence; and (2) whether the trial court erred in instructing the jury as to the elements of child abuse where Defendant has asserted a claim of self-defense. For the reasons discussed herein, we reverse.

FACTS

The events giving rise to this case grew out of an altercation between Defendant and his neighbors. Defendant and Mary Hooper, Defendant's girlfriend and housemate, lived in one side of a duplex; the nearly eleven-year-old child, alleged to have been the victim of child abuse, and the child's mother lived in the adjoining duplex. On May 4, 1991, Defendant rebuked the child and told him in a stern manner to keep the gate to the back yard closed. The child reported this admonition to his mother, saying, " 'George scared me,' " and " 'He just scared me real bad.' " The mother, accompanied by the child, went next door to speak to Defendant about the incident. She knocked on Defendant's front door but got no response.

At this point, the child's father drove up and the mother informed her ex-husband that her neighbor had frightened their son. The child's father then went to Defendant's front door and began knocking on the door. Defendant was unable to find the key to open his front door and both he and the child's father exchanged profane remarks through the locked door. Hooper testified that the child's father threatened Defendant and demanded that Defendant open the door. Shortly thereafter, Defendant exited the house through the back door carrying a knife. Defendant testified he took the knife for self-defense. Defendant demanded that the child and the child's parents leave the property, and began gesturing with the knife in an angry manner. During the course of the argument, the father picked up a tree limb. Hooper testified that the father voiced threats toward Defendant and that she telephoned the police. Defendant testified that when he first exited his house he held the knife at his side, and that he only raised the knife after he had been struck on the arm with a tree limb picked up by the child's father.

In contrast to the testimony presented by Defendant, the child's mother and father testified that, as the incident progressed, Defendant became more agitated and began waving the knife around in a threatening manner, thereby menacing both the child and his parents; and that Defendant used the knife to cut at a trellis and vines near the front porch of his residence.

The child testified that his father held the tree limb in front of his body and fended off "[o]ne or two" jabs by Defendant. Although the child was not physically harmed by Defendant, the child testified that at one point during the altercation the knife wielded by Defendant came close to his body. The child testified that Defendant waved the knife around and he felt "like my body and life was in danger." During most of the confrontation, the child was standing several feet behind his father and was later directed to get inside the father's van that was parked in the street. When Defendant drew back toward his house, the child's father followed him back to the porch, trying to get Defendant to come out from the front of his residence.

Witnesses at the trial included the child, the child's father and mother, two neighbors, Defendant, Hooper, and four police officers. Testimony of the neighbors corroborated the fact that Defendant was acting in a loud, angry, and belligerent manner toward the child's father. Defendant testified that during the events in question

his attention was focused on the child's father, not the child, and he denied endangering or harming the child.

After the police arrived, Defendant was arrested and charged with three counts of aggravated assault (consisting of one count each against the child, the father, and the mother), and one count of child abuse. Following a jury trial, the jury acquitted Defendant of each of the three counts of aggravated assault on the child and his parents, but convicted Defendant of child abuse.

I. *SUFFICIENCY OF THE EVIDENCE*

Defendant argues that since the child was not physically injured or touched by him during the events in question, there was insufficient evidence to establish that he threatened or endangered the child so as to warrant submission of the charge of child abuse to the jury.

In reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, we review the record to determine whether substantial evidence, either direct or circumstantial, exists such that a rational jury could have found proof beyond a reasonable doubt of facts with respect to every element essential to a conviction. *State v. Garcia,* 114 N.M. 269, 273–74, 837 P.2d 862, 866–67 (1992); *see also State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). In applying this standard we view the evidence in a light most favorable to the State, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict of the jury. *State v. Cotton,* 109 N.M. 769, 771, 790 P.2d 1050, 1052 (Ct.App.), *cert. denied,* 109 N.M. 751, 790 P.2d 1032 (1990).

NMSA 1978, Section 30–6–1(C) (Cum.Supp.1992) has been characterized as a strict liability statute. *State v. Leal,* 104 N.M. 506, 509, 723 P.2d 977, 980 (Ct.App. 1986). Proof of criminal intent is not required to establish the crime of child abuse. *State v. Fuentes,* 91 N.M. 554, 557, 577 P.2d 452, 455 (Ct.App.), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978). A defendant may also be convicted of child abuse, even though the child does not suffer a physical injury. *See* § 30–6–1(C)(1) (child abuse may exist where a defendant places a child "in a situation that may endanger the child's life or health"); *see also People v. Harris,* 239 Cal.App.2d 393, 48 Cal.Rptr. 677, 680–81 (1966) (actual injury to a child need not be proven where a statute declares it a crime to cause or permit a child to be placed in a situation dangerous to the child's life or health); *see generally* Milton Roberts, Annotation, *Validity and Construction of Penal Statute Prohibiting Child Abuse,* 1 A.L.R.4th 38, § 15(c), at 86 (1980).

In order to prove the offense under Section 30–6–1(C)(1), the State is required to prove beyond a reasonable doubt that Defendant "knowingly, intentionally or negligently, and without justifiable cause, ... placed [the child] in a situation that *may* endanger the child's life or health[.]" (Emphasis added.) The term "may," as used in Section 30–6–1(C)(1), does not connote a mere possibility, however remote, that harm may result from Defendant's acts; instead, we conclude that the legislature intended the phrase "may endanger" to convey a more restrictive meaning in child abuse cases, i.e., "a reasonable probability or possibility" that the child will be endangered. *See State v. Fisher,* 230 Kan. 192, 631 P.2d 239, 242 (1981) (word "may" as used in Kansas child abuse statute given restrictive construction, indicating reasonable probability or likelihood the child would be placed in situation whereby that child's life or health will be endangered); *cf. State v. Roybal,* 115 N.M. 27, 33, 846 P.2d 333, 340 (Ct.App.), *cert. denied,* 114 N.M. 550, 844 P.2d 130 (1992) (where the defendant left his child in his car with his wife while he bought a minor amount of heroin nearby, there was insufficient evidence to indicate that the child, from mere proximity to the drug transaction, "was in fact placed in danger" to support child abuse conviction).

Both the child and his parents testified that Defendant brandished the knife in a threatening and menacing manner. The child also testified that, at the beginning of

the altercation, he was standing by his father and Defendant thrust the knife in such manner that he could not discern whether it was directed at him or his father.

Under the standard of review and statutory analysis discussed herein, we think reasonable minds could differ on whether Defendant's acts placed the child in a situation whereby a reasonable probability existed that the child's life or health would be endangered. *Cf. State v. Gonzales,* 95 N.M. 636, 639, 624 P.2d 1033, 1036 (Ct. App.) (conflicts in evidence and weight to be accorded to the testimony of witnesses are to be resolved by finder of facts), *overruled on other grounds by Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981). Thus, we conclude that Defendant's claim of lack of substantial evidence to support the charge of child abuse is without merit and the trial court did not err in submitting this issue to the jury. Resolution of this issue, however, is not determinative of Defendant's guilt or innocence as to the charge of child abuse. We also address Defendant's second issue relating to the propriety of the instructions.

II. *REJECTION OF REQUESTED JURY INSTRUCTION*

Defendant tendered a proposed jury instruction that his acts in carrying and brandishing a knife during the incident in question were done in self-defense and that "[t]here was an appearance of immediate danger of bodily harm to the [D]efendant as a result of [the child's father] picking up a club or stick to be used as a weapon and ... striking [Defendant] with the weapon[.]" Although the trial court gave another requested defense instruction relating to Defendant's claim of self-defense to the charge of aggravated assault upon the child's father, the court refused Defendant's proposed self-defense instruction relating to the child-abuse charge. The refused instruction would have allowed the jury to consider Defendant's contention that his acts and use of the knife in protecting himself from the father could also be considered in connection with the State's assertions that his acts were without justifiable cause and unlawfully endangered the child's "life or health."

The State contended at trial that Defendant was not entitled to a self-defense instruction incident to the charge of child abuse and that the jury was only entitled to consider the claim of self-defense incident to the charge of aggravated assault with a deadly weapon upon the child's father. Defendant's counsel submitted a requested self-defense instruction patterned upon SCRA 1986, 14-5181, arguing that Defendant proffered such instruction "because I don't believe deadly force was used." According to the testimony of the child and his parents, during most of the time Defendant and the child's father were confronting each other, the child was beside or remained some distance behind his father. The child testified, however, that he was standing near his father at one point when Defendant jabbed the knife in such manner that it came within a close proximity to his body, and he could not tell if Defendant intended to direct the weapon toward him or his father.

The version of events given by Defendant and Hooper sharply contrasted from that related by the child and his parents. Defendant testified that because he did not know the child's father or who he was, and because the father made threats and demanded that he open the door to his home, he took a knife for protection when he went outside. Defendant also stated that he held the knife down at his side and did not raise it or point it at the father until the child's father picked up a "log or club" and hit him, causing him to partially fall.

Hooper testified that at the beginning of the confrontation she heard the child's father say in a loud voice, " 'He better open the door, I am going to kick his [f——] ass.' " She also stated the father told Defendant, " 'I am going to bash your brains in.' " Defendant denied assaulting, threatening or abusing the child and testified that his actions and brandishing of the knife were done in response to his fear that he was in danger of bodily harm from the

child's father after he had been struck by the log or limb.

If there is sufficient evidence to raise a reasonable doubt as to whether Defendant's use of the knife was in self-defense, it was error to limit the instruction on self-defense solely to the charge of aggravated assault upon the father. *See State v. Allison,* 16 Kan.App.2d 321, 823 P.2d 213, 215 (1991) (self-defense may under certain circumstances be raised as a defense to a charge of child abuse); *see generally State v. Heisler,* 58 N.M. 446, 455, 272 P.2d 660, 666 (1954); *State v. Gallegos,* 104 N.M. 247, 249, 719 P.2d 1268, 1270 (Ct.App.1986). As observed by our Supreme Court in *Heisler,* "where self-defense is involved in a criminal case and there is any evidence, although slight, to establish [such defense], it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on [that] issue...." *Id.,* 58 N.M. at 455, 272 P.2d at 666.

Based on the record, resolution of the issue of whether Defendant's acts in using the knife were justified in defending himself presents a factual issue to be determined by the jury. *State v. Montano,* 95 N.M. 233, 235, 620 P.2d 887, 889 (Ct.App. 1980). Thus, we conclude that the trial court erred in limiting Defendant's requested instruction on self-defense solely to the issue of whether Defendant committed aggravated assault upon the child's father. Under the evidence here, Defendant was entitled to have the jury determine whether his acts, which were alleged to have endangered the child, were justified as self-defense in protecting himself from injury by the father. *Id.*

In order to establish the offense of child abuse, not resulting in death or great bodily harm, as charged in the indictment, the State was required to prove beyond a reasonable doubt each of the elements of the offense, including the fact that Defendant's use of the knife was "*without justifiable cause.*" (Emphasis added.) As noted in the committee commentary to SCRA 14–5181 (self-defense, nondeadly force), the words "without excuse or justification" are the equivalent to the word "unlawful," and identify "a defense theory, i.e., even if all of the acts constituting the crime were committed, the act is otherwise excusable or justifiable. Cf. Section 30–2–8 NMSA 1978 [Repl.Pamp.1987]". Similarly, our Supreme Court, in *State v. Pierce,* 110 N.M. 76, 80, 792 P.2d 408, 412 (1990), observed that the term "unlawful," as used in NMSA 1978, Section 30–9–13 (Cum.Supp. 1992), prohibiting criminal sexual contact of a minor, means "without legal justification or excuse." Thus, we conclude that in a prosecution for child abuse where a defendant is charged with having intentionally or negligently endangered the life or health of a child, if the evidence otherwise supports a claim that a defendant's acts were carried out in self-defense, the defendant is entitled to have the jury consider his claim of self-defense as justification for his acts. *See State v. Trammel,* 100 N.M. 479, 481, 672 P.2d 652, 654 (1983) (where evidence at trial supports an instruction on a defense raised by accused, failure to instruct constitutes reversible error).

The language of Section 30–6–1(C), requiring proof that Defendant's acts were "without justifiable cause," requires the State to negate Defendant's claim that he acted in self-defense, where Defendant has presented evidence warranting submission of that defense to the jury. *Id.; cf. Santillanes v. State,* 115 N.M. 215, 222, 849 P.2d 358, 365 (1993) (trial court erred in failing to instruct jury on standard of criminal negligence).

We conclude that the trial court erred in refusing Defendant's tendered instruction on self-defense and precluding the jury's consideration of such defense incident to the charge of child abuse.

CONCLUSION

Defendant's conviction for child abuse is reversed and the cause is remanded for a new trial.

IT IS SO ORDERED.

CHAVEZ and BLACK, JJ., concur.

856 P.2d 982

NCR CORPORATION, Protestant–Appellant,

v.

TAXATION AND REVENUE DEPARTMENT of the State of New Mexico, Respondent–Appellee.

No. 13035.

Court of Appeals of New Mexico.

May 6, 1993.

Certiorari Denied July 8, 1993.

Curtis W. Schwartz, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Santa Fe, Paul H. Frankel, Walter Hellerstein, Morrison & Foerster, New York City, for protestant-appellant.

Tom Udall, Atty. Gen., Daniel Yohalem, Asst. Atty. Gen., Santa Fe, Bruce J. Fort and Frank D. Katz, Sp. Asst. Attys. Gen., Taxation & Revenue Dept., Santa Fe, for respondent-appellee.

OPINION

DONNELLY, Judge.

NCR Corporation (NCR) appeals from an administrative decision and order of the State Taxation and Revenue Department (Department), denying NCR's challenge to four separate deficiency assessments of corporate income tax, penalty, and interest. It contends that (1) the Foreign Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution prohibits New Mexico from imposing a corporate income tax upon NCR's foreign source royalty, interest, and dividend income; (2) the Due Process Clause, Amendment XIV of the United States Constitution prohibits New Mexico from taxing an apportioned share of NCR's Subpart F income; and (3) the Due Process Clauses of the state[1] and federal constitutions require that New Mexico modify its apportionment formula as it relates to NCR. We affirm the decision and order of the administrative hearing officer entered below; we remand, however, for determination of the amount of credits due for taxes previously paid by NCR.

FACTS

The Department issued corporate income tax assessments against NCR for taxes due in 1981 through 1987, totalling approximately $439,681.80, plus interest and penalties. The assessments principally relate to income earned outside the United States by NCR and its foreign subsidiaries. NCR protested each of the assessments and its challenges were consolidated for hearing before a hearing officer on August 29, 1990.

The parties stipulated, inter alia, that NCR was incorporated in Maryland and maintains its corporate headquarters and principal place of business in Ohio. NCR is engaged in the manufacture of business equipment, computers, and machinery, and sells its products, supplies, and services at wholesale and retail world-wide. It conducts its businesses in foreign countries either directly or through its foreign subsidiaries and branches, through the ownership of stock in foreign subsidiaries, through ownership of patents and license agreements with foreign subsidiaries, and through loan agreements. NCR does not contest New Mexico's taxation of its branch income. The operation of NCR's

1. N.M. Const. art. II, § 18 (Repl.Pamp.1992).

foreign subsidiaries and its foreign branches is nearly identical. All significant operating decisions for both branches and subsidiaries are made at NCR's corporate headquarters in the United States. The royalties, interest, and dividends received by NCR from its foreign subsidiaries were treated as gross income of NCR. Either NCR or its foreign subsidiars were subject to tax on the income earned in the host country.

During the years in question, NCR had seventeen manufacturing facilities throughout the world; each was operated either directly by NCR or through a subsidiary. During this same time period, NCR conducted business in all fifty states, including New Mexico. NCR had ten domestic subsidiaries, approximately seventy-five foreign subsidiaries, and eighteen foreign branches. Approximately 70% of all products sold by NCR are manufactured in the United States and shipped overseas. NCR does business essentially through its domestic and foreign subsidiaries operating together as a fully-integrated unitary business and, except for its Japanese subsidiary, NCR owns 100% of the stock of its other foreign subsidiaries.

The income tax assessed by the Department against NCR during the applicable time periods was based upon an apportionment formula utilized by the state and which apportioned a share of NCR's total income as reported to the federal government. To calculate the amount of tax due, the Department took NCR's reported federal taxable income, deducted foreign dividend gross-up, income from United States obligations, and non-business income allocated to other states, and then apportioned NCR's New Mexico income in accordance with the statutory formula specified by the Uniform Division of Income for Tax Purposes Act (UDITPA). NMSA 1978, §§ 7–4–1 to –21 (Repl.Pamp.1990). The Department then imposed an apportioned income tax by taxing NCR's unitary business income.[2]

The tax imposed by the Department, subject to certain deductions, is levied on a percentage basis determined by comparing NCR's New Mexico business income to the remainder of its business. This formula resulted in a tax apportionment factor, which varied depending on the applicable year, of between 0.3307% and 0.2207% of NCR's annual federal taxable income.

Following the administrative hearing, the hearing officer disallowed NCR's protest of each of the tax assessments imposed by the Department, except insofar as NCR protested the inclusion of a portion of its Subpart F income which was previously taxed in New Mexico, and except for allowance of a deduction for previous tax payments made by NCR for the tax years in question.

I. *Foreign Commerce Clause*

NCR contends that the Foreign Commerce Clause of the United States Constitution bars imposition of New Mexico's corporate income tax upon a proportionate share of NCR's corporate income received in the form of royalties, interest, and dividends from its foreign subsidiaries, and which is earned in, and subject to taxation by, foreign countries. In advancing this argument, NCR argues that allocation of NCR's corporate income to a single situs and apportionment is constitutionally prohibited under the Foreign Commerce Clause, and that New Mexico's apportionment formula results in impermissible multiple international taxation and contravenes national policy.

NCR asserts that New Mexico's statutory apportionment formula is prohibited under the Foreign Commerce Clause because Section 7–4–10 must be read to require inclusion of its entire property, payroll, and sales of its dividend, royalty, and interest-paying foreign subsidiaries in calculating the denominator of the apportionment factor applied to the taxable portion of its foreign income. Thus, it contends the tax in question is a tax on its foreign subsidiaries. We do not believe the statute or its application in the instant case offends

2. New Mexico utilizes a hybrid system of corporate income tax reporting. *See Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 168, 103 S.Ct. 2933, 2937, 77 L.Ed.2d 545 (1983).

the Foreign Commerce Clause. Reading Sections 7–4–10, –11, –14, and –16 together, in light of the provisions of UDITPA, we think, evinces a clear legislative intent to impose the tax on the property, payroll, and sales of the unitary business of the "taxpayer." In this case the "taxpayer" is NCR, not its foreign subsidiaries. *See Giant Indus. Ariz., Inc. v. Taxation & Revenue Dep't,* 110 N.M. 442, 445, 796 P.2d 1138, 1141 (Ct.App.1990) (fundamental purpose of statutory interpretation is to further legislative intent and purpose).

New Mexico utilizes a three-factor apportionment formula as set forth in UDITPA. A majority of states, including New Mexico, have adopted UDITPA, or a variation of such uniform legislation. *Barclays Bank Int'l, Ltd. v. Franchise Tax Bd.,* 2 Cal.4th 708, 8 Cal.Rptr.2d 31, 34, 829 P.2d 279, 282 (1992) (en banc); *see also* 1 *State Tax Guide* ¶ 10–110, at 1061–63 (Commerce Clearing House, 2d ed. 1991); 4 Zolman Cavitch, *Business Organizations* § 79.04, at 79–29 (1992); *see generally* Larry D. Scheafer, Annotation, *Construction and Application of Uniform Division of Income for Tax Purposes Act,* 8 A.L.R.4th 934 (1981); Uniform Division of Income for Tax Purposes Act, 7A U.L.A. 331 (1985).

As specified in UDITPA, Section 7–4–10, "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." Under this statutory formula, the income attributable to the state is determined by multiplying the taxpayer's gross income by a fraction which represents the ratio of sales, payroll, and property located in the state to the total sales, payroll, and property of the corporation.

Relying in part upon the decision in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979), NCR also asserts that the Foreign Commerce Clause precludes the state, even on an apportioned basis, from imposing any tax upon the royalty, interest, and dividend income earned by it from its foreign subsidiaries, because this income has already been taxed on an unapportioned basis by the government of the foreign country in which the income was generated and earned. NCR argues that in *Japan Line,* which involved a challenge of local taxation of foreign, rather than interstate commerce, the Court held that the Foreign Commerce Clause imposed greater restraints upon state taxing authority than those articulated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), relating to restrictions emanating from the Interstate Commerce Clause. It argues that the hearing officer erred in failing to determine, under the rationale of *Japan Line,* that the taxes assessed fail to satisfy constitutional scrutiny. We reach a different conclusion from that asserted by NCR and find that the tax imposed here survives the six-part test set forth in *Japan Line.*

In *Complete Auto Transit,* the United States Supreme Court observed that where purely *interstate* commerce is involved, a state tax will survive Commerce Clause scrutiny when "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.,* 430 U.S. at 279, 97 S.Ct. at 1079.

In *Japan Line* the Court applied a six-part test, holding that where a taxing authority seeks to tax foreign commerce it must satisfy the four-part inquiry set forth in *Complete Auto Transit* to determine the validity of state or local taxation of interstate commerce and, in addition, must satisfy two additional considerations:

> [F]irst, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, 441 U.S. at 451, 99 S.Ct. at 1823.

Pointing to the decisions in *Japan Line* and *ASARCO, Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), NCR contends that New Mexico, in seeking to tax the income of a multistate or multinational business, is limited under the Commerce Clause and Foreign Commerce Clause to taxing only the income of such an entity earned within the state. We do not read the authorities relied upon by NCR so restrictively. While it is true that in *ASARCO, Inc.* and *Container Corp.,* the Supreme Court held that under both the Due Process Clause and the Commerce Clause a state may not impose an income tax upon value earned by a taxpayer beyond the state's borders, the Court, in *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 439–40, 100 S.Ct. 1223, 1232–33, 63 L.Ed.2d 510 (1980), recognized that a state may lawfully impose a fairly apportioned income tax upon such taxpayer. The general premise underlying unitary taxation is that the value of a corporation's unitary business is apportionable to a state for taxation if the corporation's operations within the state contribute to the profitability of the entity's overall business. *Id.*

Similarly, the Court in *Container Corp.* observed that multiple taxation of a multinational, world-wide unitary enterprise may, when properly apportioned, survive the restrictions articulated in *Japan Line.* Although the *Japan Line* Court held that a state tax on foreign instrumentalities of commerce may neither impose multiple tax burdens on international commerce nor impair federal uniformity in an area where federal uniformity is essential, in a subsequent decision, *Container Corp.,* the Court declined to declare invalid California's apportioned corporate income tax. *Container Corp.* held that while "[a]llocating income among various taxing jurisdictions bears some resemblance . . . to slicing a shadow," *id.,* 463 U.S. at 192, 103 S.Ct. at 2954, nevertheless, it was unwilling to require a state to give up one method of allocation that may at times result in double taxation in favor of another allocation method that may also result in double taxation. *Id.* at 193–96, 103 S.Ct. at 2955–57. Thus, the *Container Corp.* Court declined to infer that the state's use of unitary taxation violated a clear federal policy requiring uniform state income taxation of foreign commerce. The United States Constitution does not impose any single method of apportionment on a multistate or multinational taxpayer's income. *See Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 445, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

The Department disputes NCR's claims that the Supreme Court's decision in *Japan Line* is dispositive of the issue of constitutionality raised here. The Department asserts that the Court's decision in *Japan Line* is inapplicable to the facts of the instant case because *Japan Line* involved a challenge to the taxing authority's imposition of an ad valorem property tax on cargo containers owned by Japanese companies engaged in foreign commerce and which were transported to California ports en route to other places. We agree. Unlike the situation in *Japan Line,* which involved six Japanese shipping companies engaged in the transport of cargo in foreign commerce, and an ad valorem property tax, which was determined to constitute an unlawful restraint on foreign commerce, the present case presents a different factual basis. Here, NCR is domiciled in the United States, engages in business in New Mexico, and the tax in question is an apportioned corporate income tax on NCR's unitary business income.

In contrast to the tax involved here, the tax imposed in *Japan Line* was a tax on a foreign entity, not a domestic corporation. In *Japan Line* several municipalities in California levied ad valorem personal property taxes on cargo containers used by the shipping companies. The cargo containers were taxed at full value in Japan. Moreover, unlike the situation in *Japan Line,* the Court in *Container Corp.* upheld the tax in question, noting that the California net income tax was imposed on the domestic parent of foreign subsidiaries and not upon a foreign entity. *Container Corp.,* 463 U.S. at 195, 103 S.Ct. at 2955.

Does the New Mexico corporate income tax apportionment scheme, as applied in this case, pass constitutional muster against contentions that such tax fails to survive Commerce Clause scrutiny and violates the Foreign Commerce Clause? We conclude that it does and that the basic premise and holding of the Court in *Container Corp.* is controlling here.

The income the Department seeks to tax is derived from NCR's subsidiaries that operate together as a fully-integrated unitary business. *Cf. Kewanee Indus., Inc. v. Reese,* 114 N.M. 784, 788 n. 5, 845 P.2d 1238, 1242 n. 5 (1993). The tax in question is not a tax on any of NCR's foreign subsidiaries; instead, the tax falls upon an apportioned share of NCR's income which it receives in the form of royalties, interest, and dividends from its unitary foreign subsidiaries. The fact that the tax is apportioned in part upon NCR's foreign income sources does not constitute a bar to state taxation. *See Mobil Oil Corp.,* 445 U.S. at 439–40, 100 S.Ct. at 1232–33.

NCR's argument that both the Commerce Clause and the Foreign Commerce Clause of the United States Constitution prohibit New Mexico from imposing its income tax on NCR's royalties, interest, and dividends which were subject to the taxing jurisdiction of foreign countries, has been considered and rejected in several other jurisdictions. *See NCR Corp. v. Commissioner of Revenue,* 438 N.W.2d 86 (Minn.), *cert. denied,* 493 U.S. 848, 110 S.Ct. 144, 107 L.Ed.2d 103 (1989); *NCR Corp. v. South Carolina Tax Comm'n,* 304 S.C. 1, 402 S.E.2d 666 (1991); *see also NCR Corp. v. Comptroller of the Treasury, Income Tax Div.,* 313 Md. 118, 544 A.2d 764 (1988). We find these decisions instructive in the instant case.

The Minnesota Supreme Court, in *Commissioner of Revenue,* considered a similar argument by NCR and concluded that the Minnesota unitary business income tax apportionment formula did not violate the Due Process or Foreign Commerce Clauses of the United States Constitution, or result in impermissible multiple taxation.

In *South Carolina Tax Commission* the South Carolina Supreme Court turned aside a similar argument to that raised by NCR in the instant case. In that case, as here, NCR placed great reliance on the Supreme Court's decision in *Japan Line.* The South Carolina court found unpersuasive NCR's claim that the Foreign Commerce Clause precluded the tax commission's inclusion in NCR's total taxable income the royalty and interest income it received from its foreign subsidiaries. In rejecting this argument, the court held:

> [T]he case controlling the situation here is not *Japan Line* in our view, but *Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159 [103 S.Ct. 2933, 77 L.Ed.2d 545] ... (1983). In *Container Corp.* the Court retreated from its broad *Japan Line* rules and in our view restricted *Japan Line* substantially. *Container Corp.* again involved a California tax. This time, however, the tax was an apportioned corporate income tax on Container Corporation, a company headquartered in Illinois but doing business in California as well as other states and countries. California imposed the same three-factor apportionment formula upon Container [C]orporation as was here imposed by the Tax Commission on NCR.

South Carolina Tax Comm'n, 402 S.E.2d at 670.

We arrive at a similar result to that reached by the court in *South Carolina Tax Commission* and the Minnesota Supreme Court in *Commissioner of Revenue,* each of which denied related challenges of NCR to the imposition of an apportioned state income tax.

■ In rejecting the arguments advanced above, we have also considered NCR's contention that New Mexico's tax impairs federal uniformity in an area where uniformity is essential and that the imposition of such tax may impede federal policy. We do not agree that the limitations cited by NCR bar the imposition of the tax here in issue. In *Japan Line* the Court held that to withstand scrutiny under the Foreign Commerce Clause a state tax must meet the standards with respect to

state taxation of interstate commerce enunciated in *Complete Auto Transit* and, additionally, the tax must not give rise to the risk of multiple taxation or prevent the federal government from speaking with one voice when regulating commercial relations with foreign countries. *Japan Line,* 441 U.S. at 453, 99 S.Ct. at 1824; *see also Colgate-Palmolive Co. v. Franchise Tax Bd.,* 10 Cal.App.4th 1768, 13 Cal.Rptr.2d 761, 767 (1992) (unitary state tax held to survive constitutional challenge alleging violation of Foreign Commerce Clause, where tax meets requirements of Interstate Commerce Clause test and tax is not shown to create substantive risk of international taxation and does not impair need for federal uniformity where federal uniformity is essential).

Applying this test to the facts before us, we conclude that NCR's challenges here must fail.[3] Contrary to the contentions of NCR, in the instant case, New Mexico is taxing only an apportioned share of the income of NCR, a domestic corporation, not imposing a tax on tangible property of a foreign corporation. Unlike the situation in *Japan Line,* multiple taxation, although real, is not inevitable, the tax was fairly apportioned under the formula set forth in UDITPA, and the legal incidence of the tax here does not fall on a foreign owner but instead is upon a unitary, domestic entity. Moreover, NCR has failed to establish that the tax here violates the "one voice" standard or implicates foreign policy issues which must be left to the United States government. *Cf. Itel Containers Int'l Corp. v. Huddleston,* — U.S. ——, ——, 113 S.Ct. 1095, 1103, 122 L.Ed.2d 421, 435 (1993) (Tennessee's sales tax as applied to cargo containers leased by corporation for use in international shipping found not to violate the Foreign Commerce Clause under *Japan Line*'s three-part test, and tax did not create substantial risk of multiple taxation implicating foreign commerce concerns).

3. In *Container Corp.* the Court observed, "[I]f a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, '[a]bsent some explicit directive from Congress, ... that treatment of foreign income at the federal level mandates identical treatment by the States.'" *Id.,* 463 U.S. at 194, 103 S.Ct. at 2955 (quoting *Mobil Oil Corp.,* 445 U.S. at 448, 100 S.Ct. at 1237).

II. *Commerce Clause—NCR's Subpart F Income*

NCR argues, alternatively, that even if this Court affirms the hearing officer's determination that its foreign source royalties, interest, and dividends can be included in its New Mexico apportionable tax base without impinging upon the limitations of the Foreign Commerce Clause, nevertheless, under the Due Process Clause, the state is precluded from including in its apportionable tax base the Subpart F portion of NCR's foreign source dividends.

NCR argues that its Subpart F income is exempt from taxation by the Department because income may not be taxed until it is actually realized. Thus, it asserts that this principle precludes taxation of a shareholder on income earned by NCR until it is distributed.

The Commerce Clause states that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has been recognized as a restriction upon the power of a state to regulate or tax interstate and foreign commerce even in the absence of the enactment of specific congressional legislation. *See Container Corp.,* 463 U.S. at 164, 103 S.Ct. at 2939; *Japan Line,* 441 U.S. at 444, 99 S.Ct. at 1819; *see generally* E.H. Schopler, Annotation, *Validity, Under Federal Constitution, of State Tax On, Or Measured by, Income of Foreign Corporation,* 67 A.L.R.2d 1322 (1959); Scheafer, *supra.* The Foreign Commerce Clause of the United States Constitution also imposes restrictions upon the taxing authority of the states. *See Japan Line,* 441 U.S. at 451, 99 S.Ct. at 1823.

NCR contends that its Subpart F income is not business income under Section 7-4-2(A) and is not apportionable under Section

7-4-10. NCR bases its challenge to the inclusion of its Subpart F income on three principal grounds. First, it contends that Subpart F income is hypothetical income, similar to gross-up income which this state does not tax; hence, it contends, Subpart F income is not subject to taxation. Second, NCR argues that the Department is barred from taxing Subpart F income under the Due Process Clause of the United States Constitution. Third, it argues that a portion of its Subpart F income has been previously taxed and New Mexico is precluded by the Equal Protection Clause, the Commerce Clause, and the Due Process Clause of the New Mexico Constitution from taxing this income a second time. We disagree.

In *Estate of Whitlock v. Commissioner of Internal Revenue Service,* 59 T.C. 490 (1972), *aff'd,* 494 F.2d 1297 (10th Cir.1974), the court rejected the argument that Subpart F income is hypothetical. Subpart F of the Internal Revenue Code (IRC), 26 U.S.C. §§ 951–964 (1982), contains a limited exception to the general rule that shareholders are not subject to taxation on the undistributed earnings of their corporations. IRC Section 951(a)(1) provides that United States shareholders of "controlled foreign corporation[s]" are required to report as income their pro rata share of such corporation's undistributed income, consisting of the controlled foreign corporation's "Subpart F income" and its increase in earnings invested in United States property. The effect of such legislation is to provide that the shareholders of controlled foreign corporations shall be treated as if they had received actual dividend distributions from such corporations even though no income has been actually distributed. IRC § 951(a)(2).

Under IRC Section 951(a)(2)(A), a shareholder of a controlled foreign corporation must include in its share of such corporation's Subpart F income that income "which would have been distributed with respect to the stock which such shareholder owns ... if ... it had distributed [a pro rata share of] ... its subpart F income," reduced by certain actual dividend distributions. *Id.* United States shareholders must also include in his or her pro rata share of the amount of earnings that a controlled foreign corporation invests in United States property for any taxable year "to the extent not excluded from gross income under [other provisions of the Internal Revenue Code]." IRC § 951(a)(1)(B).

NCR also argues that the Due Process Clause of the United States Constitution confines the state's power to tax non-domiciliary corporations engaged in interstate or foreign business to income or property that has its source within the state. *See, e.g., Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 272–73, 98 S.Ct. 2340, 2344, 57 L.Ed.2d 197 (1978); *Norfolk & W. Ry. v. Missouri State Tax Comm'n,* 390 U.S. 317, 325, 88 S.Ct. 995, 1000, 19 L.Ed.2d 1201 (1968). We do not find this argument persuasive under the facts existing here. As observed by the United States Supreme Court in *Mobil Oil Corp.,* 445 U.S. at 438, 100 S.Ct. at 1232:

> The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability has often been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extrastate activities formed part of a single unitary business.

In the instant case it is undisputed that there is a substantial flow of goods between NCR and its domestic and foreign subsidiaries and branches, and that NCR conducts its business world-wide through its domestic and foreign subsidiaries as a single, integrated unitary operation. Since NCR conducts part of its unitary business in this state, New Mexico has the right to impose a corporate income tax on an apportioned share of NCR's unitary income. *See F.W. Woolworth Co. v. Taxation & Revenue Dep't,* 458 U.S. 354, 102 S.Ct. 3128, 73 L.Ed.2d 819 (1982) (state may tax corporation income if it arises from subsidiaries whose business is part of the corporation's

unitary business). We have examined each of the arguments and authorities relied upon by NCR, including its challenge on state constitutional grounds, and conclude that because its subsidiaries with Subpart F income remain part of its unitary business and the federal government requires inclusion of NCR's Subpart F income in the corporation's gross income, under the unitary business principle, the state assessments in question here do not violate the United States or New Mexico Constitutions, are fairly apportioned, and tax a fair portion of such income. *See Mobil Oil Corp.*, 445 U.S. at 438, 100 S.Ct. at 1232; *see also Container Corp.*, 463 U.S. at 165–67, 103 S.Ct. at 2940–41; *Comptroller*, 544 A.2d at 768–70; *see generally* William D. Dexter, *Attribution of a Multinational Corporation's Net Income: The Position of Unitary States Regarding Combined Reporting*, 18 Vand.J.Transnat'l L. (1985).

III. *Validity of Apportionment*

NCR's final argument raised on appeal asserts that even if this Court upholds the decision of the hearing officer against its first and second challenges, nevertheless, New Mexico's apportionment method must be modified so as to reflect certain factors which give rise to NCR's foreign source income. In advancing this contention, NCR asserts that New Mexico's apportionment statute, Section 7–4–10, necessitates inclusion of all or a portion of its foreign subsidiaries' expenses in computing NCR's proper formula percentage. NCR also contends that its disputed foreign source income (royalties, interest, and dividends) is neither taxable nor apportionable by New Mexico because (1) that income is earned by NCR in foreign countries where such income is subject to an unapportioned tax and that income is not attributable to New Mexico; and (2) NCR's Subpart F income may not be taxed by New Mexico and may not be subjected to apportionment by the state.

NCR urges this Court to follow the reasoning of Justice Stevens in his dissenting opinion in *Mobil Oil Corp.* which argues that "[u]nless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause [the corporation's] income to be overstated." *Id.*, 445 U.S. at 461, 100 S.Ct. at 1243 (footnote omitted). In resolving this issue, however, we are guided by the rationale of the majority decision which rejected the views set forth in the dissent.

In challenging the efficacy of New Mexico's apportionment formula, as applied here, NCR further argues that the formula fails to satisfy the test of fairness set forth in *Container Corp.* In *Container Corp.* the Supreme Court emphasized that two standards must be met in order for an apportionment formula to be fair, e.g., "internal consistency," and "external consistency." *Id.*, 463 U.S. at 169, 103 S.Ct. at 2942. The test of internal consistency is that the formula must be such that if it were applied by every jurisdiction, it would result in a tax which does not exceed the unitary business's income. The requirement that the apportionment formula satisfy external consistency mandates that the factors used in the apportionment scheme "actually reflect a reasonable sense of how income is generated." *Id.*

As noted in *Container Corp.*, a taxpayer seeking to invalidate a state's apportionment formula must show by clear and cogent evidence that the income attributed to the state is in fact disproportionate to the business transacted in that sta *Id.*, 463 U.S. at 179, 180–81, 103 S.Ct. at 2948–49. In *South Carolina Tax Commission* the South Carolina Supreme Court, guided, in part, by the Supreme Court's decision in *Container Corp.*, rejected a like contention by NCR that South Carolina's statutory apportionment scheme impermissibly required NCR's foreign subsidiaries' payroll, property, and sales to be included in the denominator of that state's apportionment formula. Similarly, in *Comptroller*, 544 A.2d at 768, the Maryland Court of Appeals noted:

"Under both the Due Process and Commerce Clauses of the [United States] Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 164 [103 S.Ct. 2933, 2939, 77 L.Ed.2d 545] ... (quoting *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 [102 S.Ct. 3103, 3108, 73 L.Ed.2d 787] ... (1982)). Nonetheless, "[i]t has long been established that the income of a business operating in interstate commerce is not immune from fairly apportioned state taxation." *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436 [100 S.Ct. 1223, 1231, 63 L.Ed.2d 510] ... (1980)....

In order to challenge successfully State apportionment of corporate income, "the taxpayer [must] ... prove 'by clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted ... in that State, ... or has led to a grossly distorted result....'" *Container Corp., supra*, 463 U.S. at 170 [103 S.Ct. at 2942] ... (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 [98 S.Ct. 2340, 2345] ... (1978)).

Has NCR established that New Mexico's apportioned income tax upon a share of its unitary income for the years in question results in a grossly distorted result? We hold that it has not. *See id.; see also Tipperary Corp. v. New Mexico Bureau of Revenue*, 93 N.M. 22, 24, 595 P.2d 1212, 1214 (Ct.App.) (taxpayer has duty to present evidence overcoming correctness of assessment), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *cf. Crocker Equip. Leasing, Inc. v. Department of Revenue*, 314 Or. 122, 838 P.2d 552, 557 (1992) (en banc) (taxpayer has burden of proving that statutory apportionment formula does not fairly represent taxpayer's business activity). NCR has failed to establish that the method of apportionment utilized by the Department is contrary to law or unfairly applied for the time periods in question. Similarly, we conclude that New Mexico's apportionment statute, Section 7–4–10, and the assessments challenged herein meet the test of fairness specified in *Container Corp.*, and do not violate the Due Process and Commerce Clauses of the United States Constitution or the Due Process Clause of the New Mexico Constitution. N.M. Const. art. II, § 18 (Repl.Pamp.1992). Based upon the record before us, however, we note that the hearing officer found that NCR is entitled to credits for income taxes previously paid by it for certain of the years in question. Since a portion of NCR's Subpart F income was previously taxed for the tax years 1978 through 1980, we agree that NCR is entitled to an adjustment of the tax assessment. Neither NCR nor the Department has contested this portion of the hearing officer's ruling.

CONCLUSION

We affirm the decision and order entered below. We remand, however, for determination by the hearing officer of the amount of the allowable adjustment from the additional taxes imposed, because of NCR's previous payment of taxes for certain of the years in question.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

857 P.2d 22

Flora FERNANDEZ and Ruby Fernandez, Petitioners–Appellees,

v.

FARMERS INSURANCE COMPANY OF ARIZONA, Respondent–Appellant.

No. 20515.

Supreme Court of New Mexico.

July 7, 1993.

Romero & Romero, Dennis C. Romero, Taos, for petitioners-appellees.

Schutte & Trafton, P.C., Donald C. Schutte, Albuquerque, for respondent-appellant.

OPINION

MONTGOMERY, Justice.

Two automobile-accident victims, Flora and Ruby Fernandez ("the Fernandezes"), arbitrated with their insurance company, Farmers Insurance Company of Arizona ("Farmers"), over their claims under various underinsured motorist policies. The arbitration panel entered an award that, according to the Fernandezes, misapplied the law. The Fernandezes petitioned the trial court to modify or correct the award; Farmers, the successful party in the arbitration, counterpetitioned for confirmation of the award. The trial court agreed with the Fernandezes and remanded the proceeding to the arbitrators to apply what the court held was the proper application of the law. Farmers brought this interlocutory appeal to us, contending that the court lacked the authority to review the arbitration award for errors of law. We agree with this contention, reverse the court's decision, and remand with instructions to enter judgment confirming the award.

I.

In July 1985, a car driven by Ruby Fernandez was struck by a car backing out of a driveway in Llano Quemado, New Mexico. Ruby Fernandez and her passenger, Flora, were injured in the collision. At the time of the accident, the driver of the other vehicle, who was at fault, carried a single-limit liability insurance policy in the sum of $60,000. With Farmers' consent, Ruby Fernandez received $25,000 of this sum and Flora Fernandez received $20,000.[1]

The Fernandezes were insured by policies issued by Farmers providing underinsured motorist coverage. When the Fernandezes and Farmers were unable to agree on the amount of the Fernandezes' damages, the Fernandezes demanded arbitration pursuant to arbitration clauses in the insurance policies, and an arbitration was held in November 1990. On June 13, 1991, the arbitration panel issued its award, finding that Ruby Fernandez had suffered damages in the amount of $32,500 and that Flora Fernandez had suffered damages of $75,000. The award also considered the extent to which each of the Fernandezes was entitled to underinsured motorist benefits. Construing NMSA 1978, Section 66-5-301(B) (Repl.Pamp.1989),[2] the arbitrators deter-

1. Abraham Fernandez, a passenger in the Fernandezes' car at the time of the accident, was also injured and received the remaining $15,000 of the proceeds from the tortfeasor's liability insurance. He was not a party to the subsequent arbitration and is not involved in this appeal.

2. NMSA 1978, § 66-5-301(A) (Repl.Pamp.1989), requires that all automobile liability policies issued in New Mexico include coverage for bodily injury and property damage caused the insured by an uninsured motorist. Section 66-5-301(B) provides that the uninsured motorist coverage shall include underinsured motorist

mined that the proper method of calculating available underinsured motorist benefits was to apply the limits of liability under the tortfeasor's available insurance, $60,000, separately to the amount of damages found to have been suffered by each underinsured victim. Thus, the arbitrators found that $15,000 in underinsured motorist benefits was available for Flora Fernandez ($75,000 − $60,000 = $15,000) and that Ruby Fernandez was entitled to no underinsured motorist benefits because her damages of $32,500 did not exceed the tortfeasor's available insurance coverage of $60,000.

The Fernandezes filed their petition to modify or correct the award in July 1991, contending that the award was "imperfect as a matter of form" because the method used by the arbitrators to determine the available underinsured motorist benefits was incorrect.[3] The proper method for determining the available benefits, claimed the Fernandezes, is to reduce the victim's damages by that portion of the tortfeasor's liability insurance actually received by each claimant. Accordingly, the petition requested the court to modify the award to grant $55,000 to Flora Fernandez ($75,000 − $20,000 = $55,000) and $7,500 to Ruby Fernandez ($32,500 − $25,000 = $7,500).

Farmers' response to the petition asserted that the relief requested by the Fernandezes was barred by the Uniform Arbitration Act ("the Arbitration Act"), NMSA 1978, Sections 44–7–1 to –22. Farmers counterpetitioned for confirmation of the arbitrators' award or, in the event the district court did review issues of law, for resubmission of all matters of law and fact to the arbitrators or the district court for further decision.

Farmers and the Fernandezes then each filed a motion for summary judgment. The trial court declined to grant summary judgment to either party, but instead remanded the matter to the arbitrators for correction of their award.[4] The court ruled that it had jurisdiction to remand the award for correction or modification of an issue of law decided by the arbitrators when the arbitrators had incorrectly applied the law. The arbitrators were instructed to apply the law as set out in *Gonzales v. Millers Casualty Insurance Co.*, 923 F.2d 1417, 1419–22 (10th Cir.1991), in which the United States Court of Appeals for the Tenth Circuit affirmed a New Mexico federal district court's ruling that under New Mexico law, where there are multiple claimants to the proceeds of a tortfeasor's liability insurance coverage, the court must look to the liability proceeds actually available to the claimants in determining whether and to what extent the tortfeasor is an underinsured motorist.[5]

The court's order contained the certification necessary to enable Farmers to apply for an interlocutory appeal under NMSA 1978, Section 39–3–4 (Repl.Pamp.1991) (conferring appellate jurisdiction to entertain interlocutory appeal when order appealed from involves controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of the litigation). Farmers thereupon filed an application for interlocutory

coverage and defines an "underinsured motorist" as "an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage."

3. Section 44–7–13(A)(3) of the Uniform Arbitration Act as enacted in New Mexico, cited later in the text, allows for modification or correction of an award "imperfect in a matter of form, not affecting the merits of the controversy." It appears that the Fernandezes' objection is to the result of the award, not to its form, *see Carolina Va. Fashion Exhibitors, Inc. v. Gunter,* 41 N.C.App. 407, 255 S.E.2d 414, 419 (1979); but we do not rule on this issue since the question has not been briefed or argued by the parties.

4. The court apparently regarded its order as interlocutory in nature, since further proceedings to confirm the award, once corrected by the arbitrators, would have been necessary or appropriate.

5. We do not decide whether either the Tenth Circuit's or the arbitration panel's interpretation of New Mexico law is correct. That question is not an issue on this appeal.

appeal, which this Court granted. As stated previously, Farmers argues that the district court lacked authority to review a question of law decided by the arbitrators.

II.

This Court has repeatedly reaffirmed the strong public policy in this state, expressed in the Arbitration Act, in favor of resolution of disputes through arbitration. *See, e.g.,* NMSA 1978, § 44–7–1; *United Technology & Resources, Inc. v. Dar Al Islam,* 115 N.M. 1, 3, 846 P.2d 307, 309 (1993); *Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.,* 114 N.M. 557, 558, 844 P.2d 807, 808 (1992); *Dairyland Ins. Co. v. Rose,* 92 N.M. 527, 530, 591 P.2d 281, 284 (1979). Arbitration is a process by which parties submit their disputes to an impartial private tribunal for a final and binding decision based upon the parties' presentation of arguments and evidence. Gabriel M. Wilner, *Domke on Commercial Arbitration* § 1:01 (rev. ed. 1991) [hereinafter *Domke*]. This process allows for the informal, speedy, and inexpensive final disposition of disputes, *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.,* 108 N.M. 192, 193, 769 P.2d 726, 727 (1989), and also aids in relieving the judiciary's heavily burdened caseload, *see United Technology,* 115 N.M. at 3, 846 P.2d at 309 (legislative intent in encouraging arbitration is to reduce caseload in courts). In order to promote judicial economy through the use of arbitration, the finality of arbitration awards is enforced by strict limitations on court review of those awards. *Id.*

The Arbitration Act controls the scope of the district court's review of an arbitration award.[6] Sections 44–7–12[7] and 44–7–13[8] of the Act establish the statutory grounds for vacating, modifying, or correcting an award. In the absence of any of these statutory grounds, the court must confirm an award submitted for review. Section 44–7–11; *United Technology,* 115 N.M. at 4, 846 P.2d at 310. The district court's review thus is generally limited to allegations of fraud, partiality, misconduct, excess of powers, or technical problems in the execution of the award. Sections 44–7–12 & –13. The Arbitration Act clearly does not provide for review of arbitration awards on the merits of the controversy, particularly in light of its provision that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award." Section 44–7–12(A)(5). We therefore hold that the district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the

6. This Court resolved the potential conflict between the provisions for judicial review of arbitration awards under the Arbitration Act, *see* §§ 44–7–12 & –13, and the provision for de novo review of arbitration awards concerning uninsured motorist coverage in automobile liability policies under NMSA 1978, § 66–5–303, in *Dairyland Insurance Co. v. Rose,* 92 N.M. at 530, 591 P.2d at 284, which held that the Arbitration Act "was intended to supersede the de novo trial provision of the uninsured motorist insurance law."

7. Section 44–7–12(A) specifies the following grounds for vacating an award: "(1) [T]he award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 [44–7–5 NMSA 1978], as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 [44–7–2 NMSA 1978] and the party did not participate in the arbitration hearing without raising the objection."

8. Section 44–7–13(A) provides for the correction or modification of an award where: "(1) [T]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) the award is imperfect in a matter of form, not affecting the merits of the controversy."

submission, the award is a final and conclusive resolution of the parties' dispute. *See Spaw-Glass,* 114 N.M. at 560, 844 P.2d at 810; *see also, e.g., Schnurmacher Holding, Inc. v. Noriega,* 542 So.2d 1327, 1328 (Fla.1989) (arbitration awards cannot be set aside for arbitrator's errors of judgment as to either the law or facts); *Metropolitan Airports Comm'n v. Metropolitan Airports Police Fed'n,* 443 N.W.2d 519, 524 (Minn.1989) (as to merits of dispute, arbitrator is final judge as to law and fact); *Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Auth.,* 363 Mass. 386, 294 N.E.2d 340, 343 (1973) (arbitrator's grossly erroneous decision is binding in absence of fraud); *Domke, supra,* at § 34:00 (arbitrator's decision on facts and law conclusive without proof of fraud, corruption or other misconduct); 5 Am.Jur.2d *Arbitration & Award* § 167 (1962) (arbitrators are final judges of both law and fact).

To hold otherwise would undermine the goals of arbitration. Should this Court interpret the Arbitration Act to allow impeachment of awards based on honest errors of the arbitration panel, arbitration would be transformed from a final determination of the controversy into merely the first step in the resolution of a dispute. In this context, the United States Supreme Court stated over one hundred years ago that judicial review of arbitration awards for errors of fact or law "would make an award the commencement, not the end, of litigation." *Burchell v. Marsh,* 58 U.S. (17 How.) 344, 349, 15 L.Ed. 96 (1855). Judicial reexamination of arbitrators' rulings on findings of fact and issues of law would prolong adversary proceedings, thereby frustrating the parties' goals of using an expeditious and relatively inexpensive alternative to litigation.

Similarly, extended judicial review of arbitrators' decisions would defeat the goal of reducing the caseload of the courts. The courts would have to deal with more complex and more numerous appeals of arbitration awards, as well as provide a forum for those parties turning directly to the courts to decide their disputes, inasmuch as parties might perceive an arbitration lacking finality to be only another, and unnecessary, step in the litigation process.

We recognize that under appropriate circumstances the district court may find an arbitration panel's mistake of fact or law so gross as to imply misconduct, fraud, or lack of fair and impartial judgment, each of which is a valid ground for vacating an award. *See Board of Educ. v. Prince George's County Educators' Ass'n,* 309 Md. 85, 522 A.2d 931, 938 (1987). That is not the case here. The calculation of uninsured motorist benefits when there are multiple claimants is a problem that has not been addressed by New Mexico appellate courts, so the arbitration panel had no binding authority to guide them in their decision. The correct application of Section 66-5-301(B) in multiple claimant situations is not self-evident, and other jurisdictions considering this question under statutes similar to New Mexico's have reached mixed results. *Compare Knudson v. Grange Mut. Cos.,* 31 Ohio App.3d 20, 507 N.E.2d 1155, 1158 (1986) (holding that court should look to liability proceeds actually available, rather than stated policy limits, in multiple claimant situations) *with Mullen v. Liberty Mut. Ins. Co.,* 589 A.2d 1275, 1276-77 (Me.1991) (holding that stated policy limits, rather than liability proceeds actually received, should be used in calculating benefits in multiple-claimant situations). We hold that the arbitration panel's interpretation of Section 66-5-301(B) was a permissible exercise of its arbitral power, even if arguably incorrect, and thus cannot be read as an error so gross as to evidence misconduct or fraud.

Farmers and the Fernandezes agreed to submit their dispute to an arbitration panel. The dispute to be arbitrated included the question of the manner in which the underinsured motorist insurance was to be applied in determining the awards. Had the Fernandezes wished the district court to resolve this issue, they could have made a prearbitration request for a declaration of how the question was to be resolved. *Guaranty Nat'l Ins. Co. v. Valdez,* 107 N.M. 764, 766-67, 764 P.2d

1322, 1324–25 (1988). However, once the issue had been committed to the arbitrators for determination, the parties were bound by the arbitrators' decision. Having placed the resolution of the dispute in the hands of the arbitrators, the Fernandezes cannot disavow the award or ask for the court's reconsideration of an issue decided by the arbitrators. *See United Technology,* 115 N.M. at 7, 846 P.2d at 312 ("Having bitten once at the arbitration apple, [the unsuccessful party] cannot now take a second bite from the judicial one."). So long as the award is made fairly and honestly and is restricted to the scope of the submission, it must be confirmed by the district court.

III.

We now address the Fernandezes' arguments urging this Court to allow judicial review of issues of law submitted to, and resolved by, arbitration. The Fernandezes make three points in this connection. First, they contend that, because this Court reviewed questions of law decided initially by arbitrators in *Stinbrink v. Farmers Insurance Co.,* 111 N.M. 179, 803 P.2d 664 (1990), and *Stewart v. State Farm Mutual Automobile Insurance Co.,* 104 N.M. 744, 726 P.2d 1374 (1986), the district court did have authority to modify the award because of an arbitrators' error in applying the law. Second, they maintain that review of issues of law is appropriate when necessary to align the arbitrators' decision with the public policy underlying the uninsured motorist statutes, NMSA 1978, §§ 66–5–301 to –303 (Repl.Pamp.1989). Third, they suggest that this Court expand the scope of review of arbitration awards to allow vacation of an award where the arbitrators have made an error of law that is so significant that, but for the error, the award would have been substantially different. We reject each of these contentions.

The Fernandezes first argue that *Stinbrink* and *Stewart* provide authority for the proposition that judicial review of arbitration awards for errors of law is permissible. We disagree. The question whether judicial review of questions of law raised by an arbitration award is permitted under the Arbitration Act was not argued or briefed in either *Stinbrink* or *Stewart.* Thus, neither of those decisions discussed the issue decided here. As we noted in *Sangre de Cristo Development Corp. v. City of Santa Fe,* 84 N.M. 343, 348, 503 P.2d 323, 328 (1972) (quoting *United States v. Tucker Truck Lines,* 344 U.S. 33, 38, 73 S.Ct. 67, 70, 97 L.Ed. 54 (1952)), *cert. denied,* 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 400 (1973): "The general rule is that cases are not authority for propositions not considered. Likewise, the United States Supreme Court has long held that it '... is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*' "

We also reject the Fernandezes' contention that, because the specific provisions of the uninsured motorist statutes should be given effect over the more general provisions of the Arbitration Act, *see Stinbrink,* 111 N.M. at 182, 803 P.2d at 667, this Court should effectuate the legislative intent behind the uninsured motorist statutes by allowing judicial review of the arbitrators' decision. The rule of statutory construction used in *Stinbrink,* however, only applies when two or more statutes have conflicting provisions concerning the same matter. In *Stinbrink,* this rule of construction was used to help determine which of three conflicting statutes should be applied in awarding arbitration costs. *Id.* at 181, 803 P.2d at 666. Here there is no conflict between the public policy underlying the uninsured motorist statutes and the statutory provisions of the Arbitration Act limiting judicial review of arbitration awards, so the rule of construction advanced by the Fernandezes is inapplicable.

The Fernandezes further urge this Court to adopt the modified scope of review of arbitration awards used in Michigan, as expressed in *Detroit Automobile Inter–Insurance Exchange v. Gavin,* 416 Mich. 407, 331 N.W.2d 418 (1982), and *St. Bernard v. Detroit Automobile Inter–Insurance Exchange,* 134 Mich.App. 178, 350 N.W.2d 847 (1984). In those cases, Michi-

gan appellate courts interpreted that state's arbitration statute to allow judicial review of arbitration awards where " 'the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made....' " *Gavin,* 331 N.W.2d at 434 (quoting *Howe v. Patrons' Mut. Fire Ins. Co.,* 216 Mich. 560, 185 N.W. 864, 868 (1921)). The Michigan courts reached this result by ruling that the provision of the Uniform Arbitration Act allowing an arbitration award to be vacated when the arbitrators have exceeded their powers (in New Mexico, Section 44–7–12(A)(3)) applies when arbitrators have made an error of law. *Gavin,* 331 N.W.2d at 435; *St. Bernard,* 350 N.W.2d at 851. Most courts, however, read this section of the Uniform Arbitration Act narrowly and will only find that arbitrators have exceeded their powers when the arbitrators rule on a matter that is beyond the scope of the arbitration agreement, *see T & M Properties v. ZVFK Architects & Planners,* 661 P.2d 1040, 1044 (Wyo.1983); inconsistent with the arbitration agreement, *see Port Huron Area Sch. Dist. v. Port Huron Educ. Ass'n,* 426 Mich. 143, 393 N.W.2d 811, 819 (1986); removed from their consideration by statute, *see Plymouth–Carver Regional Sch. Dist. v. David M. Crawley Assocs., Inc.,* 17 Mass.App.Ct. 901, 455 N.E.2d 990, 991 (1983), *review denied,* 391 Mass. 1103, 461 N.E.2d 1219 (1984); or removed from their consideration by case law, *see Stewart,* 104 N.M. at 747, 726 P.2d at 1377. We decline to adopt the minority view advocated by the Fernandezes because we believe that this interpretation contravenes the limitations on judicial review of arbitration awards in Section 44–7–12(A)(5), and that such an expansion of the judicial role in arbitration would be contrary to the legislature's intent in enacting the Arbitration Act.

For these reasons, the district court's order remanding the parties' dispute to the arbitration panel is vacated, and the cause is remanded to the district court with instructions to enter judgment confirming the award in accordance with Section 44–7–11.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

857 P.2d 28

In the Matter of the ARBITRATION BETWEEN the TOWN OF SILVER CITY AND THE SILVER CITY POLICE OFFICERS ASSOCIATION (Mario Garcia, Grievant):

TOWN OF SILVER CITY, a municipal corporation, Plaintiff–Appellant,

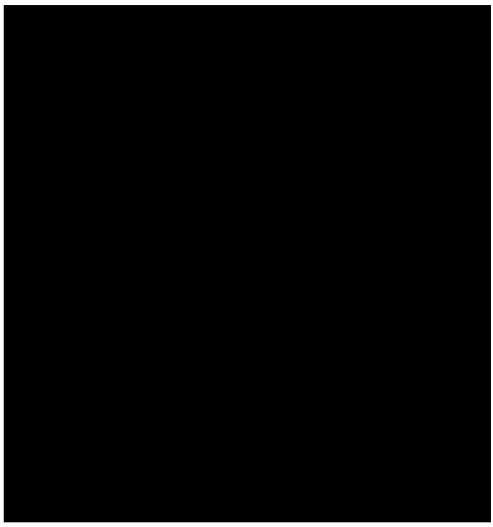
v.

Mario GARCIA, Defendant–Appellee.

No. 20975.

Supreme Court of New Mexico.

July 9, 1993.



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Kenneth R. Wagner & Associates, P.A., Kenneth R. Wagner, Phillip P. Baca, Albuquerque, for defendant-appellee.

OPINION

BACA, Justice.

Plaintiff-appellant, the Town of Silver City, New Mexico (the "City"), appeals the judgment of the district court confirming an arbitration award in favor of defendant-appellee, Mario Garcia. On appeal, we address whether the district court erred when it refused to vacate Garcia's arbitration award. We review this case under SCRA 1986, 12–102(A)(1) (Repl.Pamp.1992), and affirm.

I.

Garcia, a corporal with the Silver City Police Department (the "Department"), was discharged from the Department on October 16, 1991 for allegedly having sex with seventeen-year-old Lacy Landrum

Dominguez while on duty. Garcia waived his right to a disciplinary pretermination hearing and sought to have the matter resolved through binding arbitration pursuant to an agreement between the City and the Fraternal Order of Police. A hearing before an arbitrator was held on December 5, 1991. The sole issue presented to the arbitrator for resolution was whether Garcia ever had sex with Dominguez while on duty as a patrolman for the Department.

During his testimony at the arbitration hearing, Garcia admitted to having an affair with Dominguez, but denied that he ever had sex with her while on duty. Dominguez testified that she and Garcia had engaged in sex on several specific occasions while he was on duty. Ron Hall, a captain with the Department, testified that the Department's daily report log indicated that Garcia had been on duty during one instance when Dominguez alleged that she and Garcia had engaged in sex. Following the hearing, the arbitrator concluded that the evidence and testimony failed to adequately demonstrate that Garcia had participated in sexual activity with Dominguez while on duty. The arbitration award required that Garcia "be reinstated to the rank of Corporal and made whole with full back pay, benefits and seniority to the date of termination."

The City appealed Garcia's arbitration award to the district court. The City sought to have the award vacated or modified pursuant to NMSA 1978, Sections 44–7–12 or –13 of the Uniform Arbitration Act, NMSA 1978, §§ 44–7–1 to –22 (the "Arbitration Act"). A hearing was held before the district court on September 17, 1992. After hearing the arguments of counsel, reviewing the court file, reading the transcript of the arbitration proceedings, and reviewing various exhibits, the district court issued a letter opinion refusing to vacate the arbitration award. On November 20, 1992, the district court entered judgment adopting the award as the judgment of the court. The City appeals the district court's judgment to this Court and requests that we either enter an order upholding Garcia's termination or vacate the arbitration award so that a new hearing can be held before a different arbitrator.

II.

The sole issue that we address on appeal is whether the district court erred when it refused to vacate Garcia's arbitration award. The grounds for vacating an arbitration award are limited by statute. *See Spaw–Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.*, 114 N.M. 557, 558–59, 844 P.2d 807, 808–09 (1992); *Melton v. Lyon*, 108 N.M. 420, 421, 773 P.2d 732, 733 (1989); *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.*, 108 N.M. 192, 193, 769 P.2d 726, 727 (1989). Under Section 44–7–12(A), arbitration awards shall be vacated following proper application by a party when:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral [arbitrator] or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) the arbitrators exceeded their powers;

(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of [Section 44–7–5], as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under [Section 44–7–2] and the party did not participate in the arbitration hearing without raising the objection. The fact that relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

It is not the role of the district court to review the case de novo. *Spaw–Glass Constr. Servs.*, 114 N.M. at 558, 844 P.2d at 808; *Melton*, 108 N.M. at 421, 773 P.2d

at 733; *Hooten Constr. Co.*, 108 N.M. at 193, 769 P.2d at 727. When reviewing an arbitration award, the district court should simply "conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award." *Melton*, 108 N.M. at 421, 773 P.2d at 733.

We emphasize today that district court review of arbitration awards is strictly limited. In an opinion recently issued by this Court, *Fernandez v. Farmers Insurance Co. of Ariz.*, 115 N.M. 622, 625, 857 P.2d 22, 25 (1993) we held that an arbitration award is a final and conclusive resolution of the parties' dispute if it is fairly and honestly made and if it is within the scope of the questions submitted by the parties to the arbitrator for resolution. The Arbitration Act neither empowers the district court to review an arbitration award on the merits of the controversy, nor grants the district court the authority to review an award for errors of law or fact.[1] *Id.* at 626, 857 P.2d at 26. Thus, parties who agree to have their disputes resolved through arbitration cannot later relitigate the merits of the arbitrated issues in the district court. *Id.* at 627, 857 P.2d at 27. De novo review of the merits of arbitration awards by the district court would only serve to frustrate the purpose of arbitration, which seeks to further judicial economy by providing a quick, informal, and less costly alternative to judicial resolution of disputes. *See id.* at 625, 857 P.2d at 25.

Likewise, this Court exercises extreme caution when considering whether to vacate an arbitration award. *Spaw-Glass Constr. Servs.*, 114 N.M. at 558, 844 P.2d at 808. When reviewing whether the district court correctly confirmed an arbitration award, we determine whether substantial evidence in the record supports the district court's findings of fact, *Melton*, 108 N.M. at 421–22, 773 P.2d at 733–34, and whether the court correctly applied the law to the facts when making its conclusions of law, *see Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990). Substantial evidence is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. *Hooten Constr. Co.*, 108 N.M. at 193, 769 P.2d at 727. When determining whether a finding of fact is supported by substantial evidence, we review the evidence in the light most favorable to uphold the finding and indulge all reasonable inferences in support of the district court's decision. *Melton*, 108 N.M. at 422, 773 P.2d at 734; *Hooten Constr. Co.*, 108 N.M. at 193, 769 P.2d at 727.

A.

The City raises several arguments that it maintains require vacating Garcia's arbitration award. The City first argues that the arbitrator exceeded his power under Section 44–7–12(A)(3), by using the wrong standard of proof when deciding that the City had failed to prove whether Garcia had sex with Dominguez while on duty.

We do not agree that an arbitrator exceeds his power within the meaning of Section 44–7–12(A)(3) by mistakenly applying the incorrect standard of proof. "Arbitrators exceed their powers when they attempt to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement." *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170, 172 (Ct.App.1990). Legal and factual mistakes, such as applying the wrong standard of proof, do not comprise an abuse of power under Section 44–7–12(A)(3). *Cf. Batten*, 389 S.E.2d at 172 (concluding that the arbitrators' factual and legal errors do not constitute an abuse of power under a provision of the South Carolina Arbitration Act that provides for vacation of an arbitration award when arbitrators exceed their powers). Thus, contrary to the City's argument, Section 44–7–12(A)(3) does not provide a basis for vacating Garcia's arbitration award.

1. As we noted in *Fernandez*, mistakes of law or fact may in certain cases be egregious enough to imply misconduct, fraud, or lack of fair and impartial judgment, and may thus constitute the grounds for vacating an award under Section 44–7–12(A). 115 N.M. at 626, 857 P.2d at 26.

The City raises a related argument that the district court erred when it reviewed whether the arbitrator applied the wrong standard of proof because the court failed to give proper weight to testimony from Dominguez and Hall that purportedly corroborated Dominguez's testimony that she had sex with Garcia on two specific occasions while he was on duty. The City contends that Garcia's award must now be vacated because the district court failed to consider this corroborative evidence. We cannot agree.

By asserting that the district court erred in failing to give the proper weight to certain testimonial evidence when reviewing Garcia's arbitration award, the City in essence suggests that it is appropriate for the district court to conduct a de novo review of the merits of the issues decided by the arbitrator. As we emphasized previously in this opinion and in *Fernandez,* the grounds for reviewing an arbitration award are strictly limited by Section 44–7–12(A). *See Fernandez,* 115 N.M. at 625, 857 P.2d at 25. Consequently, a district court has no authority to review the merits of the issues arbitrated. *See id.* at 625, 857 P.2d at 25. The City's argument that Garcia's award must be vacated because the district court failed to consider certain corroborative evidence is without merit.[2]

B.

During the arbitration hearing, the arbitrator refused to admit certain evidence that Garcia had sex with other people besides Dominguez while on duty. The City contends that exclusion of this evidence constitutes grounds for vacating the award under Section 44–7–12(A)(4) because the arbitrator caused substantial prejudice to the City by refusing to hear evidence material to the parties' controversy. Thus, the City asserts that the district court erred when it upheld the arbitrator's ruling to exclude the evidence and argues that Garcia's award must now be vacated by this Court. We disagree.

As the language of Section 44–7–12(A)(4) clearly states, evidence excluded by an arbitrator must have been material to the controversy to provide the statutory grounds for vacating an arbitration award. Section 44–7–12(A)(4); *cf. Wayne Insulation Co. v. Hex Corp.,* 534 A.2d 1279, 1280 (D.C.1987) (holding, under a statute containing the same substantive language as Section 44–7–12(A)(4), that the exclusion of evidence provided the grounds for vacating an arbitration award only if the evidence excluded was material). "Material" evidence is evidence that relates to the matter in dispute or has a reasonable bearing on the issue to be decided in a given case. *See* 31A C.J.S. *Evidence* § 159, at 434–35 (1964). In the instant case, the stipulated issue to be decided by the arbitrator was whether Garcia had sex with Dominguez while on duty. Evidence that Garcia had sex with women other than Dominguez while on duty is not material to the specific issue presented to the arbitrator for decision and thus does not provide a basis for vacating the arbitration award under Section 44–7–12(A)(4). In addition, the arbitrator's exclusion of immaterial evidence did not deprive the City of an otherwise fair hearing. *See L.R. Foy Constr. Co. v. Spearfish Sch. Dist.,* 341 N.W.2d 383, 385–86 (S.D.1983) ("Courts which have examined the issue of exclusion of evidence at arbitration hearings have stated that the primary concern of the courts should be

2. In the instant case, our review of the district court's letter opinion discloses that the court actually gave a great deal of consideration to the aforementioned corroborative evidence when deciding whether to vacate Garcia's arbitration award. The district court found that the corroborating evidence showed that Garcia and Dominguez were likely to have been together on the two occasions in question, but did not prove that Garcia and Dominguez had engaged in sex on either occasion. The district court then concluded that even if the arbitrator had applied the wrong standard of proof, the City still failed to meet its burden of proving that Garcia had sex with Dominguez while on duty. Because a trial court lacks the power to review the merits of an arbitration award, the district court erred by weighing the evidence and ruling on the merits of the issues presented to the arbitrator. We consider this error harmless because the district court correctly refused to vacate the arbitration award. *See Jaramillo v. Jaramillo,* 113 N.M. 57, 62, 823 P.2d 299, 304 (1991) (noting that appellate courts will affirm a district court's decision when the district court reaches the correct result for the wrong reason).

whether the parties received a full and fair hearing."); *Pinnacle Group, Inc. v. Shrader,* 105 N.C.App. 168, 412 S.E.2d 117, 120 (1992) (stating that the party moving for vacation of an arbitration award based upon the improper exclusion of evidence "must show that the arbitrators' failure to receive evidence rose to the level of misconduct and thus deprived [the party] of a fair hearing"). We hold that the district court did not err by affirming the arbitrator's decision to exclude evidence that Garcia engaged in sex with persons other than Dominguez while on duty.

C.

The City also asserts that the district court erred by refusing to vacate Garcia's arbitration award because the arbitrator's conclusion that Dominguez's mother filed a complaint against Garcia conflicted with an earlier finding that both Dominguez and her mother brought the complaint. No provision of Section 44–7–12(A) provides for the vacation of an arbitration award because of an admittedly minor inconsistency between the arbitrator's findings and conclusions. Thus, we find meritless the City's argument that this minor error mandates vacation of Garcia's arbitration award.

D.

Finally, the City asserts that the district court erred by not finding that the arbitrator demonstrated partiality toward Garcia and by deciding not to vacate the award pursuant to Section 44–7–12(A)(2). To vacate an arbitration award under Section 44–7–12(A)(2), evidence of arbitrator partiality " 'must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative.' " *Melton,* 108 N.M. at 422, 773 P.2d at 734 (quoting *Ormsbee Dev. Co. v. Grace,* 668 F.2d 1140, 1147 (10th Cir.), *cert. denied, Grace v. Santa Fe Pac. R.R.,* 459 U.S. 838, 103 S.Ct. 84, 74 L.Ed.2d 79 (1982)). The party seeking to vacate the award bears the burden of proving partiality. *Dean Witter Reynolds, Inc. v. Deislinger,* 289 Ark. 248, 711 S.W.2d 771, 772 (1986) (citing Annotation, *Setting Aside Arbitration Award on the Ground of Interest or Bias of Arbitrators,* 56 A.L.R.3d 697, 726 (1974)).

In this case, the City points to several factors in an attempt to prove that the arbitrator was partial in favor of Garcia. The City claims that the arbitrator "refused to fairly consider the evidence" and "refused to properly evaluate corroborative evidence." However, our Court, like the district court, will not independently review the degree of consideration that the arbitrator gave to the evidence. *See Belen v. Allstate Ins. Co.,* 173 Mich.App. 641, 434 N.W.2d 203, 205 (1988) (holding that the degree of consideration that arbitrators give to the evidence is not a matter for appellate review). Clearly, partiality cannot be imputed from the methods by which an arbitrator considers and evaluates evidence.

The City also argues that the arbitrator improperly "refused to consider Garcia's pattern of lying." In essence, the City's argument amounts to an attempt to allege that the arbitrator was partial in favor of Garcia by refusing to admit evidence that Garcia had sex with other persons besides Dominguez while on duty. As a general rule, partiality cannot be inferred from adverse evidentiary rulings or from the enforcement of procedural rules. *State v. Hernandez,* 115 N.M. 6, 20, 846 P.2d 312, 326 (1993). We hold that the City's allegations of arbitrator partiality are, at best, speculative, indefinite, and uncertain. Because the City has failed to meet its burden of proving partiality, the district court correctly decided not to vacate Garcia's arbitration award under Section 44–7–12(A)(2). The judgment of the district court is AFFIRMED.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

857 P.2d 35

Thomas JAYCOX, Plaintiff–Appellant,

v.

Bertrelle EKESON, Defendant–Appellee.

No. 20754.

Supreme Court of New Mexico.

July 8, 1993.

James R. Beam, Albuquerque, for plaintiff-appellant.

Whitney C. Buchanan, Cynthia A. Fry, Albuquerque, for defendant-appellee.

OPINION

BACA, Justice.

Plaintiff-appellant Thomas Jaycox appeals from the trial court's denial of his application to vacate an arbitration award in favor of defendant-appellee Bertrelle Ekeson. Jaycox raises five issues that he contends mandate a reversal of the trial court: (1) Whether an oral agreement to

share expenses during unlawful cohabitation is unenforceable as a violation of public policy; (2) whether the trial court erred in affirming the arbitration award because the agreement lacked mutual assent; (3) whether the results of the arbitration proceedings are void for lack of proper notice and a refusal to postpone upon a showing of sufficient cause; (4) whether the failure to postpone the arbitration proceedings violates the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501–591 (1988); and (5) whether the trial court erred when it failed to adopt findings of fact and conclusions of law. We review the trial court's decision pursuant to SCRA 1986, 12–102(A)(1) (Repl.Pamp.1992), and reverse.

I

In March of 1989, Jaycox and Ekeson met and shortly thereafter decided to live together in Ekeson's residence. Their cohabitation continued through October of 1990. Following the dissolution of the relationship, Jaycox filed a complaint against Ekeson alleging malicious prosecution and requesting an allocation of debts and assets, creation of a constructive trust, and injunctive relief. Ekeson answered and counterclaimed alleging breach of contract and later amended her answer to add an allegation of fraud. In April of 1991, the parties agreed to drop all tort allegations and have the matter presented to binding arbitration.

On September 30, 1991, the first arbitration hearing was held. Jaycox was not present at this hearing, but with the consent of counsel for both parties, testimony of two witnesses was introduced. At a second hearing on January 31, 1992, both Jaycox and Ekeson testified under oath. At the close of this hearing, the arbitrator suggested a possible settlement and set a date by which the settlement was to be concluded. If the settlement was not concluded by that date, the arbitrator indicated that a third hearing of a half day would be held. On February 6, 1992, the arbitrator's secretary attempted to notify counsel for each party that the third hearing had been scheduled for February 11. She was unable to reach Jaycox's counsel by telephone until the morning of February 7. Jaycox's counsel received written notice of the third hearing on February 10.

Jaycox's counsel appeared at the February 11 hearing and made an oral motion for a continuance, asserting that Jaycox had not received timely notice and that Jaycox was unable to be present because he was out of state on a military assignment. The arbitrator denied the motion, and the third hearing was held. On February 27, the arbitrator issued findings of fact and conclusions of law, the substance of which was that the parties had cohabitated, that they had an agreement to share expenses, and that Ekeson should be awarded certain pre- and post-separation expenses.

On May 18, 1992, Jaycox filed an application to vacate the arbitration award pursuant to the New Mexico version of the Uniform Arbitration Act, NMSA 1978, Sections 44–7–1 to –22 (the "Arbitration Act"). At the conclusion of an evidentiary hearing, the district court denied Jaycox's application and entered a judgment confirming the arbitrator's award, without issuing findings of fact and conclusions of law. From this judgment, Jaycox appeals.

II

The only issue that we address is whether the arbitration award should be vacated because of a lack of proper notice to Jaycox and because the arbitrator refused to postpone the third hearing upon a showing of sufficient cause. Citing Section 44–7–5(A), Jaycox first argues that he did not receive sufficient notice of the third hearing. Citing Section 44–7–12(A)(4), Jaycox also argues that the arbitrator failed to postpone the third hearing upon sufficient cause being shown and that as a result he suffered prejudice. Jaycox concludes that the trial court erred when it failed to vacate the arbitration award. Ekeson replies that Jaycox has not established that the lack of proper notice or the failure of the arbitrator to postpone the hearing in any way prejudiced Jaycox's ability to present his case.

Where freely chosen by the parties, arbitration is a favored method of resolving disputes because it is a relatively inexpensive and speedy process. *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.*, 108 N.M. 192, 193, 769 P.2d 726, 727 (1989). Once an arbitration award is entered, it should be accorded great deference by the district court on review. *Id.* "It is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award." *Melton v. Lyon*, 108 N.M. 420, 421, 773 P.2d 732, 733 (1989). While judicial review of arbitration awards is limited to the grounds established in the Arbitration Act, *United Technology & Resources, Inc. v. Dar Al Islam*, 115 N.M. 1, 3, 846 P.2d 307, 309 (1993), the court may review arbitration proceedings to ensure that they comport with the Act's procedural requirements. *See* Sections 44–7–5 & –12(A)(4); *see also PPX Enters., Inc. v. Musicali*, 53 A.D.2d 555, 384 N.Y.S.2d 801, 803 (1976) (vacating arbitration award for failure to follow statutory procedure), *aff'd*, 42 N.Y.2d 897, 397 N.Y.S.2d 987, 366 N.E.2d 1341 (1977).

The procedural safeguards of the Arbitration Act are found in Section 44–7–5, and the standards for review by the district court are found in Sections 44–7–12 and –13. Section 44–7–5(A) provides in pertinent part that "the arbitrator shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail or certified mail, return receipt requested, not less than five days before the hearing." [1] Section 44–7–5(B) entitles "the parties ... to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing...." Section 44–7–12(A)(4) provides that the district court "shall vacate an award where ... the arbitrator[ ] refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 [44–7–5 NMSA 1978], as to prejudice substantially the rights of a party...." The grammatical structure of this provision suggests that the "prejudice" clause only modifies the "otherwise so conducted" clause, and not the other two grounds for vacating the award. For purposes of this opinion, however, we assume without deciding that failure to give proper notice to a party must substantially prejudice that party's rights before an arbitration award will be vacated under Section 44–7–12(A)(4).

In this case, it is undisputed that Jaycox did not receive written notice of the third arbitration hearing until the day before that hearing, contrary to the requirement of Section 44–7–5(A) that notice be served not less than five days before the hearing is to be held. Ekeson argues, however, that Jaycox cannot show that he was prejudiced by his lack of adequate notice and inability to attend the third hearing because (1) Jaycox would have been unable to attend the third hearing because of a prior military commitment even if he had received adequate notice; (2) Jaycox testified at a prior hearing, and Jaycox's counsel extensively cross-examined Ekeson at the third hearing; and (3) even if Jaycox had testified at the third hearing, the arbitrator would have resolved issues against Jaycox because the arbitrator found that Jaycox's testimony was not credible. In addition, Ekeson argues that the only evidence presented by Jaycox at the evidentiary hearing to show that he was prejudiced was his counsel's "conclusory testimony that Mr. Jaycox was prejudiced." Ekeson concludes that because Jaycox has not demonstrated prejudice, we should affirm the trial court. We cannot agree.

Ekeson first argues that Jaycox was not prejudiced by inadequate notice because even had he received notice he would not have been able to attend the hearing. This argument, rather than show-

1. The statute continues "[a]ppearance at the hearing waives such notice." Section 44–7–5(A). Ekeson, however, has not argued that Jaycox waived notice when his counsel appeared at the third hearing; therefore, we do not address that issue.

ing that Jaycox was not prejudiced, bolsters Jaycox's contention that he presented sufficient cause for the arbitrator to grant a continuation. We review the denial of a continuance for an abuse of discretion. *See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 104, 654 P.2d 548, 557 (1982) (reviewing trial court's denial of continuance). An abuse of discretion will be found if the decision is contrary to logic and reason. *Kueffer v. Kueffer*, 110 N.M. 10, 13, 791 P.2d 461, 464 (1990). As Ekeson states, Jaycox was unable to attend the third hearing because a prior military commitment required him to be out of state on the date that that hearing was scheduled. Thus, Jaycox presented sufficient cause to support his motion for a continuance, and the arbitrator's decision was contrary to logic and reason.

Ekeson's second argument is that Jaycox failed to prove that his inability to attend the hearing resulted in any prejudice because he presented testimony at a prior hearing and because his counsel cross-examined Ekeson at the third hearing. This argument ignores the clear language of Section 44–7–5(B), which allows both parties to be heard, to present evidence, and to cross-examine adverse witnesses. The fact that Jaycox's counsel was able to cross-examine Ekeson at the third hearing and that Jaycox testified at the second hearing does not make up for his inability to present evidence and to be heard at the third hearing. In other words, the prejudice that Jaycox suffered was his inability to attend the hearing, to testify, and to offer evidence contrary to that offered by Ekeson.

Ekeson's final argument is based on the arbitrator's testimony at the evidentiary hearing that she (the arbitrator) determined at the second arbitration hearing that Jaycox's testimony was not credible.[2] Ekeson asserts that "[a]nything [Jaycox] might have said at the February 11th hearing to refute Ms. Ekeson's testimony would have been deemed [by the arbitrator] incredible as well." While the arbitrator's testimony at the evidentiary hearing below made it appear that the result of the arbitration had been determined prior to the third arbitration hearing, the fact that Ekeson introduced evidence and was cross-examined shows that the arbitrator intended to allow the introduction of evidence at that hearing. In addition, if Ekeson is correct in asserting that the arbitrator would not have believed any testimony that Jaycox could have presented at the third hearing, then we are concerned that the arbitrator was not an unbiased fact finder. The testimony of the arbitrator, set out in the margin, indicates that she may have prejudged the outcome of the arbitration before the third hearing.

The Arbitration Act provides for an award to be vacated when an arbitrator appointed as a neutral demonstrates "evident partiality." Section 44–7–12(A)(2). The arbitrator's predisposition to discredit testimony not yet given by Jaycox suggests that the arbitration award could be vacated due to the arbitrator's apparent lack of impartiality. Our holding, however, is limited to resolution of the issue raised by Jaycox—his claim that the result of the arbitration should be invalidated because of his lack of notice of the third hearing and the arbitrator's refusal to postpone the hearing after having been notified that Jaycox could not attend. Resolution of this issue is dispositive of this appeal, so we need not and do not address any other issue raised by the parties.

2. At the evidentiary hearing, the arbitrator testified on direct as follows:

Q: Do you feel that Mr. Jaycox's position was unfairly prejudiced by his inability to attend on February 11?

A: Well, it's hard for me to know. By that time, as I stated, both parties had acknowledged that there was an agreement, and we needed to figure out what the terms of the agreement were. To the extent that his testimony was going to be different from her testimony, because of the credibility issue that I had already resolved, her testimony was going to be found credible and his was not.

On cross-examination, the testimony continued:

Q: Is it your testimony that you had already made, essentially, your decision on the arbitration so that Mr. Jaycox's testimony, if he had been there on the 11th, was going to be totally discounted anyway?

A: To the extent that his testimony would contradict her testimony, his testimony would have been found incredible.

Because we find that Jaycox was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and that the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, we hold that the trial court erred when it failed to vacate the arbitration award pursuant to Section 44–7–12(A)(4). *See Coral Kingdom of Kaneohe, Ltd. v. Harter*, 65 Haw. 247, 649 P.2d 1159, 1161–62 (1982) (per curiam) (vacating arbitration award for arbitrators' refusal to postpone hearing after failure to give proper notice of hearing). We remand this case to the district court with instructions to vacate the arbitration award and to conduct proceedings consistent with the foregoing discussion.

The judgment of the trial court is reversed.

IT IS SO ORDERED.

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

857 P.2d 39

Dorothy FOLZ, as Personal Representative of Sylvester C. Folz, Deceased, and Steven Folz, Deceased; Dorothy M. Folz, Individually; Thomas Tallant, a Minor, by and through his Guardian Ad Litem, Nettye T. Moten; Nettye T. Moten, Individually; and Rita Garcia, as Personal Representative of the Estate of Leo L. Garcia, Deceased, Plaintiffs–Appellants,

v.

STATE of New Mexico and New Mexico State Highway Department, an Agency, Defendants–Appellees.

No. 12947.

Court of Appeals of New Mexico.

May 24, 1993.

Certiorari Denied July 7, 1993.

Louis Marjon, Law Offices of Louis Marjon, Albuquerque, James Cunningham, Phoenix, AZ, for plaintiffs-appellants.

William P. Gralow, Nickay B. Manning, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendants-appellees.

OPINION

ALARID, Judge.

This appeal concerns the trial court's denial of Appellants' Motion to Assess Post-Judgment Interest. Appellants claim the statute governing the award of interest, NMSA 1978, Section 56-8-3 (Cum.Supp. 1982), in effect at the time these consolidated actions were filed, authorized recovery of interest on judgments at a rate of ten percent annually. The State of New Mexico and one of its agencies, the Highway Department (hereinafter "the State"), maintain that the trial court properly prohibited the award of post-judgment interest because New Mexico law precludes interest on judgments against the State. Under the limited facts of this case, we reverse the denial of post-judgment interest.

BACKGROUND AND FACTS

Appellants and Appellants' decedents (hereinafter "Appellants") were injured and killed in automobile accidents on July 21, 1981, in the course of a New Mexico State Highway Department maintenance project. The facts surrounding this incident are fully set forth in *Folz v. State,* 110 N.M. 457, 797 P.2d 246 (1990). Following the accidents, Appellants brought tort actions against the State and the highway construction company which had contracted to resurface a mountainous portion of Highway 82 between Cloudcroft and Alamogordo. Complaints were filed in 1982 and in April of 1983. After a trial on the merits, a judgment was entered against the State and the highway construction company on October 12, 1984. Thereafter, all parties appealed various portions of the judgment. Subsequently, the New Mexico Supreme Court issued a writ of certiorari to the Court of Appeals and rendered its Opinion on August 8, 1990. *See id.* An Amended Judgment and Order was entered nunc pro tunc, effective October 12, 1984.

Following the Supreme Court decision, Appellants filed with the trial court a Release and Satisfaction pertaining to their claims and judgments against the highway construction company. Thereafter, Appellants filed a Motion to Assess Post-Judgment Interest against the State from the date of the entry of judgment, October 12, 1984. The trial court denied that Motion basing its ruling on *Fought v. State,* 107 N.M. 715, 764 P.2d 142 (Ct.App.1988) (wrongful death plaintiff not entitled to post-judgment interest on judgment obtained against State). The denial of post-judgment interest is the subject of this appeal.

DISCUSSION

Appellants argue the trial court erred in denying post-judgment interest on their judgment obtained against the State under the Tort Claims Act, NMSA 1978, Sections 14-4-1 to -27 (Cum.Supp.1982) (hereinafter the "Tort Claims Act"). In particular, Appellants point to NMSA 1978, Section 41-4-19(B) (Repl.Pamp.1982), which informs us that "[n]o 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.*" (Emphasis added). In addition, Appellants claim that NMSA 1978, Section 56-8-3 (Cum.Supp. 1982), which was in effect at the time these consolidated actions were filed in 1982 and 1983, authorized recovery of interest on judgments at a rate of ten percent annually. Appellants emphasize that the language in Section 56-8-3 provided in pertinent part:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be ten percent annually in the following cases:

. . . .

B. On judgments and decrees for the payment of money when no other rate is expressed;

. . . .

Thus, Appellants argue, post-judgment interest was not prohibited at the time these actions were initiated and therefore Appellants should be permitted to recover interest against the State.

However, the State argues that in 1983, the legislature amended Section 56–8–3 and completely deleted the language from this statute which authorized interest on judgments and decrees. After amendment, NMSA 1978, Section 56–8–3 (Repl.Pamp.1986) read:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:
>
> A. on money due by contract;
>
> B. on money received to the use of another and retained without the owner's consent expressed or implied; and
>
> C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

Moreover, the State stresses that the 1983 Legislature rewrote and restructured NMSA 1978, Section 56–8–4 (Repl.Pamp.1986), so that it allowed interest on judgments generally, but exempted the State from its provisions except as otherwise provided by law. *See* § 56–8–4(A) ("Interest shall be allowed on judgments and decrees * * * * ") and 56–8–4(D) ("[t]he state and its political subdivisions are exempt from the provisions of this section except as otherwise provided by statute or common law."). Thus, the State counters that the intent of the legislature was to exempt the State from the award of interest on judgments and that Section 56–8–4(D) must be applied retroactively to preclude the imposition of post-judgment interest against the State. We disagree.

This Court has already recognized that when Section 56–8–4 was amended in 1983, it did not contain an emergency clause. *See Sanchez v. Molycorp, Inc.,* 103 N.M. 148, 154 n. 1, 703 P.2d 925, 931 n. 1 (Ct. App.1985). Therefore, as provided in New Mexico Constitution Article IV, Section 23, the amendment became effective ninety days following its enactment in the session ending March 19, 1983, and subsequent to the time Appellants filed their causes of action herein. *Id.* Nevertheless, the State contends that an award of post-judgment interest against it is prohibited because Section 56–8–4(D) is remedial legislation that should apply retroactively. *See Gray v. Armijo,* 70 N.M. 245, 248, 372 P.2d 821, 823–24 (1962) (contrasting procedural versus substantive rights). The State also contends that interest against the State is a privilege that the State can withdraw at any time and that the statute in effect at the time of the judgment controls. *See Bradbury & Stamm Constr. Co. v. Bureau of Revenue,* 70 N.M. 226, 238, 372 P.2d 808, 817 (1962).

We answer both contentions with reference to our understanding of the Tort Claims Act. Prior to the enactment of the Tort Claims Act, sovereign immunity was the rule, and the State was treated very differently than private parties. *See Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975). *Hicks* abolished sovereign immunity but allowed the legislature to reenact it. In reenacting an immunity scheme, the Tort Claims Act provides for numerous waivers of immunity, §§ 41–4–5 to –12 (immunity waived for certain activities), as well as certain particular procedures, § 41–4–16 (notice of claims), and certain limits, § 41–4–19(A) (upper limit on damages); and § 41–4–19(B) (prohibiting punitive damage and prejudgment interest). Apart from the express procedures and limits, however, the Tort Claims Act manifests an intent for the State to be treated just as a private party once immunity is waived.

If the State were a private party, it is clear that the law governing interest would be the law in effect at the time the suits were filed. The Supreme Court, in *Hillelson v. Republic Ins. Co.,* 96 N.M. 36, 37–38, 627 P.2d 878, 879–80 (1981), held that Article IV, Section 34 of the New Mexico Constitution (providing that no act

of the legislature shall affect the right or remedy of any party in any pending case) required that the statute governing interest would be the statute in effect at the time the case was filed. Although *Hillelson* distinguished *Bradbury,* we believe that the distinction does not apply to this case and neither does *Bradbury.* In this case, the State is not required to pay interest in its capacity as sovereign by special statute dealing with taxes; rather the State would be required or not be required to pay interest as a defendant in a tort action for which immunity has been waived.

Therefore, we do not believe that Section 56–8–4(D) bars Appellants from recovering interest against the State under the circumstances of this case because the present causes of action were pending prior to the effective date of Section 56–8–4(D). *See USLife Title Ins. Co. v. Romero,* 98 N.M. 699, 703, 652 P.2d 249, 253 (Ct.App.1982) (where a case is pending when an amended statute is enacted, the old statute applies to the case), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).

Post-judgment interest is intended to prevent the inequity of denying the prevailing party the cost of the lost opportunity of using the money that the judgment debtor had use of during the pendency of the appeal. *See Ulibarri v. Gee,* 107 N.M. 768, 769, 764 P.2d 1326, 1327 (1988). The law in existence at the time of the adoption of the Tort Claims Act permitted interest generally. However, when the Tort Claims Act was enacted in 1976, the statute expressly prohibited "interest prior to judgment." NMSA 1953, § 5–14–17(B) (Interim Supp.1976). This evinces a legislative intent to permit the award of interest following a judgment to the extent allowed in other cases. The legislature could have ended Section 41–4–19(B) after the word "interest." By negative inference, the failure to do so suggests post-judgment interest may be available. *Cf. Patterson v. Globe American Casualty Co.,* 101 N.M. 541, 544, 685 P.2d 396, 397 (Ct.App.1984).

Reading Section 41–4–19(B) to prohibit post-judgment interest both reads words that are not present in the statute ("prior to *and following* judgment") and assumes that other words ("prior to judgement") are useless. Both of these ways of reading the statute are prohibited. *Garrison v. Safeway Stores,* 102 N.M. 179, 692 P.2d 1328 (Ct.App.) (courts are prohibited from reading words into a statute), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1984); *State ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977) (courts will not presume legislature enacted useless language).

In the present case, the trial court denied Appellants' Motion to Assess Post–Judgment Interest, based on an interpretation of the Tort Claims Act found in *Fought v. State,* 107 N.M. 715, 764 P.2d 142 (Ct.App. 1988). In *Fought,* the plaintiff moved for post-judgment interest on a judgment obtained against the State for the wrongful death of her husband under the Tort Claims Act. The plaintiff in *Fought* argued that Section 41–4–19(B) of the Act only prohibited the award of interest prior to judgments against the State. However, the *Fought* court announced that "[t]he fact that the [Tort Claims] act is silent as to postjudgment interest does not indicate that the legislature intended to permit recovery of postjudgment interest against the State." *Id.* While we agree with the result reached in that case, we disagree with two sentences used by that court to support its decision. We explain and take this opportunity to clarify *Fought.*

First, the *Fought* court announced that one of the reasons why post-judgment interest was being denied in that case was because "the Tort Claims Act must be strictly construed." *Id.* (citing *Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980)). However, we believe that statement was written in a different context and does not necessarily mandate the result prohibiting post-judgment interest against the State. In *Methola,* the Supreme Court actually stated that "[s]ince the [Tort Claims] Act is in derogation of petitioner's common law rights to sue respondents for negligence, the Act is to be strictly construed insofar as it modifies the common law." *Methola,* 95 N.M. at 333, 622 P.2d at

238 (citing *State v. Chavez,* 70 N.M. 289, 291, 373 P.2d 533, 534 (1962)). On the other hand, the Supreme Court has said that it consistently has given the Tort Claims Act a liberal construction to effectuate its remedial purposes. *Castillo v. County of Santa Fe,* 107 N.M. 204, 206, 755 P.2d 48, 50 (1988). These seemingly conflicting rules of statutory construction show that such rules should not be used as a substitute for reading the statutory language. Thus, we believe the sentence in question in *Methola* to mean that strict construction of the Tort Claims Act does not mandate a prohibition of payment of post-judgment interest, but requires a court to immunize the State from a party's avenues of redress no further than the words of the statute itself require.

Second, the *Fought* court rejected the plaintiff's attempt to recover post-judgment interest by reasoning that when "the Tort Claims Act was enacted, statutory provisions for post-judgment interest referred to judgments based on contracts." *Fought,* 107 N.M. at 715, 764 P.2d at 142. The *Fought* court cited NMSA 1953, Sections 50–6–3 & –4 as support for this statement. However, our reading of Section 50–6–3 (Repl.Vol. 8, pt. 1, 1962) suggests that this statute applied to all judgments and decrees. For example, we note that the Supreme Court had allowed interest in non-contract claims. *See Varney v. Taylor,* 81 N.M. 87, 88, 463 P.2d 511, 512 (1969). Moreover, we believe that the references to contracts in the statute simply clarified that a contract could always set a different rate of interest, which a judgment was to follow. *See Schultz & Lindsay Constr. Co. v. State,* 83 N.M. 534, 494 P.2d 612 (1972).

Because the plaintiff in *Fought* initiated her complaint against the State after the effective date of the statute which barred the State from having interest awarded against it, we believe the *Fought* court correctly prohibited that plaintiff from recovering post-judgment interest. However, to the extent that *Fought* held that post-judgment interest was prohibited in Tort Claims Act cases filed against the State prior to the effective date of Section 56–8–4(D), we overrule that decision. Nevertheless, as this Court recently reiterated, under the current statutory framework, except as otherwise provided by law, the State and its political subdivisions are exempted from awards of interest on judgments. *See* § 56–8–4(D); *Montney v. State ex rel. State Highway Dept.,* 108 N.M. 326, 331, 772 P.2d 360, 365 (Ct.App.), *cert. denied,* 108 N.M. 197, 769 P.2d 731 (1989).

CONCLUSION

Because we reverse on the grounds that the Tort Claims Act and the other applicable statutes, in effect at the time these causes of action were filed, permitted the award of post-judgment interest against the State, we need not address the constitutional or discovery issues raised by Appellants. For the reasons set out above, we hold that post-judgment interest may be awarded in Tort Claims Act cases against the State which were filed before the effective date of Section 56–8–4(D). We therefore reverse and remand this appeal to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PICKARD, J., concurs.

HARTZ, J., Specially concurring.

HARTZ, Judge, Specially concurring.

I join fully in Judge Alarid's opinion for the Court.

I write separately only to suggest the demise of the construction given to Article IV, Section 34, of the New Mexico Constitution by *Bradbury & Stamm Construction Co. v. Bureau of Revenue,* 70 N.M. 226, 372 P.2d 808 (1962). The constitutional provision reads: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." *Bradbury & Stamm* held that the provision does not restrict the legislature's authority to reduce the interest rate paid by the state on tax refunds arising from pending cases

because "[t]he requirement that the state pay interest creates no right in the taxpayer, but only a privilege subject to being changed." *Id.* at 238, 372 P.2d at 817.

Thus, *Bradbury & Stamm* distinguished the state from private litigants with respect to the application of the constitutional provision. That distinction was not firmly rooted even in 1962; *Bradbury & Stamm* was a three-to-two decision. Today the roots are weak indeed. I suspect that most present readers of *Bradbury & Stamm* would find the dissent of Justice Moise to be much the more persuasive opinion. Particularly in light of the elimination of sovereign immunity for torts by *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975), any reason for distinguishing the state from other litigants is substantially undermined. Even before *Hicks* the New Mexico Supreme Court suggested its discomfort with *Bradbury & Stamm* by citing Justice Moise's dissent as authority in a per curiam opinion on rehearing in *State ex rel. Barela v. New Mexico State Board of Education,* 80 N.M. 220, 223, 453 P.2d 583, 586 (1969).

I do not read *Hillelson v. Republic Insurance Co.,* 96 N.M. 36, 627 P.2d 878 (1981) as reinvigorating *Bradbury & Stamm.* The opinion in *Hillelson* did not approve of *Bradbury & Stamm;* the opinion merely distinguished *Bradbury & Stamm* on the obvious ground that the case then before the Court involved claims between private parties. *Id.* at 38, 627 P.2d at 880.

Judge Alarid's opinion today properly limits *Bradbury & Stamm.* When the time comes, I am confident that *Bradbury & Stamm* will be overruled in its interpretation of Article IV, Section 34, of the New Mexico Constitution.

857 P.2d 44

STATE of New Mexico ex rel. The DEPARTMENT OF PUBLIC SAFETY, STATE POLICE DIVISION, Plaintiff-Appellant,

v.

ONE 1990 CHEVROLET PICKUP, MODEL Z-71, FOUR WHEEL DRIVE, WHITE, BEARING TEXAS LICENSE NO. 3003VR, VIN: 1GCDK14K6LZ204458, Defendant-Appellee. (Two Cases).

In the Matter of the FORFEITURE OF ONE 1990 FORD RANGER PICKUP, VIN: 1FTCR10AXLUA86836, WHITE IN COLOR, LICENSE NO. 347 BMC.

CITY OF DEMING, New Mexico, a Municipal Corporation, Plaintiff-Appellee,

v.

Thomas ORTEGA, Defendant-Appellant.

Nos. 13,728, 13,731, 14,242.

Court of Appeals of New Mexico.

June 1, 1993.

Certiorari Denied July 16, 1993.

Vigil, Marchiondo & Vigil, P.A., Albuquerque, for plaintiff-appellant.

Temple B. Ingram, El Paso, for defendant-appellee.

Robert C. Floyd, Deming, for plaintiff-appellee in No. 13,731.

H.R. Quintero, Robinson & Quintero, P.C., Silver City, for defendant-appellant in No. 13,731.

William H. Carpenter, Michael B. Browde, Albuquerque, amicus curiae New Mexico Trial Lawyers Ass'n in No. 13,731.

Charles W. Daniels, Albuquerque, amicus curiae New Mexico Criminal Defense Lawyers Ass'n in No. 13,731.

OPINION

CHAVEZ, Judge.

We have consolidated the above three cases because each raises the issue of whether NMSA 1978, Section 30-31-34(D) (Repl.Pamp.1989), provides for forfeiture of vehicles and other property when the owner of the property is in possession of a small amount of controlled substances designated solely for personal use. We hold that, in order for property to be forfeited under Section 30-31-34, possession of a controlled substance must be for the purpose of sale. We begin by discussing the facts and procedural posture of each case.

Spencer Forfeiture

In two cases, the State appeals two orders, one granting Fernando Spencer's (Spencer) motion for summary judgment disallowing forfeiture, and one granting Spencer's motion allowing him to use the vehicle pending final decision on the State's appeal. Spencer was stopped at a border patrol checkpoint in Las Cruces, New Mexico, on February 24, 1991. Spencer appeared nervous and confused when the border patrol agent asked him for a driver's license and vehicle registration. Spencer told the agent that he was headed for El Paso, even though he was travelling west on Interstate 10. The officer asked Spencer to proceed to a secondary inspection

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Tom Udall, Atty. Gen., John W. Wheeler, Sp. Asst. Atty. Gen., Santa Fe, Michael E.

area so that the officer could inquire further about ownership of the Chevrolet Truck. Spencer eventually went into the checkpoint trailer where the border patrol agent asked him to empty his pockets because his pockets had "noticeable bulges." Another agent noticed that white flakes and powder came out of Spencer's pockets when he emptied them. The powder tested positive for cocaine, and a further search of Spencer's person revealed a plastic bag in his right front pocket that contained a substance that tested positive for cocaine. Spencer's truck was searched and more cocaine powder was discovered. The total weight of cocaine discovered on Spencer's person and in his truck was approximately two grams.

The State commenced forfeiture proceedings against the truck on February 26, 1992, two days after the arrest. Spencer was indicted for possession of cocaine with the intent to distribute, but pled guilty to possession of cocaine, a fourth degree felony. The parties agree the truck was not used to transport the cocaine for purpose of sale. The trial court granted summary judgment in favor of Spencer.

On November 25, 1991, Spencer filed a motion to transfer possession of the vehicle to him pending final disposition of the forfeiture proceedings. After the trial court entered its findings and conclusions and judgment on February 10, 1992, the parties filed supplemental memoranda concerning Spencer's motion. On August 20, 1992, the trial court entered an order requiring the State to transfer possession of the truck to Spencer. The trial court ordered that Spencer was required to deposit the certificate of title to the vehicle and proof of insurance with the court prior to the State's release of the vehicle.

Ortega Forfeiture

On July 20, 1991, Thomas Ortega (Ortega) was arrested in Luna County for driving while intoxicated. An inventory search of Ortega's possessions was conducted pursuant to his arrest. The officers conducting the search discovered a folded $100 bill in Ortega's wallet. When the officers unfolded the bill, a very small amount of cocaine was found. The City of Deming (City) instituted forfeiture proceedings against Ortega's truck on August 2, 1991. The parties stipulated that the cocaine found was for Ortega's personal use. The trial court denied Ortega's motion to dismiss and ordered that the truck be forfeited. Ortega appealed the trial court's order. The trial court stayed the order of forfeiture pending final resolution of Ortega's appeal. The New Mexico Trial Lawyers Association and the New Mexico Criminal Defense Lawyers Association filed amicus briefs with this Court on Ortega's behalf.

ISSUES

The State raises nine issues in the Chevrolet Truck cases, which may be summarized as follows: (1) whether the trial court erred in interpreting Section 30–31–34(D) as requiring a vehicle to be transporting drugs "for the purpose of sale" in order to be forfeited; and (2) whether the trial court properly granted Spencer's motion to transfer possession of the vehicle. Ortega raises the following issues in his appeal: (1) whether Section 30–31–34(D) precludes forfeiture of his vehicle because the small amount of cocaine he possessed was for personal use; and (2) whether Section 30–31–34(D) is unconstitutionally vague as applied. In the Chevrolet Truck cases, we affirm the trial court's order denying forfeiture, and we do not reach the issues concerning the trial court's order granting Spencer's motion to transfer possession of the vehicle. In the Ortega appeal, we reverse the trial court's order of forfeiture.

Interpretation of Section 30–31–34(D)

The current version of Section 30–31–34(D) subjects the following property to forfeiture: "... all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B of this section...." The parties and amici argue a range of positions about how the phrase "for the

purpose of sale" should be interpreted as a modifying or limiting phrase.

The parties' difference of opinion begins with two New Mexico cases, *In re Forfeiture of One 1982 Ford Bronco (State v. Stevens),* 100 N.M. 577, 673 P.2d 1310 (1983) and *State v. Barela,* 93 N.M. 700, 604 P.2d 838 (Ct.App.1979), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980), which the *Stevens* Court expressly overruled. In *Stevens,* the Supreme Court interpreted an earlier version of Section 30–31–34(D) as allowing forfeiture when a vehicle is used to transport an illegal substance, regardless of whether the transportation was for the purpose of sale. In *Barela,* decided three years before *Stevens,* this Court held that the provision did not apply in cases where transportation of the controlled substance was not for the purpose of sale. The Supreme Court in *Stevens* interpreted Section 30–31–34(D) as allowing forfeiture any time an illegal substance is transported by a vehicle, and, as a result, overruled *Barela.* As all parties in the present cases point out, the *Stevens* Court interpreted an earlier version of the statute that is no longer in effect. In fact, at the time *Stevens* was decided in December 1983, the earlier version of the statute had been ineffective for two years, having been amended in 1981. This earlier version of Section 30–31–34(D) read as follows: "... all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property described in Subsections A or B."

The 1981 amendment to Section 30–31–34(D) removed three commas: one between the words "used" and "or," one between the words "use" and "to," and one between the words "transport" and "or." The City and the State both argue that the legislative amendment resulting in the removal of the commas does not matter, that *Stevens* is still good law, and that the phrase "for the purpose of sale" modifies only the phrase directly before it; i.e., "in any manner to facilitate the transportation." Interpreting the statute in this manner would result in forfeiture of property any time an individual "transports" a controlled substance in a vehicle, regardless of the amount or whether the drugs were for personal use, as long as the government entity shows that a controlled substance was being transported. The *Stevens* Court made such a determination, and in doing so, the Court relied heavily on the placement of the commas in the earlier version of the statute. The *Stevens* Court also relied heavily on the "last antecedent rule." Specifically, the Court stated that a statute must be read to make "grammatical sense," that a comma must not be placed between the restrictive clause and that which it restricts, and that a restrictive clause only applies to the words or the phrase immediately preceding it. Applying these rules, the *Stevens* Court determined that "for the purpose of sale" only modified the phrase "in any manner to facilitate the transportation." Finally, the Supreme Court stated that the only manner in which the restrictive clause could apply to the phrase "to transport" would be to enclose the clause "for the purpose of sale" by commas.

In the present appeals, the trial court in the Chevrolet cases determined that because the Supreme Court relied heavily on commas that no longer exist, *Stevens* cannot be relied upon for the proposition that a vehicle merely transporting controlled substances, whether or not the substances are intended for sale, may be forfeited. In contrast, the trial court in the Ortega case determined that *Stevens* is still applicable, and that since the legislature has not followed the Supreme Court's directive about how it should draft a modifying phrase, the trial court was required to interpret the current statute in the same manner as *Stevens.*

[redacted] "[T]he cardinal rule of statutory construction is to determine legislative intent." *D'Avignon v. Graham,* 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct.App.1991). "[L]egislative intent is first sought by reference to the plain meaning found in the language used by the legislature. However, both this [C]ourt and the New Mexico Supreme Court have rejected formalistic

and mechanistic interpretation of statutory language." *Id.* The "last antecedent rule" utilized in *Stevens* and other cases is a valid method of statutory interpretation, *see, e.g., Hale v. Basin Motor Co.,* 110 N.M. 314, 795 P.2d 1006 (1990), however, the doctrine is merely a tool of statutory interpretation and is not an end to itself. *See* Norman J. Singer, 2A *Sutherland, Statutes and Statutory Construction* § 47.33 (5th Ed.1992). Instead, the last antecedent rule is merely an aid to interpretation, and is not inflexible and uniformly binding. *Id.* Where the context requires that a qualifying word or phrase apply to several preceding phrases, the qualifying word or phrase will not be restricted to its immediate antecedent. *Id.*

Applying a less technical version of the "last antecedent rule" to Section 30–31–34(D), we hold that the phrase "for the purpose of sale" modifies the following three clauses that are connected by the word "or": (1) conveyances which are used to transport controlled substances; (2) conveyances which are intended for use to transport controlled substances; or (3) conveyances which are used in any manner to facilitate the transportation of controlled substances. Thus, reading the section in its entirety, forfeiture is allowed only in those instances where an individual possesses a controlled substance for the purpose of selling it.

Our interpretation is further supported by examining the Uniform Controlled Substances Act (UCSA) and cases interpreting that Act. The New Mexico forfeiture statute was modeled after Section 505 of the UCSA. New Mexico's Section 30–31–34(D) and Section 505(a)(4) of the UCSA contain identical wording, except that New Mexico did not adopt the words "or receipt" contained in the Uniform Act. Section 505(a)(4) reads as follows: "all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property...." Unif. Controlled Substances Act, § 505(a)(4), 9 U.L.A., Part II, 834 (1988). The comment following Section 505 indicates that the purpose of the provision is to disrupt drug trafficking. Specifically, the comment states that in order to be effective, law enforcement must be able to confiscate the "vehicles and instrumentalities used by drug traffickers in committing violations under this Act." The comment further states that the confiscation is to deprive drug traffickers of "needed mobility," and to prevent use of vehicles and instrumentalities "in the commission of subsequent offenses involving transportation or concealment of controlled substances." Other jurisdictions that have adopted statutes similar to the UCSA have addressed the question of whether forfeiture is allowed when simple possession of drugs is involved. *See generally* Ana K. Ramares, Annotation, *Application of Forfeiture Provisions of Uniform Controlled Substances Act or Similar Statute Where Drugs Were Possessed for Personal Use,* 1 A.L.R.5th 375 (1992). None of the courts allowing forfeiture in cases where simple possession of drugs was involved relied on a technical grammatical analysis of a statute. Instead, in possession cases from other jurisdictions that allowed forfeiture, virtually every statute in question specifically provided for forfeiture when a controlled substance was simply possessed, or when the amount possessed constituted a felony. *See, e.g., State v. Crenshaw,* 548 So.2d 223 (Fla.1989) (statute provided that when felony contraband is possessed vehicle or other personal property where contraband is located is subject to forfeiture); *State v. One 1983 Black Toyota Pickup,* 415 N.W.2d 511 (S.D.1987) (legislature amended statute to specifically allow forfeiture when drugs are possessed solely for personal use); *Commonwealth v. One 1983 Toyota Corolla,* 134 Pa.Cmwlth. 325, 578 A.2d 90 (Ct. 1990) (statute requires forfeiture of vehicle when drugs are possessed). In contrast to those jurisdictions where statutes specifically provide for forfeiture when drugs are possessed for personal use, New Mexico's forfeiture law contains no such language. The statutory amendments discussed in cases such as *One 1983 Black Toyota* suggest that state legislatures made affirmative decisions to go beyond the UCSA and

include possession of controlled substances as one condition leading to forfeiture of vehicles or other property associated with drug possession. *See also, One 1977 Porsche 911S v. County of Washoe,* 100 Nev. 210, 678 P.2d 1150 (1984) (where forfeiture statute is ambiguous on whether it applies to mere possession, court construes ambiguity against state; if statute should be broadened to include mere possession, state's argument is more appropriately made to legislature). However, since New Mexico has not affirmatively adopted language indicating that simple possession is a condition leading to forfeiture, and since it appears that Section 30–31–34(D) provides for forfeiture only in those cases where controlled substances are possessed for the purpose of sale, we must construe any ambiguity in the statutory scheme against the State. *See State v. Ozarek,* 91 N.M. 275, 573 P.2d 209 (1978) (forfeiture statutes must be strictly construed against forfeiture). Thus, we hold that Section 30–31–34(D) permits forfeiture only when the controlled substances in question are possessed for the purpose of sale.

We reject the State's and the City's argument that the legislature specifically intended to allow forfeiture in all instances where a felony drug crime is involved because it also enacted NMSA 1978, Section 30–31–34(G)(3) (Repl.Pamp.1989), which disallows forfeiture in those instances where a misdemeanor crime occurs. We construe Sections 30–31–34(D) and 30–31–34(G)(3) together as providing for forfeiture in those trafficking and distribution cases where the crime involved constitutes a felony, and conclude that the purpose of Section 30–31–34(G)(3) is to exclude misdemeanor drug trafficking offenses. We make this interpretation because certain trafficking/distribution offenses contained within the Controlled Substances Act are punishable as misdemeanors. *See e.g.,* NMSA 1978, § 30–31–22(B)(2) (Repl.Pamp.1989) (possession with intent to distribute a counterfeit substance listed in Schedule V is a petty misdemeanor).

Insofar as the City suggests that the UCSA cannot be relied on for guidance, and that the comment accompanying the UCSA is of no assistance because New Mexico did not adopt the comment, we reject that argument. This Court has often looked to uniform acts and the commentaries explaining those acts for guidance in interpreting New Mexico law. Most recently, we relied on comments accompanying the Uniform Probate Code to determine the meaning of certain provisions of the New Mexico Probate Code. *See In re Newalla,* 114 N.M. 290, 837 P.2d 1373 (Ct.App. 1992). The City cites no authority prohibiting this Court from looking to uniform acts for guidance in interpreting the meaning of legislation, nor have we found any such authority.

Finally, insofar as the City and the State suggest that the principles of *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973), require that this Court be bound by the holding of *State v. Stevens,* we disagree. As we have stated, the statute interpreted in *Stevens* is no longer in effect; thus, *Stevens* is not controlling precedent and we are not required to follow its holding. *Alexander v. Delgado.*

In the Chevrolet Truck cases, we do not reach the issue of whether the trial court properly granted Spencer's motion to transfer possession of the vehicle pending appeal because the issue is moot in that Spencer will have possession of his vehicle when mandate issues from this appeal. *See generally Johnson v. Francke,* 105 N.M. 564, 734 P.2d 804 (Ct.App.1987) (appellate court will not decide moot issues). Similarly, we need not reach Ortega's issue of whether the forfeiture statute is unconstitutionally vague, given that we reverse the trial court's order of forfeiture.

The order of the Santa Fe County District Court denying forfeiture is affirmed. The order of the Luna County District Court granting forfeiture is reversed.

IT IS SO ORDERED.

BIVINS and ALARID, JJ., concur.

857 P.2d 761

Lidio G. RAINALDI, Petitioner-Appellee,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD, et al., Respondents-Appellants.

No. 20138.

Supreme Court of New Mexico.

June 14, 1993.

Rehearing Denied July 26, 1993.

Tom Udall, Atty. Gen., Andrea B. Buzzard, Asst. Atty. Gen., Santa Fe, for appellants.

Marchiondo & Vigil, Michael E. Vigil, Albuquerque, for appellee.

OPINION

RANSOM, Chief Justice.

Magistrate Lidio Rainaldi claims entitlement to retirement benefits, prospectively and retroactively from January 1, 1987, under the Public Employees Retirement Act in effect at the time this lawsuit was initiated, NMSA 1978, Sections 10–11–1 to –41 (Repl.Pamp.1983 & Cum.Supp.1986).[1] On April 30, 1987, the Public Employment Retirement Board, a state agency created in the Act and assigned the tasks of effecting the provisions of the Act and of managing the Public Employees Retirement Association (PERA), granted retirement benefits to Judge Rainaldi; but on May 11, upon advice from the Attorney General, the

1. The Act was repealed and re-enacted in 1987. *See* 1987 N.M. Laws, ch. 253, § 140 (codified at NMSA 1978, §§ 10–11–1 to –140 (Repl.Pamp.1992)). That revision of the Act took effect after this lawsuit was instituted and is not applicable to this case.

Board rescinded that decision. Judge Rainaldi filed suit in the eleventh judicial district against the Board and its members in their official and individual capacities seeking a writ of mandamus, declaratory judgment, and injunctive relief. The Board appeals the ruling of the district court in favor of Judge Rainaldi, under which the court granted a permanent writ of mandamus and ordered the Board to pay the contested benefits. Although appellate jurisdiction in this Court has not been properly alleged or shown, we determine we have jurisdiction under NMSA 1978, Section 34–5–14(A) (Repl.Pamp.1990) (Supreme Court has plenary appellate jurisdiction except where specifically vested by law in Court of Appeals), and proceed to decide the matter. *See* NMSA 1978, § 34–5–10 (Repl.Pamp.1990) (appellate court's determination of jurisdiction is final). We reverse the declaratory judgment and vacate the writ of mandamus.

Facts. In 1986, as he had for a long time, Judge Rainaldi held two part-time jobs as a municipal judge for the City of Gallup and as a magistrate judge for McKinley County. Both of his employers, the city and the state, were affiliated public employers under the Act. Judge Rainaldi had belonged to PERA for over thirty years, and he was eligible for retirement and a retirement annuity.[2] In September 1986, Judge Rainaldi submitted his resignation from his position as a municipal judge. While it is not clear exactly when his resignation became effective, it is clear that he did not work or receive compensation as a municipal judge any later than December 30, 1986, the next to last work day of the year. That Fall, he had travelled to Santa Fe to learn from Board officials what steps he should take to begin receiving his annuity payments. Initially, although standing as an unopposed candidate for re-election to the magistrate's position in the general election of November 1986, Judge Rainaldi contemplated retiring from both of his judicial positions and collecting his retirement annuity. Benny Armijo, a deputy director of the Board, advised Judge Rainaldi, however, that he could begin collecting his retirement annuity if he were to retire from his municipal judgeship, complete a break in his service as a magistrate, and then resume work as a re-elected magistrate. Judge Rainaldi contends that he accordingly completed a break in service from his magistrate position before beginning another term on January 1, 1987. The Board disputes that a break in service was proved. In connection with his magistrate position, the court made no finding that there was a break in service, but did find that Judge Rainaldi requested in December 1986 that his name be deleted from the PERA membership rolls effective December 30, 1986.

Jurisdictional issues.—Jurisdiction in the eleventh judicial district. The Board challenges the propriety of bringing this action in the eleventh judicial district rather than in the first judicial district where the Board sits. It couches its argument in terms of a challenge to the court's subject-matter jurisdiction, citing to the New Mexico Constitution to support its claim that the eleventh judicial district court was without jurisdiction.

> The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and *appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts,* and supervisory control over the same.

N.M. Const. art. VI, § 13 (emphasis added). The Board points out that all its decisions relative to this matter were made in Santa

2. *See* § 10–11–1(F) (Cum.Supp.1986) (defining affiliated public employer); § 10–11–1(G) (Cum.Supp.1986) (defining employee); § 10–11–1(I) (Cum.Supp.1986) and § 10–11–9 (Repl.Pamp.1983) (defining a member of PERA); § 10–11–1(Z) (Cum.Supp.1986) (defining retirement as member's withdrawal from service of an affiliated public employer with an annuity granted under the Act); § 10–11–1(T) (Cum.Supp.1986) (defining annuity as an annual amount, payable to retiree in monthly installments); § 10–11–22(A) (Cum.Supp.1986) (allowing member to retire for superannuation on or after reaching voluntary retirement date); § 10–11–1(Y) (Cum.Supp.1986) (stating requirements of voluntary retirement date).

Fe. The Board cannot persuasively argue, however, that its actions denying benefits to Judge Rainaldi were taken as an inferior court or tribunal. Legislatively-created boards, while clothed with certain quasi-judicial powers to administer agencies, are not courts, and in this instance the Board was not acting in its quasi-judicial capacity. *See State ex rel. Hovey Concrete Prods. v. Mechem,* 63 N.M. 250, 258, 316 P.2d 1069, 1074 (1957) (Sadler, J., dissenting) (stating that the legislature did not create a court when it created a board, even though it invested the board with certain quasi-judicial powers), *overruled and dissenting opinion adopted by Wylie Corp. v. Mowrer,* 104 N.M. 751, 753, 726 P.2d 1381, 1383 (1986). The Board's decision to reverse its grant of benefits to Rainaldi was not rendered after a hearing with any of the trappings required by due process, e.g., notice, hearing, and opportunity to present witnesses. *See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 107 N.M. 278, 285–86, 756 P.2d 558, 565–66 (1988) (reasonableness of notice and procedures followed is essential to due process). In fact, the reversal came after a closed-door executive committee session held at the request of the attorney general's office. This case did not originate as an appeal, but as an action for declaratory relief.[3] The Board never asserted either claim or issue preclusion arising out of any quasi-judicial proceedings in any inferior tribunal. Because the Board did not act as an inferior court or tribunal in denying benefits to Judge Rainaldi, the district court's jurisdiction was not limited by Article VI, Section 13. *See Peisker v. Chavez,* 46 N.M. 159, 164, 123 P.2d 726, 729 (1942) (jurisdiction of district courts not limited by Constitution except as to appellate jurisdiction of cases originating in inferior courts). The Board has not identified any other constitutional provision excepting this matter from the general jurisdiction of the district courts.

Judge Rainaldi sought a declaration that he was entitled to collect retirement benefits and a writ of mandamus to enforce that right. Jurisdiction for a declaratory judgment is found in the Declaratory Judgment Act, NMSA 1978, Sections 44–6–1 to –15. Section 44–6–4 provides that "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." Section 44–6–13 provides that the state "or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of ... any of the laws of the State of New Mexico or the United States, or any statute thereof." Judge Rainaldi properly sued the Board seeking a determination and declaration of his rights to retirement benefits under the Public Employees Retirement Act. Jurisdiction over the cause, not being excepted by any constitutional provision, was within the grant of general jurisdiction to district courts, including the courts of the eleventh district.

—Mandamus was an appropriate remedy. The district court's jurisdiction in a declaratory judgment case extends to issuance of appropriate writs in support of its judgment. *See* § 44–6–9 (granting district courts the power, *inter alia,* to issue writs based on the court's declaratory relief); *see also State ex rel. State Highway Comm'n v. Quesenberry,* 72 N.M. 291, 293, 383 P.2d 255, 256 (1963) (writ of mandamus compelling state agency to act was ancillary to and in aid of judgment, which gave court jurisdiction over the case).

The Board, however, attacks the propriety of a writ of mandamus as the remedy. "[M]andamus lies to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is

3. In the procedure since established by the legislature for appealing Board decisions to deny benefits, a claim for benefits is first subject to a Board hearing that results in a final decision. *See* NMSA 1978, § 10–11–120 (Repl.Pamp.1992). Appeals from final decisions of the Board are to be brought in the first judicial district. *Id.*

no other plain, speedy and adequate remedy in the ordinary course of law." *Lovato v. City of Albuquerque,* 106 N.M. 287, 289, 742 P.2d 499, 501 (1987); *see* NMSA 1978, § 44–2–4 (writ of mandamus may be issued to compel performance of an act specially enjoined by law as duty of office); § 44–2–5 (mandamus shall not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law); *Concerned Residents for Neighborhood, Inc. v. Shollenbarger,* 113 N.M. 667, 669, 831 P.2d 603, 605 (Ct.App.1991) (discussing difference between writs of mandamus and certiorari, Court stated that mandamus lies to enforce legal right against one having legal duty to perform an act or to compel performance of ministerial duty that one charged with its performance refuses to perform), *disapproved of by Regents of Univ. of New Mexico v. Hughes,* 114 N.M. 304, 310, 838 P.2d 458, 464 (1992) (holding decisions regarding transfer of liquor licenses, such as the one in *Concerned Residents,* are reviewable by statutory appeal). The act compelled by a writ of mandamus "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,* 106 N.M. at 289, 742 P.2d at 501. Mandamus is used to enforce an existing right, not to resolve material issues of fact. *Concerned Residents,* 113 N.M. at 670, 831 P.2d at 606 (citing *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), and *State ex rel. Black v. Aztec Ditch Co.,* 25 N.M. 590, 185 P. 549 (1919)).

A writ of certiorari, on the other hand, lies when it is shown that an inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally, and no appeal or other mode of review is allowed or provided. *See Morris v. Apodaca,* 66 N.M. 421, 422, 349 P.2d 335, 336 (1960); *Concerned Residents,* 113 N.M. at 671, 831 P.2d at 607. Certiorari reviews a performed duty, while mandamus compels an unperformed ministerial duty. 14 Am. Jur.2d *Certiorari* § 4 (1964). "Certiorari is merely a writ of review to determine legality; mandamus is a coercive remedy." *Id.* at 781.

It is true, as the Board argues, that we have held that certiorari may be the only method available for reviewing the actions of a state board where no statutory review is provided.[4] *See, e.g., Roberson v. Board of Educ.,* 78 N.M. 297, 300, 430 P.2d 868, 871 (1967) [*Roberson II*] (reviewing local board of education's act of discharging contract teacher after state board of education had affirmed the dismissal); *Concerned Residents,* 113 N.M. at 668, 831 P.2d at 604 (petitioners sought review of action taken by Director of the Alcohol and Gaming Division, i.e., approval of the transfer of a liquor license after public hearings had been held). In the cases cited, however, either an affirmative action already had been taken, or some type of hearing had been held and the action or hearing was reviewable.[5] In the *Roberson* case the plaintiff properly sought, during the course of the dispute, both a writ of mandamus and a writ of certiorari. The litigation began as a petition for a writ of mandamus to compel the local school board to recognize an employment contract it had entered into and to prevent any hearings on the plaintiff's re-employment. *See Roberson II,* 78 N.M. at 298, 430 P.2d at 869. The action was first appealed to this Court for review of the writ of mandamus issued by the district court in *State ex rel. Roberson v. Board of Educ.,* 70 N.M. 261, 372 P.2d 832 (1962). *See Roberson II,* 78 N.M. at 298, 430 P.2d at 869. In the first appeal, this Court ordered the district court to modify the writ that it had issued in order to allow the local board of education to

4. Such a statutory method is now in place. NMSA 1978, § 10–11–120(B) (Repl.Pamp.1992).

5. As noted above, this Court has recently held the type of decision reviewed by certiorari in *Concerned Residents* is subject to direct appeal. *See Regents of Univ. of New Mexico v. Hughes,* 114 N.M. at 310, 838 P.2d at 464.

hold a hearing on the termination. *See id.* After a hearing, the local school board again refused to honor the contract. The plaintiff appealed for review to the state board of education, which affirmed. The plaintiff then sought review of the state board's affirmance, but there was no statutory appellate procedure in place. The school board hearing provided a record for this Court to review, thus the plaintiff was able to seek review of the hearing with a writ of certiorari. Under those circumstances, we held that a writ of certiorari was the only means to review the action of the state board. *Id.* at 299–300, 430 P.2d at 870–71. A writ of mandamus to the state board would not have been appropriate after the hearing since there was a record to review and there was no affirmative action for the state board to take—the state board was not in a position to reinstate the plaintiff's contract. In her first attempt to force the school board to honor her employment contract, however, the plaintiff had appropriately sought a writ of mandamus in order to compel the board to perform an act that the teacher hoped to show was required by law.

Initially, Judge Rainaldi sought a declaratory judgment to establish his entitlement to begin receiving his retirement annuity. Because Judge Rainaldi was able to satisfy the district court that the facts supported his position and that the Board was required to perform by direction of law regardless of its own opinion as to the propriety or impropriety of doing so, the coercive nature of mandamus was entirely appropriate. *See Lovato,* 106 N.M. at 289, 742 P.2d at 501.

Annuitants who become elected officials. Upon terminating employment with a qualified public employer, after filing a written application for retirement with PERA, and upon meeting certain other conditions, a retiree can begin receiving the retirement annuity he has earned. The retiree becomes an annuitant once he or she is receiving an annuity granted under the Act. Section 10–11–1(L) (Cum.Supp. 1986). If a PERA annuitant again becomes employed by a PERA affiliated employer, payments being made to the annuitant are suspended and he or she again becomes a contributing member of PERA. Section 10–11–22(D) (Cum.Supp.1986). An exception is made to the rule of Section 10–11–22(D) in Section 10–11–9(E) (Repl.Pamp.1983) (the "elected official exception"): [6]

> An annuitant retired under the provisions of Section 10–11–22 NMSA 1978 who becomes an elected official on or after January 1, 1981, including those officials elected to serve a successive term commencing January 1, 1981, may continue to receive his annuity without suspension of benefits during the term of office for which he was elected; provided that the annuitant files with the retirement board, within thirty days of becoming an elected official or within thirty days from the effective date of this act, an irrevocable exemption from membership for the official's term of office.... If no exemption is filed as provided herein, the annuitant's benefits will be suspended, and he will again become a contributing member as provided [elsewhere in the Act].

Judge Rainaldi was told that if he retired from his municipal judgeship, by having a break in service from his magistrate position he could become an annuitant. He was told that once he was an annuitant he could resume his magistrate position and still collect his annuity by using the elected official exception. Judge Rainaldi admits that during any break in service he had no intention of retiring from his magistrate position; the only purpose was to become an annuitant so that he could begin receiving his retirement annuity while continuing to work for a PERA affiliated employer. While it is questionable that Judge Rainaldi became an annuitant before January 1, 1987, he did not, in any event, *become* an elected official on that date so as to qualify

6. The current version of the provisions for suspension of benefits to an annuitant who is again employed by a qualified public employer and the elected official exception are found in NMSA 1978, Section 10–11–8 (Repl.Pamp.1992), Paragraphs (C) and (F), respectively.

for the elected official exception. The Board argues that the applicable statute's requirement for retirement—termination of employment with *an* affiliated public employer, *see* § 10–11–1(Z)—is not any different from the current version of the Act that requires termination of employment with *all* affiliated public employers, *see* NMSA 1978, § 10–11–8(A)(2) (Repl.Pamp.1992). Judge Rainaldi counters that the amended statute clearly requires termination with all affiliated public employers, but that the applicable statute required termination only from a single affiliated public employer. We do not need to address any technical interpretation of "all" versus "an", as that is not the determinative factor.

Judge Rainaldi did not "become" an elected official on January 1, 1987. In conclusions numbered four and eight, the district court held that the operative provision of the elected official exception was that the employee be retired, that Judge Rainaldi complied with all of the requirements of the exception, and that he was eligible for retirement benefits. Assuming for now that Judge Rainaldi did become an annuitant on or before January 1 by virtue of ending his service as a municipal judge and asking PERA to delete him from the membership roll as a magistrate, Section 10–11–9(E) clearly requires that the employee *become* an elected official on or after January 1, 1981. The legislature significantly amended the Act by 1981 N.M. Laws, Chapter 135, Sections 1 to 18. In Section 3, the legislature amended Section 10–11–9, including in the Act for the first time the elected official exception. The newly created exception included a grandfather clause allowing annuitants who were elected to successive terms beginning on January 1, 1981 the option of electing to take advantage of the exception beginning with that term of office.

The wording of the elected official exception, including the grandfather clause, clearly indicates that the legislature intended for there to be a difference between a person who "became" an elected official, i.e., was elected for the first time to a term beginning on or after January 1, 1981, and a person who was serving a successive term. If a person re-elected to a successive term became an elected official upon re-election, the grandfather clause would be superfluous. Therefore, the only conclusion is that a person who begins a successive term has not *become* an elected official. The elected official exception, on its face, applies only to those who became an elected official after they were already an annuitant.[7] Even if Judge Rainaldi became an annuitant on or before January 1, he did not *become* an elected official when he began his new term as a magistrate in January 1987; he was already an elected official and he merely retained that status in a successive term. Because Judge Rainaldi did not become an elected official when he began his successive term in January 1987, he was not eligible for the elected official exception. The district court's conclusion that Judge Rainaldi qualified for the exception is in error.

Any interruption or break in service of Judge Rainaldi's employment as a magistrate was admittedly for the purpose of simultaneously collecting both retirement benefits and a salary. In New York, the purpose of an elected official exception for retired public employees similar to the provision at issue here was examined in *Baker v. Regan,* 114 A.D.2d 187, 498 N.Y.S.2d 557, *aff'd in part, rev'd in part on other grounds,* 68 N.Y.2d 335, 509 N.Y.S.2d 301, 501 N.E.2d 1192 (1986). That court found that the purpose of the exception is to encourage those who have retired from public service to again serve the public in an elected capacity, not to allow those who

7. This interpretation of the elected official exception and the grandfather clause is bolstered further by the latest version of the exception as amended by the 1987 legislature, which deleted the grandfather clause. *See* NMSA 1978, § 10–11–8(F) (Repl.Pamp.1992). The deletion makes sense since any who could have taken advantage of it had to have been an annuitant and use the exception in 1981, the year the statute containing the exception was first passed. *See* § 10–11–9(E) (Repl.Pamp.1983).

are already elected officials to reap a windfall by collecting retirement benefits while continuing to work in the same capacity. *Id.* 498 N.Y.S.2d at 560. Here, as was the case in the New York statutory scheme, the public policy evinced by the legislature is in favor of suspending retirement benefits of retirees who return to service in the public sector as elected officials. *See Baker v. Regan,* 509 N.Y.S.2d 301, 302, 501 N.E.2d 1192, 1193 (1986). Exceptions like the one for an elected official "were enacted for limited purposes and were not meant to abrogate or dilute the long-standing and overriding state policy to prohibit the receipt of retirement benefits and salary at the same time which could constitute an abuse of the public fisc." *Id.* That limited purpose does not include allowing persons to take advantage of the exception and receive both annuity payments and a salary when they are merely continuing in the same position that they have occupied before they "retired". The elected official exception serves the limited purpose of encouraging people who have accumulated expertise and wisdom in their years of service to run for elected office after retiring from their former positions. The legislature could not have intended to encourage those who have already been serving to simultaneously collect a salary and retirement benefits earned in that position. Our decision today comports with that limited purpose policy.

The Board is not estopped from denying benefits to Rainaldi. In his answer brief, Judge Rainaldi asserts that the Board is estopped from denying him retirement benefits. We note that estoppel was raised in the second count of his complaint. However, the district court issued no conclusion regarding application of estoppel against the Board. Such a conclusion by this Court would not be supported by the court's findings, which do not address all of the elements required for estoppel against the Board, as a state agency.[8] Because the court ruled in Judge Rainaldi's favor based on the law, it was not necessary to enter findings regarding estoppel, although Rainaldi did request such findings. If we were to find that use of estoppel was appropriate against the Board, we would have to remand the case for entry of additional findings on the elements of estoppel. We look then to see if, in this case, it would be appropriate to assert estoppel against the state agency.

The essential elements of estoppel are set forth in *State ex rel. State Highway Dep't v. Yurcic,* 85 N.M. 220, 223, 511 P.2d 546, 549 (1973). We have allowed the use of estoppel against the state reluctantly. *See, e.g., id.* (estoppel not applied against the state except in exceptional situations where there is a shocking degree of aggravated and overreaching conduct); *National Advertising Co. v. State ex rel. State Highway Comm'n,* 91 N.M. 191, 194, 571 P.2d 1194, 1197 (1977) (estoppel available against state only where right and justice demand it).

The statements relied upon by Judge Rainaldi to the effect that he would qualify for the elected official exception were not representations of facts that existed; they were opinions as to the effect of the law upon a certain factual situation. Generally, statements of opinion on a matter of law raise no estoppel where the facts are equally well known to both parties. *State ex rel. Reynolds v. McLean,* 76 N.M. 45, 47, 412 P.2d 1, 3 (1966); *see also,* 28 Am.Jur.2d *Estoppel and Waiver* § 47 (1966) (expression of opinion on matter of law not generally basis for estoppel); 31 C.J.S. *Estoppel* § 79 (1964) (same); *cf. Gonzales v. Public Employees Retirement Bd.,* 114 N.M. 420, 426, 839 P.2d 630, 636 (Ct.App.) (specific statements concerning

8. For example, the court did not enter a finding that Judge Rainaldi's actions in reliance on the statements were detrimental to his interests. We note that Judge Rainaldi continued in one of his judicial positions when he was already contemplating leaving one or more of his positions. As of January 1, 1987, in order to keep his magistrate position, he apparently would have had to leave his municipal position anyway. *See* 1986 N.M. Laws, ch. 96 (codified as NMSA 1978, § 35–1–36.1 (Repl.Pamp.1988)) (effective January 1, 1987 all magistrates, with a few exceptions not applicable to Judge Rainaldi, "shall be full-time magistrates" and may not hold other employment that conflicts with their full-time judicial duties).

amount of retirement benefits were considered to be statements of fact sufficient to warrant application of estoppel), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992). An exception to the general rule may be made where the advisor has actual or professed special knowledge. 28 Am.Jur.2d *Estoppel and Waiver* § 47; 31 C.J.S. *Estoppel* § 79 (1964).

The Board employees advised Judge Rainaldi that he would qualify for the elected official exception if he took certain steps. As employees of the agency charged with enacting or administering the Act, those employees had special knowledge regarding its application. Given our holding today, allowing Judge Rainaldi to qualify for the elected official exception would be contrary to law. We are left then with the question of whether the demands of right and justice should be the basis for estopping a state agency from denying benefits to which the recipient of advice would not otherwise be entitled because such benefits would be contrary to law.

We have previously refused to allow estoppel based on advice given by a government employee in contradiction of a statute. *See Trujillo v. Gonzales,* 106 N.M. 620, 622, 747 P.2d 915, 917 (1987) (county not estopped to deny employment contract based on promises made by county commissioners made outside of board meeting where language of statute clearly states that powers of municipal council must be exercised at legally called meeting); *see also Taxation & Revenue Dep't v. Bien Mur Indian Market Center, Inc.,* 108 N.M. 228, 231, 770 P.2d 873, 876 (1989) ("New Mexico cases recognize that, especially in cases involving assessment and collection of taxes, the state will be held estopped only rarely."); *cf. Office of Personnel Management v. Richmond,* 496 U.S. 414, 416, 110 S.Ct. 2465, 2467, 110 L.Ed.2d 387 (1990) (holding estoppel may not be used to force federal government to pay monies not authorized by Congress). *But see United States v. Bureau of Revenue,* 87 N.M. 164, 166, 531 P.2d 212, 214 (Ct.App. 1975) (estopping retroactive, but not prospective, collection of taxes based on Bureau's prior representations). We note that, in cases where estoppel is asserted against the state based on erroneous advice given by a state employee, there well may be a distinction between those cases where estoppel would result in the *receipt of benefits* to which an individual would not otherwise be entitled and those where estoppel would foreclose *liability* of an individual who relied on the advice.

Other state courts also have ruled that estoppel cannot lie against the state when the act sought to be carried out through the use of estoppel is contrary to law. *See Bresnahan v. Bass,* 562 S.W.2d 385, 390 (Mo.Ct.App.1978) (refusing to estop state agency where plaintiff was included in public retirement system based on mistaken attorney general opinion and estoppel would require retirement board to act inconsistently with governing statute); *see also Austin v. Austin,* 350 So.2d 102, 105 (Fla.Dist.Ct.App.1977) (holding erroneous statements in a retirement system's benefits pamphlet did not estop retirement agency, the court said: "Administrative officers of the state cannot estop the state through mistaken statements of the law."), *cert. denied,* 357 So.2d 184 (1978);[9] *Louisiana State Troopers Ass'n v. Louisiana State Police Retirement Bd.,* 417 So.2d 440, 445 (La.Ct.App.1982) ("It is well settled that equitable considerations and estoppel cannot be permitted to prevail when in conflict with positive written law."); *Parsons v. Department of Transp.,* 74 Misc.2d 828, 344 N.Y.S.2d 19, 24 (Sup.Ct. 1973) ("The mere expression of an erroneous opinion on a matter of law raises no estoppel, and this is also true where a

9. Judge Rainaldi cites two Florida cases that were decided after *Austin* where the courts applied estoppel against the State agency. *See Kuge v. Department of Admin., Div. of Retirement,* 449 So.2d 389 (Fla.Dist.Ct.App.1984); *Salz v. Department of Admin., Div. of Retirement,* 432 So.2d 1376 (Fla.Dist.Ct.App.1983). In both cases estoppel was allowed where the agency erred in calculating the number of years of service that could be credited to a particular member. Both courts, without mentioning *Austin,* pointed out that the representations were factual, not of law.

mistaken opinion is given by an agent of a governmental body which is engaged in administering or enforcing the law in question." (citations omitted)). A very similar factual situation to the instant case was addressed in *Baker*, 498 N.Y.S.2d 557. There, a number of judges were told by retirement association officials that they could retire between terms and continue to collect retirement benefits after their new terms began, and they were told that this practice was legal and had been administratively approved before. The intermediate appellate court in New York ruled that the judges did not qualify for that public employees retirement act's version of the elected official exception, then went on to address their estoppel claim, stating, with no other discussion, that "the doctrine of estoppel is not applicable to create rights to retirement benefits to which there is no entitlement." *Id.* at 560.

While we do not restrict the use of estoppel against the state as severely as the United States Supreme Court has restricted its use against the federal government, we do agree with reasoning stated by that Court concerning the giving of advice by government employees:

> It ignores reality to expect that the Government will be able to "secure perfect performance from its ... employees...."
>
> ... Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice.

Office of Personnel Management, 496 U.S. at 433–34, 110 S.Ct. at 2476 (citations omitted) (substantially relying for its ruling on the appropriations clause of the United States Constitution).

We are not prepared to adopt a rule that the state may never be estopped by the statement of an employee when a person comes to that employee for an opinion regarding a question where that employee has special knowledge. In this case, right and justice do not demand that the Board be estopped from denying benefits to Judge Rainaldi when the most that he has done in reliance upon the opinion given was to fill out some paperwork, continue to work as a magistrate, and receive pay therefor.

Judge Rainaldi may also claim that the Board resolution granting the benefits constitutes a statement upon which estoppel could be based. In that instance, we note simply that the resolution itself was passed subject to legal documentation from the Attorney General's office. Any reliance upon the Board's acceptance of his retirement could not have been reasonable due to the contingency of that approval. *See Bien Mur*, 108 N.M. at 231, 770 P.2d at 876 (that reliance be reasonable is an element of estoppel).

Judge Rainaldi also argues that the relationship between a public employee retirement association and a vested member is contractual in nature, and should be analyzed as a contract. For this proposition he cites *State ex rel. Hudgins v. Public Employees Retirement Bd.*, 58 N.M. 543, 273 P.2d 743 (1954), and 60A Am. Jur.2d *Pensions and Retirement Funds* § 1620 (1988). In his complaint, Judge Rainaldi made no mention of a claim sounding in contract, and there are no findings as to a contract between the parties. We will not consider an issue raised for the first time on appeal where it does not involve subject-matter jurisdiction, general public interest, or fundamental error. *See* SCRA 1986, 12–216 (Repl.Pamp.1992). Further, if we considered the relationship to be contractual, Judge Rainaldi would

have had a legal remedy and mandamus would have been inappropriate.

In light of the foregoing, the declaratory judgment of the district court is reversed, the permanent writ of mandamus issued against the Board is vacated, and this case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

857 P.2d 771

Frank L. SANCHEZ and Joanne Sanchez, Plaintiffs–Appellants,

v.

The CHURCH OF SCIENTOLOGY OF ORANGE COUNTY, Defendant–Appellee.

No. 20839.

Supreme Court of New Mexico.

June 23, 1993.

Rehearing Denied July 28, 1993.

Civerolo, Wolf, Gralow & Hill, Roberto C. Armijo, Albuquerque, for plaintiffs-appellants.

White, Koch, Kelly & McCarthy, Janet E. Clow, Karen Kilgore, Santa Fe, for defendant-appellee.

OPINION

FRANCHINI, Justice.

Frank and Joanne Sanchez filed an action in district court to recover damages for violation of the New Mexico Unfair Practices Act, for breach of contract, for intentional infliction of emotional distress, for injunctive relief, for breach of covenant of good faith and fair dealings, for civil conspiracy, and for tort. The Church of Scientology of Orange County (Church) was one

of four named defendants. The Church moved to dismiss for lack of jurisdiction. The district court granted the Church's motion. The Sanchezes appeal. We affirm.

I.

This case stems from the Sanchezes' involvement in a series of management training courses. Initially, they were impressed with defendant Sterling Management Systems (Sterling) and agreed to attend classes at Sterling's training facility in California. Upon advice of Sterling's representatives, the Sanchezes obtained additional training from the Scientology and Dianetics Center (Center), also located in California and operated by the Church. They became dissatisfied with the management consulting training and thereafter chose to disassociate with the defendants, to repudiate their agreements, and to return from the Center to New Mexico. After returning from California, a Church agent attempted to contact the Sanchezes, and up to two hundred mailings were sent to them from various defendants. They filed their complaint on December 30, 1991.

On April 13, 1992, the Church filed a motion to dismiss the claim, challenging the personal jurisdiction of the New Mexico court over the Church under the long-arm statute. *See* NMSA 1878, § 38–1–16 (Repl.Pamp.1987). The motion was supported by an affidavit from the Secretary of the Church stating that: the Church is a nonprofit corporation located in Tustin, California; the Church does not have now, nor has it ever had, an office established or operating in New Mexico; all physical contacts between the Sanchezes and the Church occurred in California; all services, interviews, and consultations rendered by the Church occurred in California and; a few letters were sent and a few phone calls were made to the Sanchezes in New Mexico.

In response, the Sanchezes attached several affidavits describing their ordeal. One incident involved a counselor from the Center who attempted to contact them in New Mexico after their relationship with the Church was terminated. Also, a check for $120,000, made out in blank by Frank Sanchez, was presented by the Church to his bank in New Mexico for payment. At Frank Sanchez's direction, the check was not honored.

The Church's reply included an affidavit by its president, John Woodruff, which essentially denied any corporate connection or relationship between the Church and Sterling. He denied that the Church controlled any activities of Sterling or conspired or participated with Sterling with respect to Sterling's contacts with the Sanchezes. Finally, he stated that it was only after the Sanchezes arrived in California to attend a seminar given by Sterling that the Church became aware of their existence or had any contact with them.

The district court granted the motion to dismiss on July 27, 1992. The Sanchezes filed a motion to reconsider and to allow them to present argument and evidence. This motion was denied, and the order dismissing the complaint for lack of jurisdiction was filed on August 17, 1992.

II.

The main issue before us is whether the acts of the Church warrant the exercise of personal jurisdiction over the Church by New Mexico. We also decide whether the district court erred by not conducting a hearing on the motion to dismiss or by not staying its ruling on the motion pending further discovery. We do not address the Sanchezes' contention that granting the motion to dismiss deprived them of a right to trial by jury on this issue. Because they did not raise this issue to the district court, it was not properly preserved for review on appeal. *See Beneficial Fin. Co. v. Alarcon,* 112 N.M. 420, 424, 816 P.2d 489, 493 (1991).

The long-arm statute sets out five different acts, which if conducted in our state, and if any cause of action arises from such act, submit the actor to the jurisdiction of our courts. NMSA 1978, § 38–1–16 (Repl.Pamp.1987). The pertinent acts here are the transaction of any business or the commission of a tort within

this state. To determine whether personal jurisdiction exists over an out-of-state nonresident defendant, we apply the following three-step test: Whether, (1) defendant's acts are enumerated in the long-arm statute; (2) plaintiff's cause of action arises from the acts; and (3) minimum contacts necessary to satisfy due process are established by defendant's acts. *See State Farm Mut. Ins. Co. v. Conyers,* 109 N.M. 243, 244, 784 P.2d 986, 987 (1989); *Salas v. Homestake Enter., Inc.,* 106 N.M. 344, 345, 742 P.2d 1049, 1050 (1987).

The Sanchezes claim that the Church "transacted business" in New Mexico. They support this argument with allegations from their complaint that co-defendant Sterling was an agent and employee of the Church, and thus its acts should be imputed to the Church. The Sanchezes also suggest that the activities of Sterling are attributable to the Church because they have alleged a civil conspiracy.

It is the acts of the Church and not the acts of Sterling that must provide the basis for personal jurisdiction over the Church. *See Visarraga v. Gates Rubber Co.,* 104 N.M. 143, 147, 717 P.2d 596, 600 (Ct.App.), *cert. quashed,* 104 N.M. 137, 717 P.2d 590 (1986). In *Allen v. Toshiba Corp.,* 599 F.Supp. 381 (D.N.M.1984), an issue addressed by the court was whether TAI, a subsidiary corporation which admittedly was subject to jurisdiction in New Mexico, was the agent or alter ego of Toshiba, the parent corporation, so as to render Toshiba subject to jurisdiction under New Mexico's long-arm statute. The allegation that TAI was acting as Toshiba's agent was controverted by an opposing affidavit setting forth facts similar to those in the Church's affidavit. The court noted that when the alleged jurisdictional basis was controverted, plaintiff had to sustain the burden of proof on the jurisdictional issue. *Id.* at 387. Because plaintiff failed to sustain that burden, the court granted the defendant's motion to dismiss for lack of personal jurisdiction. Similarly, here, where there is no parent-subsidiary relationship, the Sanchezes failed to sustain their burden on the agency theory.

The case of *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij,* 710 F.2d 1449 (10th Cir.1983), is also instructive to our analysis. Applying the Utah long-arm statute, Utah Code Ann. Section 78–27–24 (1977), the Tenth Circuit decided various personal jurisdiction issues. In particular, the court examined whether one conspirator's acts were "sufficient to establish personal jurisdiction over [the other] nonresident coconspirators." *Bonaventura,* 710 F.2d at 1454. In *Bonaventura,* the plaintiff alleged conspiracy and defendants countered by sworn affidavits that no conspiracy existed. Plaintiff did not contravene defendants' affidavits, and the court determined that the threshold burden of establishing personal jurisdiction was not met. *Id.* " 'Mere allegations of conspiracy, without some sort of prima facie factual showing of a conspiracy, cannot be the basis of personal jurisdiction of coconspirators outside the territorial limits of the court.' " *Id.* (quoting *Baldridge v. McPike, Inc.,* 466 F.2d 65, 68 (10th Cir. 1972)).

■ We hold that the Church properly and adequately challenged the Sanchezes' prima facie jurisdictional allegations by submitting Woodruff's affidavit. That affidavit established the separateness of the corporate entities, the lack of an employee or agency relationship between the Church and Sterling, and the denial of a conspiracy. Therefore, the Sanchezes had the burden of proving the jurisdictional allegations, and the record does not reveal proof of the jurisdictional allegations contained in the complaint. *See State ex rel. Anaya v. Columbia Research Corp.,* 92 N.M. 104, 105, 583 P.2d 468, 469 (1978). We hold that the Church did not "transact business" in New Mexico and therefore this requirement of the long-arm statute is not satisfied. Our courts lack personal jurisdiction over the Church on this claim.

■ The Sanchezes also claim that the Church committed a tortious act within the state. Section 38–1–16. The acts complained of were attempts by Church agents to contact the Sanchezes after they returned to New Mexico through phone calls,

over 200 mailings, and two personal visits. The Sanchezes alleged that these actions gave rise to a claim for intentional infliction of emotional distress.

The Sanchezes failed to sustain their burden on this jurisdictional issue as well. The Church controverted the Sanchezes' affidavits. The Church's affidavits support the following acts by the Church: several phone calls and mailings and two unsuccessful attempts by an agent of the Church to contact them. These acts, taken alone, are not enough to support the commission of a tort within this State, especially a tort in which extreme and outrageous conduct is a key element. *See Dominguez v. Stone*, 97 N.M. 211, 214, 638 P.2d 423, 426 (Ct.App.1981). These acts, at most, amount to indignations and annoyances. The Sanchezes affidavits state that they were personally offended and angered by the communications. The mailings and communications caused Mrs. Sanchez "anxiety, fear and worry" because her receipt of the materials reminded her of the California experience. The New Mexico conduct alleged was not " 'beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.*

Finally, the Church does not have sufficient minimum contacts with New Mexico, and maintaining a suit here would offend " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citations omitted). To determine whether "minimum contacts" were established, we look at the "degree to which defendant purposefully initiated its activity within the State". *Customwood Mfg., Inc. v. Downey Constr. Co.*, 102 N.M. 56, 57, 691 P.2d 57, 58 (1984). The activity consists of some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law." *Valley Wide Health Servs., Inc. v. Graham*, 106 N.M. 71, 73, 738 P.2d 1316, 1318 (1987) (emphasis omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958)). The purposeful activity requirement assumes that a defendant will not be subject to jurisdiction solely as a result of random, fortuitous, or attenuated contacts. We agree with the Ninth Circuit "that ordinarily 'use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state.' " *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir.1985) (citations omitted), *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). Furthermore, it would offend our conception of fair play and substantial justice to subject the Church to suit for unsuccessfully attempting to contact the Sanchezes on two occasions. The complaint and its supporting affidavits do not allege sufficient "minimum contacts" to allow the exercise of extraterritorial jurisdiction over the Church consistent with the Due Process Clause.

The Sanchezes next argue that they were wrongly denied a hearing on the Church's motion to dismiss. We analyze a motion to dismiss as a summary judgment motion when matters outside the pleadings are considered. *See Boyd v. Permian Servicing Co.*, 113 N.M. 321, 322, 825 P.2d 611, 612 (1992). It is within the district court's discretion when considering a motion for summary judgment to hold an oral hearing. *See National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 327, 742 P.2d 537, 539 (Ct. App.1987). Here, the issue of personal jurisdiction was fully briefed by both parties, and both the Sanchezes and the Church submitted sworn testimony through affidavits. Although there were two requests for hearings on the motion, both requests were made by the Church, and the record is void of information that the district court was put on notice that any additional evidence would be presented at the motion hearings. The district court was within its discretion by disposing of the motion on the materials submitted. *See id.; cf. Nolan v. de Baca*, 603 F.2d 810, 812 (10th Cir.1979) (holding no abuse of discretion under federal rules where oral argument was denied),

cert. denied, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 814 (1980).

The Sanchezes finally contend that the district court wrongfully refused to permit them to pursue discovery. Contrary to their contention, our reading of the record shows only a denial of a request for stay of decision pending discovery. Nevertheless, we review a district court's decision limiting discovery solely on the grounds of abuse of discretion. *Roberts v. Piper Aircraft Corp.,* 100 N.M. 363, 368, 670 P.2d 974, 979 (Ct.App.1983). As the district court noted, "[t]he opportunity for discovery has always existed since the inception of this case." The Sanchezes were free to conduct discovery, if necessary, to support their jurisdictional allegations up until the time of the court's ruling. Considering that the complaint was filed on December 30, 1991, regarding events which occurred in October through December 1989, and the court's order was entered on July 27, 1992, the Sanchezes had ample time to conduct discovery. The district court did not abuse its discretion by refusing to stay its ruling pending additional discovery.

In view of the foregoing, the decision of the district court granting the Church's motion to dismiss is affirmed.

IT IS SO ORDERED.

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

857 P.2d 776

Bill HARTBARGER, Plaintiff–Appellee,

v.

FRANK PAXTON COMPANY, Defendant–Appellant.

No. 19913.

Supreme Court of New Mexico.

June 14, 1993.

Rehearing Denied July 21, 1993.

Albert N. Thiel, Jr., Albuquerque, for defendant-appellant.

Jeffrey Romero, Albuquerque, for plaintiff-appellee.

OPINION

RANSOM, Chief Justice.

This appeal is taken from a judgment entered on a jury verdict in favor of Bill Hartbarger in his action against his former employer, Frank Paxton Company, and the supervisor who fired him, Alan Crownover, for breach of an implied contract of employment. Hartbarger worked as an outside salesperson and was terminated after refusing to accept a lower rate of commission on his sales. Paxton argued there was no implied contract and, therefore, Hartbarger was an at-will employee and no justification was needed for the firing, or alternatively, if there was an implied contract, sufficient justification existed to fire Hartbarger. The jury found there was an implied contract requiring just cause for termination and that the contract was breached, and awarded Hartbarger $400,000 in compensatory damages and $100,000 in punitive damages. Paxton raises numerous points on appeal, essentially arguing that a reasonable jury could not have found there was an implied contract of employment, that if there was a contract it was not breached, and that there was no basis for the award of punitive damages. We reverse.

Facts surrounding termination. Hartbarger worked for Paxton for more than twenty years during two periods, the last one beginning in 1977 and ending with his termination in 1987. At the time of his termination, Hartbarger was employed as

one of several salespersons working out of Paxton's Albuquerque operation. Paxton paid its outside sales staff a base salary plus a commission for sales that exceeded a particular amount per month. The commission percentage had varied over the course of Hartbarger's employment from as high as 4¾ percent to as low as 2 percent. Hartbarger's commission had been cut before, once for disciplinary reasons and on another occasion to bring the Albuquerque commission structure more in line with the commissions paid at Paxton's other locations around the country. Just before his termination, Hartbarger's commission rate was 2½ percent, while the commissions of Paxton's other Albuquerque salespersons were 2 percent. Paxton does not dispute that Hartbarger often had the highest sales of the three Albuquerque-based salespersons and that his sales were the highest in the Albuquerque office at the time of his termination. Hartbarger's sales volume was one reason why Hartbarger had a higher commission rate than the other Albuquerque-based salespersons.

Crownover testified that in the months before the termination he had become dissatisfied with the quality of Hartbarger's work effort and recounted several of Hartbarger's perceived improprieties. In February 1987, Crownover wrote an employee evaluation, which he gave to Hartbarger at a March meeting, along with an oral evaluation. Hartbarger testified that Crownover told him that he was (1) not putting forth 100 percent effort, (2) not cooperating, (3) not observing company policies, (4) not taking the initiative (had to be forced), and that (5) his dependability was lacking. After Hartbarger signed the evaluation form, Crownover told him that "it's going to cost you another half percent of your commission." Hartbarger told Crownover that he could not take a cut like that. (When Hartbarger's commission rate had been cut to 2 percent before, after a few months he told Crownover that he needed more money, and Crownover responded with an increase to 2½ percent.) Crownover offered Hartbarger three choices: accept the cut, resign, or be fired. After a pause, Crownover asked what it was going to be. Hartbarger replied that he could not take the first two choices and Crownover said, "Then I guess you're fired." The parties agree that Paxton could change the commission rate at any time and did not need the employee's permission to do so, but Hartbarger argues that implied in the choices presented to him by Crownover was an expectation for productive negotiation and that there was no good cause for an abrupt firing.

Implied employment contracts. The general rule in New Mexico is that an employment contract is for an indefinite period and is terminable at the will of either party unless the contract is supported by consideration beyond the performance of duties and payment of wages or there is an express contractual provision stating otherwise. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109, *cert. denied*, 488 U.S. 822, 109 S.Ct. 67, 102 L.Ed.2d 44 (1988). An at-will employment relationship can be terminated by either party at any time for any reason or no reason, without liability. *Id.* New Mexico courts have recognized two additional exceptions to the general rule of at-will employment: wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge. *Id.* The jury below found that there was an implied employment contract between Hartbarger and Paxton permitting termination only for just cause.

This Court has upheld findings of an implied employment contract provision that restricted the employer's power to discharge where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989) (upholding finding of implied contract based on employee manual, words, and conduct of parties); *Kestenbaum v. Pennzoil Co.*, 108

N.M. 20, 24–26, 766 P.2d 280, 284–86 (1988) (affirming finding of implied contract based on words and conduct of parties), *cert. denied,* 490 U.S. 1109, 109 S.Ct. 3163, 104 L.Ed.2d 1026 (1989); *Lukoski v. Sandia Indian Management Co.,* 106 N.M. 664, 667, 748 P.2d 507–510 (1988) (upholding finding of oral contract amended by employee handbook); *Forrester v. Parker,* 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (holding that, when terminating non-probationary employee, employer is bound by policies established in "personnel policy guide" that control the employer-employee relationship). We have upheld findings that there was no implied contract in cases where the alleged promise by the employer was not sufficiently explicit. *See Shull v. New Mexico Potash Corp.,* 111 N.M. 132, 135, 802 P.2d 641, 644 (1990) (affirming summary judgment in favor of employer where employee had no bargained-for expectations and employee handbook did nothing to alter at-will relationship); *Sanchez v. The New Mexican,* 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (affirming grant of directed verdict in favor of employer where language in employee handbook was of a non-promissory nature and was merely a declaration of employer's general approach to the subject matter discussed).

Implied employment contract restricting employer's power to discharge employee is an implied-in-fact contract. The question whether an employment relationship has been modified is a question of fact. *Lukoski,* 106 N.M. at 666, 748 P.2d at 509. A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *See Newberry,* 108 N.M. at 427, 773 P.2d at 1234 (totality of the parties' relationship, circumstances, and objectives are to be considered in determining whether presumption of at-will employment has been rebutted); *Kestenbaum,* 108 N.M. at 24, 766 P.2d at 284 (same). When such a contract is implied, it is implied in fact. *Wagenseller v. Scottsdale Memorial Hosp.,* 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985) (en banc) ("An implied-in-fact contract term ... is one that is inferred from the statements or conduct of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly." (citation omitted)).

Implied employment contracts do not require a factual showing of additional consideration or mutual assent to the implied term. Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent. *See* SCRA 1986, 13–801 (Repl.Pamp.1991) (definition of contract); *Romero v. Earl,* 111 N.M. 789, 791, 810 P.2d 808, 811 (1991) (stating consideration adequate to support a promise is essential to enforcement of the contract and must be bargained for by the parties); *Trujillo v. Glen Falls Ins. Co.,* 88 N.M. 279, 280, 540 P.2d 209, 210 (1975) (holding mutual assent in contract law is elementary and it must be expressed by the parties).

—*Consideration.* Paxton challenges the sufficiency of the evidence to support an implied contract because there was no evidence that Hartbarger gave additional consideration for any agreement beyond at-will employment.[1] *See Gonzales v. United Southwest Nat'l Bank,* 93 N.M. 522, 524, 602 P.2d 619, 621 (1979) (noting uniform rule, in 1979, that an employment contract for permanent employment not supported by consideration other than performance of duties and payment of wages is terminable at will).[2] However, since 1980 when we

1. Paxton requested no instruction on consideration and none was given. While failure to raise the issue below should be dispositive, we address the argument as presented on appeal.

2. The term "permanent employment" is susceptible to a variety of interpretations. In one sense, it might refer to employment for an indefinite period. *See Gonzales,* 93 N.M. at 524, 602 P.2d at 621. In another sense it might refer to employment that is terminable only for just cause. In this opinion, the term "permanent employment" is used in the latter sense and is meant to be interchangeable with "terminable only for just cause." *See Toussaint v. Blue Cross & Blue Shield,* 408 Mich. 579, 292 N.W.2d 880, 885–90 (Mich.1980) (discussing interpretation of the term "permanent employment").

recognized an implied employment contract in *Forrester v. Parker*, 93 N.M. at 782, 606 P.2d at 192, we have not required that additional consideration be shown factually. In *Forrester*, a personnel policy guide that set out termination procedures gave rise to an implied employment contract. *Id.; see also Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (agreeing that conduct of employer may be sufficient to create an implied contract requiring just cause for discharge) (citing *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917, 925–26 (1981); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980)).

In *Kestenbaum*, we alluded to the principle that additional, independent consideration was not necessary to establish an agreement not to discharge except for good cause, but we did not fully develop the principle. 108 N.M. at 24, 766 P.2d at 284. We cited *Toussaint*, 408 Mich. 579, 292 N.W.2d 880, which did discuss the principle to some extent. The court there explained that in determining the termination rights of the parties, job security could be proven by the conduct of the parties, and consideration could be implied from construing that the employer gave up his right to discharge at will as part of the original agreement. *See Toussaint*, 292 N.W.2d at 890–92. The court rejected the "defendant's claim that the element of consideration ... limits the enforceability of the employer's promise to those instances in which the employee provides some consideration in addition to the services to be rendered." *Id.* at 900 (Ryan, J., specially concurring). We hold today that where there is proof of a promise sufficient to support an implied contract, the consideration sufficient to support the implied contract will be implied as a matter of law by the court whether the promise was part of the original employment agreement or was made later in modifying the employment relationship.[3]

3. Additional consideration may serve an evidentiary function in implied employment contracts, indicating that the parties intended to place a limitation on the employer's right to discharge, *see Pugh*, 171 Cal.Rptr. at 925, but the evidentiary function is something distinct from the showing of consideration as an essential element of contract. In stating that a contract with an express or implied term restricting the employer's power to terminate need not be supported by consideration beyond the employee's service, *Pugh* quoted from *Drzewiecki v. H & R Block, Inc.*, 24 Cal.App.3d 695, 101 Cal.Rptr. 169 (1972), a case cited with approval in the earlier New Mexico Court of Appeals case of *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct.App.1975). In *Drzewiecki*, the court held the rule that should be followed in California is the one set out in *Littell v. Evening Star Newspaper Co.*, 120 F.2d 36 (D.C.Cir.1941). *Drzewiecki*, 101 Cal.Rptr. at 174.

> [W]hen one who enters into a contract of employment[ ] promises not only that he will give his services but also additional consideration ... such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment.
> ... [W]here no ... intent [for permanent employment not terminable except pursuant to express terms] is clearly expressed and, absent evidence which shows other consideration than a promise to render services, the assumption will be that—even though they speak in terms of "permanent" employment—the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.

Littell, 120 F.2d at 37. In addition to California, a number of courts have adopted that rationale in recent years. *See Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179, 1180–81 (D.C.Cir.1986) (explaining that presumption that employment is at will applies only when there is no evidence of parties' intent; to determine intent courts look to "such factors as the express terms of the contract, evidence of surrounding circumstances, or the payment of additional consideration"); *Eales v. Tanana Valley Medical–Surgical Group, Inc.*, 663 P.2d 958, 959–960 (Alaska 1983) (stating that the rule that contract for permanent employment is at will unless supported by additional consideration is based on an unsound foundation); *Coelho v. Posi–Seal Int'l, Inc.*, 208 Conn. 106, 544 A.2d 170, 176 (1988) (adopting position that absence of additional consideration does not invalidate a contract expressing intention that employment not be terminable at will); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492, (Ky. 1983) (joining "a number of other jurisdictions" in following the rationale of *Littell*); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99–100 (Me.1984) (holding parties may create employment contract terminable only pursuant to its express terms by clearly stating intention to do so); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn.1983) (holding requirement of additional consideration and presumption of at-will employment are both rules of construction rather than substance and implied contract needs no additional consideration

—*Mutual assent.* Paxton next challenges the verdict on the ground that there was insufficient evidence to support a finding of the contract element of mutual assent. The jury in this case was given an instruction requiring mutual assent. No objection was made to that instruction,[4] and it is, therefore, the law of this case.

We have not addressed previously the issue of mutual assent in the context of an implied employment contract. In *Kestenbaum,* this Court held, under the same instruction requiring an intention to be bound, that there was substantial evidence to support a finding that the parties agreed to a contract that permitted termination only for good cause. There was no evidence, and no requirement, to prove that the parties overtly manifested their mutual assent to the just cause term of employment. We stated that we agreed with the proposition that *oral statements made by an employer may be sufficient to create an implied contract. See Kestenbaum,* 108 N.M. at 24–26, 766 P.2d at 284–286. Similarly, an explicit promise would support the jury's finding of mutual assent here. Further, in *McGinnis v. Honeywell, Inc.,* 110 N.M. 1, 791 P.2d 452 (1990), we determined that the verdict finding an implied contract was supported by evidence sufficient to find an express contract, and that the theory submitted to the jury was broad enough to encompass a finding of express agreement. We then held that "the parties' conduct was sufficient to manifest an intention to be bound by the agreement." *Id.* at 5, 791 P.2d at 456. The employer there established certain policies and procedures to be followed in termination and prepared an employment agreement stating that employment was subject to applicable personnel practices published to employees. The only evidence of the employee's assent to the policies was the signing of the agreement and that the employee commenced and continued to work. *Id.* at 2, 791 P.2d at 453. In *Forrester, Newberry,* and *Lukoski,* the implied contracts were based on employee manuals and the employers' courses of conduct and oral representations. In those cases, the employers issued policy statements and encouraged the employees to rely upon them. However, in each of those cases there was no evidence presented (beyond the fact that the employees commenced or continued to work) that the employees assented to the policies.

When an employer offers to restrict its power to discharge, the employee's assent to the restriction need not be evinced by anything more than commencing or continuing employment. As a matter of public policy, we see no need for any further manifestation of assent. Once the employee has successfully shown that the employer has demonstrated an intent to restrict its power to discharge, absent evidence to the contrary, the court will imply in law that the requirement of mutual assent has been met. There need be no separate factual finding of mutual assent.[5] *Ac-*

where intention of parties is clear); *see also Eilen v. Tappin's, Inc.,* 16 N.J.Super. 53, 83 A.2d 817, 818–19 (Law Div.1951) (explaining that New Jersey had never adopted the additional consideration rule and that the rule "is merely a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract").

4. The jury was instructed that it could find an implied contract if it found that "the parties by a course of conduct have shown an intention to be bound." Instruction 14, based on SCRA 1986, 13–803 (Orig.Pamp.).

5. Although in an employment contract, terms of consideration and mutual assent may be implied in law, we reiterate that an implied employment contract providing for termination only for just cause is a contract implied in fact; it is based on explicit representations or conduct. An implied-in-law contract, on the other hand, is a duty imposed by law and requires no assent. Restatement (Second) of Contracts § 4 cmt. b (1979) (using the term "quasi contract"). It is not really a contract at all. *See Hydro Conduit Corp. v. Kemble,* 110 N.M. 173, 178–79, 793 P.2d 855, 860–61 (1990) (distinguishing between contract implied in law based on obligations created by law for reasons of justice, and contract implied in fact based on parties' mutual assent as manifested by their conduct). An action for retaliatory discharge, for example, lies not as a breach of contract, but as a tort. *See Vigil v. Arzola,* 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App.1983) (recognizing the tort of retaliatory discharge), *rev'd in part on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G. & G., Inc.,* 106 N.M.

cord Toussaint, 292 N.W.2d at 892 (holding employer statements of policy can give rise to contractual rights without evidence of mutual agreement). In this case, *if* Paxton made a sufficiently explicit offer to terminate Hartbarger only for just cause, the same evidence will support a finding of mutual assent. An employer does not have to issue a policy statement limiting its power to discharge, but if the employer chooses to do so and creates a reasonable expectation on the part of the employee, it is bound to fulfill that expectation.

To create an implied contract, the offer or promise must be sufficiently explicit to give rise to reasonable expectations. The at-will presumption that the employee has no reasonable expectation of continued employment applies only to a single term of an employment relationship—that of the employer's unabridged right to terminate the employee. *See Sheets v. Knight,* 308 Or. 220, 779 P.2d 1000, 1008 n. 13 (1989) (at-will employee is one who has no reasonable expectation of continued employment); *Wagenseller,* 147 Ariz. at 381, 710 P.2d at 1036 (discussing exception to at-will presumption as "implied-in-fact contract *term*" (emphasis added)). The right to terminate is the only provision of an employment relationship that is challenged in a case such as the one at bar, where the employee claims that the employer promised that the employee would be discharged only for good cause. In recognizing the so-called "implied employment contract," we actually have recognized only that an implied-in-fact contract term limiting the employer's right to terminate at will may modify the underlying employment relationship.

In examining implied employment contract cases, we always have required that the *promise* that is claimed to have altered the presumed at-will term *be sufficiently explicit* to give rise to reasonable expectations of termination for good cause only. Where the alleged term has arisen in a personnel manual, we have required that the manual control the employment relationship to the point that an employee could reasonably expect his employer to conform to the procedures it outlined. *Newberry,* 108 N.M. at 427, 773 P.2d at 1234. We also have stated that " 'if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it.' " *Lukoski,* 106 N.M. at 667, 748 P.2d at 510 (quoting *Leikvold v. Valley View Community Hosp.,* 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984) (en banc)); *see also Rowe v. Montgomery Ward & Co.,* 437 Mich. 627, 473 N.W.2d 268, 275 (1991) (holding that oral statements of job security must be clear and unequivocal to overcome presumption of at-will employment). An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how definite, specific, or explicit has been the representation or conduct relied upon.

The evidence in this case does not show a sufficiently explicit offer or promise to terminate only for just cause. "On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidences and inferences to the contrary." *Newberry,* 108 N.M. at 428, 773 P.2d at 1235. We are to consider the totality of the parties' relationship, circumstances, and objectives in determining whether the presumption of at-will employment has been rebutted. Hartbarger has directed this Court's attention to many aspects of the parties' employment relationship, arguing that in totality they demonstrate a sufficient promise to support an implied contract. Under the challenges raised by Paxton, we look only to

279, 280–81, 742 P.2d 491, 492–93 (1987) (allowing retroactive application), *and overruled in part on other grounds by Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 649–50, 777 P.2d 371, 377–78 (1989) (lowering the burden of proof for retaliatory discharge and allowing recovery of damages for emotional distress).

see if the evidence is sufficient to support a finding that Paxton, by its course of conduct, evinced an intention to discharge Hartbarger only for just cause. There is no assertion that Paxton established policies and procedures for terminations; Hartbarger relies on alleged representations that he would be fired only for just cause.

—The yellow employee handbook. Paxton published at least two employee handbooks, one in 1975 or 1976 with a yellow cover and one in 1983 with a red cover. Hartbarger acknowledged receiving a copy of the yellow handbook when he rejoined the company in 1977, but denied having received the red handbook. Both handbooks set out company policies regarding compensation and reasons for discipline, outline the company's retirement plan, and contain other sections of information and advice. The evidence is sufficient to support the finding that Hartbarger received the yellow handbook and not the red handbook that contains a disclaimer stating that: "The policies in this book are subject to change.... They are not conditions of employment, and the language is not to be construed as a contract between [Paxton] and [its] employees. Employment is terminable at the will of either the employee or the Paxton division for which he or she works." For purposes of this appeal, we will accept the finding that only the yellow handbook affected the employment relationship between the parties. *Cf. McGinnis,* 110 N.M. at 4–5, 791 P.2d at 455–56 (holding handbook binding on employment relationship where employee had not been issued a copy but employee helped draft the guide, a copy was available in the department where she worked, employees could review guide on request, and it was published to employees in sense of having been made generally known to them and proclaimed officially by employer).

Page 10 of the yellow handbook is labeled "Fair and Square Policies." On that page are statements to the effect that Paxton will pay wages that "equal or exceed generally recognized levels prevailing in the area of employment," and that "[e]mployees will be paid and promoted commensurate with ability previously displayed and on length of service." While relating to Paxton's policy of compensation, the "Fair and Square Policies" do not relate to an implied contract requiring just cause for termination. There is no reference to termination on page 10, only general statements relating to Paxton's compensation rates.

Page 11 of the yellow handbook is labeled "Logical and Practical Rules." Near the bottom of the page is a list of "[a]ctions leading to severe disciplinary action or discharge." The list includes, inter alia: dishonesty, insubordination, excessive absenteeism, loafing after previous warnings, abuse of company property, and falsification of any company record for personal benefit. Hartbarger argues that nothing he did is encompassed by any of the categories in that list. We see no reason why the list should be deemed inclusive of all reasons for which an employee might be disciplined or terminated, or indeed, why the list should preclude discharge for no reason at all. There is no statement in the yellow handbook to the effect that the handbook reflects "established procedure regarding suspension of problem employees and termination for those who cannot conform to Company Policy," as there was in the handbook at issue in *Lukoski,* 106 N.M. at 666, 748 P.2d at 509. Neither is there anything suggesting "that the enumerated conduct was the only basis for dismissal, and the rules were consistent with a termination-at-will policy." *Rowe,* 473 N.W.2d at 275 (holding evidence insufficient to support finding of implied contract). We find that there is no language in the yellow handbook that directly or indirectly refers to a policy that Paxton will fire employees only for just cause.

—Paxton's custom of retaining employees for a long time and Crownover's practice of usually only firing employees for a good reason. Paxton had a history of maintaining long-term employment relationships. During the time that Hartbarger worked for Paxton, no outside salesperson had been terminated. Crownover testified that it was not his custom

and practice to go around firing people and that when he did fire someone, he usually had a good reason. Hartbarger points to this history of long-term employment and Crownover's testimony as an indication that Paxton did not maintain an at-will employment policy. Paxton responds that long-time employment is not inconsistent with an at-will policy and that it should not be penalized for not having fired employees for no reason. We agree. Paxton's retention of other employees for a long time is in itself no indication that Hartbarger had an implied contract requiring that termination be only for just cause. As a matter of policy, this Court will not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing that the company does not maintain an at-will employment policy. To do otherwise would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so.

—*Oral statements by Crownover.* The only oral statements in evidence by any agent of Paxton are statements Crownover made when Hartbarger approached him out of concern that the family-owned Paxton Company was to be sold. Hartbarger recalled asking Crownover what would happen to the employees if the company were sold. Hartbarger testified that Crownover told him in reply that as long as he kept up his sales and took care of what he was doing he would not have anything to worry about. Hartbarger said Crownover assured him that the company was not the kind of company that would sell out and just leave its employees hanging.

Hartbarger argues that these statements could be, and on appeal should be, interpreted as meaning that he would not be terminated as long as he kept up his sales and took care of his job, i.e., unless Paxton had just cause. Because we are to consider the totality of the parties' relationship, circumstances, and objectives, we can consider the context in which this assurance was made and evaluate whether the statement was intended, or reasonably could be interpreted by Hartbarger, to be confirmation of an implied contract or a modification of the employment relationship.

The context was that a concerned employee was discussing with his supervisor what might happen to current employees if the company were to be sold. The supervisor's response to the employee's concerns was to reassure the employee. Hartbarger admitted that he was on a friendly basis with Crownover at the time, that the conversation may have been "off the record," that he knew Crownover had no authority to bind the potential new owners if the sale did occur, and that the entire conversation concerned the new owners, not the current ownership. The assurance was not expressed in terms of a contractual promise. *See Sanchez v. The New Mexican,* 106 N.M. at 79, 738 P.2d at 1324 (language of a non-promissory nature and merely a declaration of employer's general approach lacks specific contractual terms which might evidence intent to form a contract).

The comments by Crownover, on their face, resemble statements made in *Toussaint* and quoted in *Kestenbaum,* 108 N.M. at 24, 766 P.2d at 284. In *Toussaint,* as in *Kestenbaum,* assurances of job security were made to the employees during the hiring process and might legitimately have given the employee an expectation that he would not be fired without just cause. The *Toussaint* court held that an employer's statements of company policy and procedure that it will terminate only for cause can give rise to rights enforceable in contract. *See Kestenbaum,* 108 N.M. at 24–25, 766 P.2d at 284–85. In contrast, Crownover was not making a statement of current or future company policy regarding its employment relationship with Hartbarger; he was expressing an opinion as to job security if the company were to be sold.

Looking at the conversation in context, there is no reasonable interpretation of Crownover's comments that would lead one to believe that Crownover was either making a promise or reaffirming an earlier promise that Hartbarger was anything other than an at-will employee. Hartbarger's

testimony cannot be construed as describing a bargaining for a change in the employment relationship between Hartbarger and the Paxton ownership at that time.

—Written statements by Crownover. About three months before he was fired, Hartbarger applied for a loan. The lender asked Crownover to fill out a verification of employment form in connection with the loan approval process. Crownover stated on the form that Hartbarger's probability of continued employment was "excellent" and that Hartbarger was "likely" to continue to receive overtime or bonus pay, by which Crownover said he meant commissions. Hartbarger points to the verification statement as indicative of an implied contract requiring just cause for termination. We disagree.

The statements were made to the lender, not to Hartbarger, and clearly could not indicate a modification of the employment relationship. The comments made were the same as might be given for an at-will employee who has been with the company a long time and has been a steady employee. They are not indicative of a modified employment relationship. The comments are no indication that Hartbarger could be terminated only for just cause. They indicate only that, at that time, Crownover did not contemplate firing Hartbarger and thought that he would continue to receive bonuses in the form of commissions. *See Rowe,* 473 N.W.2d at 273 (orally grounded contractual obligation for permanent employment " 'must be based on *more than* an expression of an optimistic hope of a long relationship' ") (emphasis added in *Rowe*) (quoting *Carpenter v. American Excelsior Co.,* 650 F.Supp. 933, 936 n. 6 (E.D.Mich.1987)).

The other written statement that Hartbarger points to as evidence of an implied contract is the evaluation form that was given to Hartbarger at the meeting where Hartbarger was terminated. That written statement cannot be construed as modifying the employment contract or as an indication of an implied contract because it contains no statements regarding future employment conditions and was not given to Hartbarger until the meeting that concluded with his termination.

—Paxton's retirement plan. Pages 20 and 21 of the yellow handbook give a brief description of the employee retirement program that was in place at the time. On page 20, the handbook points out that Paxton "will vigorously resist pension claims presented by any employee involved in theft, conversion or embezzlement of company property." On page 21 there is a paragraph providing that employees who are vested in the pension plan may be entitled to receive their retirement benefits from the Paxton plan at their normal retirement date. Benefits claimed in that manner are subject to forfeiture if the employee was "discharge[d] for theft of company property." There are no references in the retirement program to discharge for any other reason or for voluntary separation.

Hartbarger argues that the retirement plan's policy of contesting benefits if the employee was involved in theft from the company is contra-indicative of an at-will employment policy. We see nothing in the retirement plan that supports Hartbarger's position. The statement that Paxton will contest retirement benefits if termination was for theft of company property is no indication that employees will not be terminated for other reasons. The statement only indicates that a termination for any other reason will not result in a contest of accrued retirement benefits, and that position is consistent with an at-will termination policy.

Totality of the evidence insufficient to support a finding of a promise that employment could be terminated only for just cause. Viewing all of the circumstances of this employment relationship, we hold that the evidence does not support a finding that Paxton made an offer or promise sufficiently explicit to establish an implied contract. There was no representation sufficiently explicit to con-

stitute an offer not to terminate Hartbarger except for just cause, thus there could be no implied contract to that effect. Therefore, we reverse the judgment against Paxton and remand with instructions to enter judgment in Paxton's favor.

IT IS SO ORDERED.

MONTGOMERY and FRANCHINI, JJ., concur.

857 P.2d 788

SUPREME COURT OF NEW MEXICO

Denials of Certiorari

Title	Docket Number	Date of Denial
Baca v. State	21360	7/28/93
Horne v. Brogan	21355	7/28/93
Jeremy G. v. State	21368	7/28/93
Moreno v. State	21371	7/28/93
Munoz v. State	21365	7/28/93
Najar v. State	21366	7/28/93
NCR Corp. v. Taxation and Revenue Dept. of the State	21302	7/8/93
Simpson v. Freeman	21361	7/28/93
Smith v. State	21367	7/28/93

Writ Granted

Title	Docket Number	Date of Grant
Wilson v. State	21356	8/2/93

858 P.2d 54

HOBBS GAS COMPANY, Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Appellee.

Nos. 20558, 20759.

Supreme Court of New Mexico.

June 22, 1993.

Rehearing Denied July 28, 1993.

Simons, Cuddy & Friedman, Daniel H. Friedman, Santa Fe, for appellant.

Lee Huffman, Com'n Counsel, Santa Fe, for appellee.

OPINION

FRANCHINI, Justice.

In these consolidated cases, Hobbs Gas Company (Hobbs) seeks review of two orders of the New Mexico Public Service Commission (Commission) pursuant to NMSA 1978, Sections 62–11–1 to –6 (Repl.Pamp.1984). The April 1, 1992, order in Case No. 2369 denied Hobbs' application for continued use of its purchased gas adjustment clause (PGAC) and required Hobbs to refund its customers close to one million dollars in "overcollections" relating to the period September 1, 1988, to August 31, 1990. The order also disapproved Hobbs' PGAC reconciliation report for the period September 1, 1990, to August 31, 1991. Hobbs was required to file a revised reconciliation report containing computations mandated by the order and to refund approximately $521,389 in "overcollections" later identified by the Commission for that period. Finally, the Commission ordered Hobbs to cease charging its ratepayers for "free gas," to file a rate case by July 1, 1992, and to propose appropriate overcollection refund schedules.

The other case under review, Case No. 2454, concerns Hobbs' noncompliance with the Commission's prior order to cease charging ratepayers through its PGAC for "free gas" and to implement the correct methodology determined by the Commission in the earlier case. The order directs Hobbs to utilize the Commission's methodology in determining its PGAC. Pursuant to Section 62–11–5, we annul and vacate both orders of the Commission.

I.

Hobbs has included a PGAC in its tariffs since 1981. A PGAC allows a company to periodically adjust rates to reflect changes in the unit cost of gas supplies. This protects a natural gas utility from sudden increases in its fuel costs by allowing the utility to pass on the increased fuel costs without having to undergo a rate case. Similarly, ratepayers automatically receive any reductions in fuel costs, without the delay of a rate case. In order to continue use of a PGAC, a utility must file an application for approval by the Commission pursuant to Purchased Gas Adjustment Clauses For Gas Utilities, NMPSC Rule 640 (June 30, 1988). Rule 640 requires a gas utility to apply to the Commission every two years for permission to continue use of the PGAC for the next two-year period. The application process requires the submission of a reconciliation audit, by which under- or overcollections for the preceding period are computed.

Rule 640.16(d) provides that the utility can either include a portion of its gas costs in its basic rates with the remaining portions to be collected through the PGAC (base rate/PGAC), or it can separate gas costs entirely from other costs, including any gas losses, through the PGAC. Hobbs uses the base rate/PGAC methodology. This form of PGAC does not contemplate a dollar-for-dollar pass through of gas costs or savings insofar as line losses and savings from reduction of line losses are concerned. Where a portion of gas costs is included in a utility's base rates, Rule 640 requires the use of a "purchase/sale ratio" in the computation of gas cost and reconciliation factors used to increase or decrease the amount of recovery under the utility's rate schedules. Where a utility has experienced significant line losses, the utility will purchase more gas to meet its customers' requirements without increased sales; accordingly, the ratio of purchases to sales will exceed one. Conversely, should a utility receive unbilled gas from its suppliers, the ratio of purchases to sales will be less than one.

Since 1985, Hobbs has received a portion of its purchased gas from suppliers without being charged for it, possibly from meter malfunctions, meter-reading errors, or oth-

er causes. In its application in Case No. 2369, as in its two preceding PGAC continuation filings, Hobbs used the same methodology for computing the portion of its costs of gas recovered through base rates and for computing its reconciliation factor. The purchase/sale ratio reported in computing the reconciliation factor and the purchase/sale ratio utilized in computing the portion of the gas recovered through base rates were determined using the amount of gas it had purchased in the numerator of the ratio and the amount of gas sold to its customers in the denominator. This was apparent from the fact that the purchase/sale ratio shown in these calculations was less than one.[1] In Case No. 2081, the Commission granted Hobbs the continued use of its PGAC for the periods ending August 31, 1985, and August 31, 1987. In Case No. 2246, the Commission granted Hobbs the continued use of its PGAC for the periods ending August 31, 1988, and August 31, 1989. In Case No. 2369 (one of the cases on review here) the Hearing Officer ruled that Section 640.21, when read in its entirety, requires that delivered units (which includes the unmetered, cost-free gas) be used in the numerator of the purchase/sale ratio. Even though Hobbs' use of purchased units in the numerator of the purchase/sale ratio had been tacitly approved in the two prior PGAC continuation cases, the Commission adopted the Hearing Officer's recommendation that the purchase/sale ratio be recalculated using the newly recognized "proper" methodology, thus holding Hobbs responsible for a refund of the difference in the sums as recalculated.

II.

Judicial review of a Commission's order is limited to a determination of whether the Commission acted fraudulently, arbitrarily, or capriciously, and whether the Commission's order is supported by substantial evidence. *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 11–12, 399 P.2d 646, 651 (1964). The burden is on Hobbs to show that the order of the Commission is unreasonable or unlawful. Section 62–11–4; *Behles v. New Mexico Pub. Serv. Comm'n (In re Timberon Water Co.)*, 114 N.M. 154, 156, 836 P.2d 73, 75 (1992). This Court has no power to modify the order appealed from, but "shall either affirm or annul and vacate the same." Section 62–11–5. We are required to "vacate and annul the order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful." *Id.* If we vacate the order, we must "vacate and set aside en toto." *Transcontinental Bus Sys., Inc. v. State Corp. Comm'n*, 56 N.M. 158, 167, 241 P.2d 829, 835 (1952). We are "powerless to change, modify or amend an order by holding part of it lawful and reasonable and another part or parts unlawful or unreasonable." *Id.* The limitations on our power to amend or modify Commission orders are soundly grounded in the separation of powers. Amending or modifying Commission orders would be substituting our judgment for that of the Commission, and we thus would be acting legislatively and not judicially. *Id.* at 169, 241 P.2d at 836. However, we are not precluded from declaring or determining that parts of a Commission order are unlawful and/or unreasonable (which requires vacating and annulling en toto) but at the same time declaring other parts of the order to be reasonable and lawful. Following remand to the Commission, the Commission may properly enter an order embodying those provisions in the earlier, vacated order that have been declared reasonable and lawful. *See Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 92 N.M. 721, 723, 594 P.2d 1177, 1179 (1979) (remanding case to Commission for entry of new order based on substantial evidence).

Hobbs contends that requiring PGAC refunds for the period September 1, 1988, to May 1, 1992, is unreasonable and unlawful. We partially agree. "Although a Commission should be able to change its

1. Since 1985, Hobbs has filed dozens of documents disclosing that more gas was sold than purchased and that the company was experiencing negative line losses. These documents include six years of annual reports and two sets of PGAC continuation filings.

procedure, it should not arbitrarily or capriciously do so without good reasons." *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n,* 84 N.M. 330, 333, 503 P.2d 310, 313 (1972). Thus, regulatory treatment which "radically departs from past practice without proper notice" will not be sustained. *General Tel. Co. v. Corporation Comm'n,* 98 N.M. 749, 755–56, 652 P.2d 1200, 1206–07 (1982).

In *General Telephone,* the Commission utilized a novel and different method of calculating General Telephone's working capital in a rate case. General Telephone had calculated its working capital on the basis of a method approved and utilized by the Commission in prior rate cases. The Commission asserted that it was not bound by any particular method in determining rates. We disagreed, stating:

> The [Commission] is bound by, and limited to, its existing rules and regulations, proper application of the law, compliance with the constitutional mandate, and by previously established methods of rate-making, absent a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established method.

General Telephone, 98 N.M. at 755, 652 P.2d at 1206.

Applying this standard to the Commission's change of position, we noted that "[t]he record does not reflect prior notice to [General Telephone] of any 'changed circumstances' affecting the method of calculating cash working capital since prior orders of the [Commission] approved the method utilized by [General Telephone]." *Id.* Prior notice is required before any prospective change in policy can be made. To allow a radical departure from past practice, such as a new method of calculating the PGAC, to have retroactive effect without putting the utility on notice that such a change was contemplated would be inconsistent with our opinion in *General Telephone.*

In *Hobbs Gas Co. v. New Mexico Public Service Commission,* 94 N.M. 731, 735–36, 616 P.2d 1116, 1120–21 (1980), this Court held that application of the principles of res judicata and equitable estoppel in review of a Commission order was not error. In *Hobbs,* we upheld a lower court determination that the Commission was equitably estopped from retroactively applying a valuation policy which was "unprecedented and contrary to previous policy of the Commission and previous orders of the Commission." *Id.* at 735, 616 P.2d at 1120. While acknowledging that the Commission was free "to adapt to changes in circumstances in the rate-making determination from one year to the next," we also stated that the Commission may still "be bound by prior decisions as they affect a particular factual situation." *Id.* at 736, 616 P.2d at 1121. Thus, we stated:

> [T]he trial court found that the specific issue of acquisition adjustment had been dealt with by the Commission in a previous proceeding in a manner inconsistent with its theory in this case. Under the facts in this case that inconsistency was not allowed by the district court. We affirm the trial court on this issue.

Id.

Mountain States Telephone & Telegraph Co. v. New Mexico State Corp. Commission, 104 N.M. 36, 715 P.2d 1332 (1986), is also instructive to our analysis. In *Mountain States,* we held that the Commission's prospective "change in methodology" was not an arbitrary and capricious departure from past Commission practice because Mountain Bell had received proper notice of the proposed change and the Commission had demonstrated that the change was justified. *Id.* at 41–42, 715 P.2d at 1337–38. Prior notice was shown by Mountain Bell's receipt of prefiled testimony of staff and intervenor witnesses proposing to change to the flow-through method of calculating state income tax.

Thus, *Hobbs, General Telephone* and *Mountain States* instruct us that a regulatory body is not free to change its position without good cause and prior notice to the affected parties, if the regulatory change is to be imposed retroactively. Other courts recognize that while regulatory interpreta-

tions can have retroactive effect, it is necessary to balance the competing interests to determine whether that effect is desirable or permissible. *See generally* 4 Kenneth C. Davis, *Administrative Law Treatise* § 20:7 (2d ed. 1983) (examining retroactive lawmaking). While we approved the application of principles of equitable estoppel under these circumstances in *Hobbs,* courts, including this one, are generally circumspect in the use of estoppel against government agencies. *See Rainaldi v. Public Employees Retirement Bd.,* 115 N.M. 650, 658, 857 P.2d 761, 769 (1993); *see also* 4 Davis, *supra,* § 20:2 ("... Supreme Court law has moved unevenly from a rigid refusal in all circumstances to apply equitable estoppel against the government to the present somewhat uncertain law that the government may be estopped in some circumstances.") Rather than analyzing the propriety of applying new regulatory interpretations retroactively as an equitable estoppel problem, courts tend to use a "retroactive lawmaking" analysis. As Davis notes: "An agency that creates law could be 'estopped' from departing from that law with respect to a party who has relied and who has had insufficient notice of the contemplated change; the customary language is not 'estoppel' but 'retroactive lawmaking.'" 4 Davis, *supra,* § 20.12.

By approving Hobbs' prior PGAC's, the Commission established a practice of calculating purchase/sale ratios on the basis of gas purchased. In changing this interpretation in the most recent PGAC hearing so as to base the purchase/sale ratio on gas delivered, the Commission made its revised regulatory interpretation retroactive, effectively making new law through its adjudicatory proceeding. In *SEC v. Chenery Corp.,* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), the Supreme Court held that the decision to make new law through rulemaking or adjudication "is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203, 67 S.Ct. at 1580. The question remains, however, whether to apply the ruling prospectively or retroactively. While at one time any rule properly established through adjudication would be applied with full retroactive effect, *see Linkletter v. Walker,* 381 U.S. 618, 622–24, 85 S.Ct. 1731, 1733–35, 14 L.Ed.2d 601 (1965), "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." *Id.* at 628, 85 S.Ct. at 1737.

In *Chenery,* the United States Supreme Court established a balancing test used to ascertain whether adjudicatory rulemaking should be applied prospectively only. 332 U.S. at 203, 67 S.Ct. at 1580. The court in *Retail, Wholesale & Department Store Union v. NLRB,* 466 F.2d 380 (D.C.Cir. 1972), elucidated the balance suggested in *Chenery* by focusing on the following factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390.

Applying the five-factor balancing test articulated in *Retail, Wholesale,* we find that the statutory interest in using the new method of calculating the purchase/sale ratio is outweighed by the unfairness of upsetting Hobbs' reasonable reliance on a method of calculating the purchase/sale ratio that had been tacitly approved in the past two PGAC applications.

The method of calculating the purchase/sale ratio has been tacitly approved for the past four years in Hobbs' PGAC applications, so it is not a question of first impression. This factor weighs against the Commission, as does the second factor, because the new rule represents an abrupt departure from the Commission's previous practice of approving Hobbs' PGAC applications that used the amount of gas pur-

chased in the numerator of the purchase/sale ratio.

As to the third factor, extent of reliance, Hobbs did rely on its method of calculation, which was reasonable under its interpretation of the regulations. In *Daughters of Miriam Center for the Aged v. Mathews,* 590 F.2d 1250, 1262 (3d Cir.1978), the court found that a central question in the *Retail, Wholesale* analysis is how the party's conduct would have differed had the rule been applied from the start. As it was, Hobbs relied upon the method of calculation used in the approved PGAC application, which allowed Hobbs to sustain an income such that it had no need to apply for modification of the base rates established in its last rate case in 1982. Had the Commission given notice to Hobbs that the proper method of calculating the purchase/sale ratio was to use gas delivered in the numerator of the ratio, instead of the amount purchased, Hobbs could have filed a rate case to adjust its projected income accordingly.

In *Southwestern Public Service Co. v. FERC,* 842 F.2d 1204, 1208 (10th Cir.1988), the court noted that a good-faith reliance on a prior policy was an important factor in applying the *Retail, Wholesale* balancing test. In *Southwestern,* the Federal Energy Regulatory Commission had approved prior rate filings by Southwestern that included, since 1971, a flow-through-to-earnings method of accounting in calculating its investment tax credits. In a 1987 order entered pursuant to a rate increase request, the Commission required that all investment tax credits since 1971 be accounted for under the normalization method of investment tax credit treatment. *Southwestern,* 842 F.2d at 1205. The court found Southwestern's reliance upon approvals of rate applications containing accounting practices for the investment tax credits reasonable. *Id.* at 1209. Similarly, Hobbs has relied on approvals of PGAC's containing computations of purchase/sale ratios using the cost of purchased gas in the numerator of the ratio. If action by the agency leads to reasonable reliance on a certain interpretation of the rules, retroactive application of a change in policy is arbitrary and capricious.

The degree of the burden placed upon Hobbs by the new interpretation of "purchase/sale ratio" is substantial. The effect is to require Hobbs to write off forty percent of its net equity and experience no cash flow in the first year of refunds. Hobbs maintains that the refund will require it "to seek the protection of bankruptcy laws, and would further render it unable to meet its debts as they came due (the indicator of insolvency) or attract financing."

Finally, we must consider the statutory interest in applying the new interpretation despite Hobbs' reliance on the old standard. It appears that the purpose the Commission is attempting to effectuate through its requirement for PGAC reports is to "assure the existence of adequate regulatory control over a utility's operations under the PGAC." NMPSC Rule 640.1(b). Rule 640.14 allows the Commission to order refunds when the Commission determines that "the utility's collection of such amounts is contrary to the provisions of Rule 640 or otherwise is unjust and unreasonable." Thus, the intent of the refund is to allow for the reparation of money collected in contravention of an approved PGAC. Hobbs, however, did not collect more than was permitted under its approved PGAC. The refund is based solely on a new interpretation of the proper method for calculating the purchase/sale ratio. The amount collected from Hobbs' customers was not unreasonable, because it was based on a PGAC application approved by the Commission, nor was it unjust, considering that Hobbs' residential rates (including its PGAC) are among the lowest in the country.

The statutory interest in applying the new method of determining the purchase/sale ratio retroactively does not strike us as outweighing Hobbs' reliance interest on the method of calculation used in the approved PGAC's. Considering that Hobbs could have applied for a rate increase had it been notified in a timely manner of the proper method of calculating the

purchase/sale ratio, that the financial burden of reparations might bankrupt the utility, and that Hobbs' rates are already among the lowest in the country, it seems fundamentally unfair to apply the new interpretation to Hobbs retroactively.

We hold that a regulatory body cannot, without prior notice, abruptly depart from past practice on which the regulatee has relied and impose a retroactive refund requirement upon the regulatee. Therefore, the ordered refund for the period September 1, 1988, to August 31, 1990, is unreasonable and unlawful. The requirement in the order in Case No. 2369, decretal paragraph G [2], that Hobbs refund "overcollections" for the period September 1, 1990, to August 1, 1991, is also unreasonable and unlawful. The Commission did not give notice of its new requirements respecting Hobbs' PGAC until April 1, 1992, when it issued the Case No. 2369 order. From that point on, Hobbs was on notice of the new regulatory treatment that would be applied to its PGAC, and at its own risk it continued using its PGAC in the way it had done before. Once notice was given, nothing prevented the Commission from adopting a new regulatory practice and applying it prospectively; if Hobbs chose not to comply, it did so at its own peril. Therefore, decretal paragraph D of the order was a reasonable and proper exercise of the Commission's regulatory authority. That paragraph directed that: "By no later than May 1, 1992, Hobbs shall cease charging its ratepayers through its PGAC for free gas and implement the correct methodology determined in this case." Thus, on remand, the Commission is free to enforce the requirement that Hobbs implement the new methodology as of May 1, 1992, and may order appropriate refunds for any overcollection it finds to have occurred after that date, adjusted as may be appropriate for the passage of time, provided it either omits the requirement of using a purchase/sale ratio of 1.042067 or establishes an evidentiary basis for doing so.

This brings us to our next issue concerning Case No. 2454. The order in that case should be vacated. The order directs Hobbs to utilize the Commission's methodology in determining its PGAC as the means of complying with decretal paragraph D. Although we hold that the Commission was entitled to enforce the portion of its order in Case No. 2369 not stayed by this Court,[3] the method it chose to do so lacked an evidentiary foundation and was accordingly unreasonable and unlawful. The Commission acted arbitrarily when, in calculating the amount of gas cost which cannot be passed on in its PGAC, it mandated a purchase/sale ratio of 1.042067, which imputes a 4.2 percent line loss.

In computing the amount of gas costs recovered through the utility's basic rates, Hobbs could no longer use a purchase/sale ratio in which the numerator was the units of gas purchased from its suppliers and the denominator was the units of gas sold to its customers. When Hobbs was receiving unbilled gas, the purchase/sale ratio was less than one. The final order required that Hobbs not merely apply a purchase/sale ratio of one but assume line losses in the reporting period equal to more than 4 percent of sales to customers. While the Commission acknowledged that a utility is entitled to retain savings from reduction of line losses between rate cases, the forced imposition of a purchase/sale ratio in excess of one assumed that Hobbs had experienced line losses in the reporting period of 4.2 percent in excess of the gas it sold to its customers. There is no evidence in the record to support this assumption. The Commission incorrectly assumed that line losses which Hobbs experienced in

2. Decretal paragraph G in the order in Case No. 2369 provides that: "Hobbs shall refund the amount of any overcollection which is later determined by the Commission to have taken place during the 1991 Reconciliation period (September 1, 1990 to August 31, 1991) through its corrected PGAC over the twelve-month period following the Commission's determination."

3. By order dated July 8, 1992, we refused to stay the order in Case No. 2369 insofar as that order required Hobbs to "cease implementing its Purchased Gas Adjustment Clause from May 1, 1992, ... pending approval of a new PGAC."

1981 or 1982 accurately reflect its line losses in the 1988–90 reporting period. Uncontroverted testimony concerning Hobbs' actual experience was that it had no line losses during the reporting period. Thus, there was no factual basis for assuming that Hobbs' gas acquisitions exceeded its sales to customers by 4.2 percent. "The standard of review for appeals from administrative agencies is whether there is substantial evidence in the record as a whole to support the agency decision." *Gonzales v. Pub. Serv. Comm'n (In re Elec. Serv. in San Miguel County),* 102 N.M. 529, 531, 697 P.2d 948, 950 (1985). Because the Commission arbitrarily required use of a purchase/sale ratio of 1.042067 without any evidentiary basis for the use of that figure, we hold that the order in Case No. 2454 is unreasonable and unlawful.

In view of the foregoing, we annul and vacate the Commission's orders in Case No. 2369 and in Case No. 2454. Because we vacate the order in Case No. 2454, Hobbs' contention that it is free to elect not to use a PGAC at all is moot. Moreover, Hobbs' contention that it could not be ordered to file a rate case is also moot. An order on this rate case (Case No. 2462) was issued April 30, 1993, and Hobbs is appealing.

IT IS SO ORDERED.

BACA, MONTGOMERY and FROST, JJ., concur.

RANSOM, C.J., dissents.

RANSOM, Chief Justice (dissenting).

I respectfully dissent. The Commission has designed the adjustment clause under New Mexico Public Service Commission Rule 640 to allow a natural gas utility to adjust its pricing in response to fluctuations in natural gas prices without going through the expense and delay of a rate case. Under Rule 640.14, when ordered at the discretion of the Commission, the utility must make refunds of charges collected contrary to Rule 640 (or if the collection is otherwise unjust and unreasonable). We should review the Commission's exercise of discretion to determine whether it acted arbitrarily without support of substantial evidence. I do not agree with the way the majority opinion applies this appropriate standard of review to the facts of this case.

At all times relevant to this case, the Commission's announced purpose for Rule 640 has been to assure that only a utility's actual legitimate gas purchase costs are recovered through the adjustment clause. *Re Standard Purchased Gas Adjustment,* 40 PUR4th 619, 629 (NMPSC 1980). It is undisputed that Hobbs Gas never affirmatively disclosed to the Commission that it was receiving delivery of substantial amounts of free gas which it was selling to its ratepayers. The evidence adduced before the Commission was that the Commission's staff was unaware of the purchase costs of the gas sold. Nevertheless, my colleagues on this Court believe that the inclusion of negative purchase/sales ratios in reports to the Commission imputes to the Commission as a matter of law knowledge that Hobbs Gas was receiving substantial amounts of free gas, and that the free gas had been sold to its customers for the same price as gas for which it had paid.

From the imputation of knowledge of free gas, the majority opinion attributes to the Commission an "established practice" of calculating purchase/sales ratios without adjusting for free gas. From this premise, the majority then charges the Commission with "*changing this interpretation* so as to base the purchase/sale ratio on gas delivered." (Emphasis added.) This, in turn, gives rise to application of the balancing test suggested in *Chenery* to ascertain whether adjudicatory rule making should be applied retroactively. I endorse the use of a "retroactive rule making" analysis in favor of an equitable estoppel analysis. I question only the premise for its application and the discussion of detrimental reliance and imposition of burden under the third and fourth prongs of the balancing test as elucidated in *Retail, Wholesale & Department Store Union v. NLRB,* 466 F.2d at 390.

I am impressed with the fact that, because it never adjusted its charges to ac-

count for the acquisition of the free gas,[1] the calculations made by Hobbs Gas, resulting in the anomalous ratios, were incorrect and contrary to the adjustment clause rule. As I read the rule, the Commission is correct in its assertion that the "purchase" side of the purchase/sales ratio always was supposed to include all gas delivered to the utility. The purchase/sales ratio is defined in Rule 640.21(e) under the heading of "Methodology." The number to be used for the "purchase" side of the ratio is the same number that is used as the divisor in the calculation of the average cost of gas. The divisor in the calculation of the average cost of gas is "the number of units used for computing the cost of gas." Rule 640.21(b). The "cost of gas" factor is to be determined, in part, by applying the appropriate rates and charges to the "quantities of gas *delivered* by each major supplier." Rule 640.21(d) (emphasis added). "Appropriate rates" means the price paid for a particular unit of gas that was delivered—presumably the contract price on the date of delivery. The number of *delivered* units is then used as the divisor in the average cost of gas calculation and in the purchase/sales ratio. Had the unmetered gas been included as delivered gas in the "cost of gas" calculation, the units of free gas would have resulted in a lower "average cost of gas" and would have been carried through to the purchase/sales ratio, giving a ratio of more than one.

Because Hobbs Gas calculated its purchase/sales ratio based on an error in its cost of gas, it had an obligation under Rule 640.14 to make refunds. This error was not caught by the Commission until the third review of the adjustment clause practices of Hobbs Gas. The hearing officer found that since it was not apparent on its face, the Commission was justified in failing to notice the effect of a purchase/sales ratio of less than one in its previous reviews. This finding was, in part, based on the fact that Hobbs Gas was the only utility that used this particular formula in reporting to the Commission. Evidence supports the finding that the Commission actually was not aware of the effect of the negative ratio, even though the ratio tacitly indicated premises from which the Commission staff could have deduced that Hobbs Gas was getting some gas for free.

The fact that the anomalous purchase/sales ratio was not caught the first two times it was reported did not establish a "practice" by the Commission. Rather, the Commission simply committed administrative oversight. Catching the error in the third review was not a change of the rule or of the Commission's position. Because there was no change, the majority's retroactive-rule-making analysis is unnecessary. Even if the analysis should be done, I would not agree that Hobbs Gas has shown that it detrimentally relied on the "former rule," or that the question of the degree of the burden in making the refund is a proper question for this Court. I am inclined to agree with the Commission that, "Quite simply, Hobbs knew that it was charging for free gas and the Commission did not."[2]

Finally, I fail to see how overcharging its customers could be construed as an action detrimental to Hobbs Gas other than the fact that when it was found out, Hobbs Gas had to refund money. There was no change by Hobbs Gas in reliance on the Commission's previous failures to recognize the effect of the purchase/sales ratio used; there was merely a continuation of the same behavior. Regardless of whether

1. There was evidence that in 1981 Hobbs Gas had line losses of 4.2% of its gas, and that it used that figure in subsequent year calculations. There was no evidence that this figure was no longer accurate for line losses. The hearing examiner properly justified its use because there was no better figure available. Hobbs Gas reasonably could have been charged with knowledge of the amount of total (metered and unmetered) deliveries through use of the established line loss figure of 4.2%, i.e., sales $\times$ 1.042.

2. As the majority opinion acknowledges, one purpose of the adjustment clause is for ratepayers automatically to receive the benefit of reductions in fuel costs. Regardless of the failure of Hobbs Gas to use the proper formula for calculating the purchase/sales ratio, it violated Rule 640 by not giving its ratepayers an adjustment for the free gas.

Hobbs Gas was "profiteering" from its use of the adjustment clause, I can see no detrimental reliance that would prevent the order of a refund of charges collected contrary to Rule 640. I find it purely speculative that, as argued in the majority opinion, "Had the Commission given notice to Hobbs that the proper method of calculating the purchase/sale ratio was to use gas delivered in the numerator of the ratio, instead of the amount purchased, Hobbs could have filed a rate case to adjust its projected income accordingly."

While Hobbs Gas may "maintain" that the refund would require it "to seek the protection of bankruptcy laws, and would further render it unable to meet its debts ... or attract financing," I find in the record no irrefuted evidence establishing the truth of those dire predictions. I would leave it to the Commission to decide the degree of the burden which a retroactive order imposes on Hobbs Gas. In essence, Hobbs Gas has admitted it could pay the refund over a six-year period; and the Commission believes the utility can borrow the necessary funds now and pay the loan back over a six-year period or longer. The question for the Court should be whether this was a factual question supported below by substantial evidence.

Although I agree with the recitation of the law in the majority opinion, I would dissent from the application of that law to the facts of this case and defer to the decision of the Commission, which I find to be supported by substantial evidence.

858 P.2d 63

In the Matter of Mary F. SHEPARD, An attorney admitted to practice before the courts of the state of New Mexico.

No. 21154.

Supreme Court of New Mexico.

Aug. 2, 1993.

Sally E. Scott, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Mary F. Shepard, Albuquerque.

OPINION

PER CURIAM.

This matter came before the Court for consideration of the Disciplinary Board's recommendation involving seven counts of neglect and failure to communicate. It was recommended that Mary F. Shepard be suspended indefinitely, with conditions precedent to consideration of any application for reinstatement. The Court has determined that the recommended discipline is appropriate.

In each of the seven counts, the complainant paid Shepard a fee to perform legal services, but she failed to complete the agreed upon services. She failed to

respond to her clients' repeated attempts to find out the status of their legal matters. Shepard also failed to refund the unearned portions of the fees she had been paid. After the complaints were filed, Shepard failed to submit a response to disciplinary counsel.

A specification of charges was filed on January 5, 1993, and mailed to Shepard by certified mail at her address of record. The signed return receipt showed the certified mailing was received on January 11, 1993. Shepard did not file an answer to the specification of charges and, pursuant to SCRA 1986, 17–310(C), the allegations contained therein were deemed admitted. The hearing committee convened on February 22, 1993, to receive evidence in mitigation and aggravation and determine its recommendation to the Disciplinary Board for the imposition of discipline. Notice of the hearing was sent to Shepard at her address of record, but she did not appear.

The hearing committee issued its findings of fact, conclusions of law, and recommendations on March 9, 1993. The committee found that Shepard had violated the following provisions of the Rules of Professional Conduct, SCRA 1986, 16–101 through 16–805 (Repl.Pamp.1991 & Cum. Supp.1992): Rule 16–101 by failing to provide competent representation; Rule 16–103 by failing to act with reasonable diligence and promptness in representing her clients; Rule 16–104(A) by failing to keep her clients reasonably informed about the status of their legal matters and by failing to promptly comply with clients' reasonable requests for information; Rule 16–116(D) by failing to protect her clients' interests at the conclusion of representation and by refusing to refund the unearned portion of the fees paid; Rule 16–803(D) by failing to cooperate with disciplinary counsel in the discharge of her functions and duties; Rule 16–804(D) by engaging in conduct prejudicial to the administration of justice; and Rule 16–804(H) by engaging in conduct that adversely reflected on her fitness to practice law.

The committee recommended that Shepard be indefinitely suspended from the practice of law, with certain conditions precedent to consideration of any application for reinstatement. Included was the condition that Shepard make restitution to four of the seven clients whose complaints formed the basis for the disciplinary charges. Shepard was personally served with a copy of the hearing committee's findings, conclusions, and recommendations on March 16, 1993.

Pursuant to SCRA 1986, 17–314(A), Shepard had seven days after receiving written notice of the committee's recommendations within which to request oral argument or permission to submit briefs to the Disciplinary Board panel appointed to hear the matter. Shepard did not request oral argument or permission to submit briefs nor did she respond in any fashion to the committee's recommendations. The Board issued its decision on March 29, 1993, adopting the findings and conclusions of the hearing committee. The Board concurred in the sanctions recommended by the hearing committee except that the Board recommended that Shepard also be ordered to make restitution to any other clients from whom she had taken money and failed to provide the services for which payment was received.

The matter of the appropriate discipline to be imposed came before this Court on May 12, 1993. Shepard was given notice of the hearing at a verified home address, after it was learned that her address of record, a post office box, was no longer valid. Also before the Court on that date was the motion of chief disciplinary counsel, filed pursuant to SCRA 1986, 17–213, for appointment of an attorney to inventory Shepard's client files, take all necessary actions to protect the interests of Shepard's clients, and return the files to her clients. This motion was served on Shepard at her home address. Shepard failed to appear at the hearing before this Court.

The evidence admitted by the hearing committee showed that, in addition to the seven complaints that formed the basis for the formal charges, a number of other complaints subsequently had been received. These complaints also alleged that Shepard

had taken money from clients and failed to perform the agreed legal services and that she had failed to respond to the clients' requests for information. Several of these clients also alleged that they needed their files to proceed with their legal matters with new counsel. Just as in the case of the original seven complaints, Shepard then obstructed the disciplinary process by completely failing to respond to the complaints. Thus, the evidence clearly showed not only a pattern of misconduct, but an apparent indifference on Shepard's part "to making restitution or otherwise correcting the chaos created by [her] neglect [.]" *In re Carrasco,* 106 N.M. 294, 296, 742 P.2d 506, 508 (1987). For this, there is no alternative other than indefinite suspension. *Id.*

Indefinite suspension, with conditions for reinstatement, as provided in SCRA 1986, 17–214(B)(2), is an appropriate discipline, which adequately will protect the public. When indefinite suspension is imposed pursuant to SCRA 1986, 17–214(B)(2), the attorney is not automatically reinstated. Shepard must satisfy all imposed conditions before any consideration of an application for reinstatement. The conditions recommended by the hearing committee and Disciplinary Board, which this Court hereby adopts, include that Shepard must demonstrate by clear and convincing evidence that she is fit to resume the practice of law and that the resumption of the practice of law will not be detrimental to the public interest. Considering the gravity of her breach of the trust given her by this Court and the public, demonstrating that she is fit to resume the practice of law and is no longer a threat to the public will be a heavy burden indeed. *See In re Stafford,* 106 N.M. 298, 299, 742 P.2d 510, 511 (1987).

The Court also finds it appropriate to appoint an attorney to inventory Shepard's files and take the other actions contemplated by SCRA 1986, 17–213. An attorney's abandonment of her clients not only causes direct harm to her clients and undermines public confidence in the legal profession but also hampers some clients in pursuing their legal rights by denying them access to their own documents and files. When this occurs, it is the obligation of this Court to appoint another licensed New Mexico attorney to inventory the miscreant's files, take such actions as are necessary to protect the interests of the clients, and return the files to the clients. In this case, Ms. Loretta Libby Atkins is appointed to discharge these responsibilities. In addition, Ms. Atkins is directed to perform an accounting for each of Shepard's clients who claims to have paid an unearned fee and to report the results to this Court. One of the conditions Shepard must satisfy before any consideration of an application for reinstatement will be to prove that she has refunded to her clients all unearned fees determined by Atkins and reported by Atkins to this Court.

IT IS THEREFORE ORDERED that, effective the 12th day of May, 1993, Mary F. Shepard be and she hereby is indefinitely suspended from the practice of law in the State of New Mexico, pursuant to the provisions of SCRA 1986, 17–206(A)(3).

IT IS FURTHER ORDERED that the following conditions shall be satisfied before any consideration of an application for reinstatement:

1. Mary F. Shepard shall make restitution as follows:

Lon M. Bloch	$500.00
Molly Strosnider	490.00
Flora Esquivel	450.00
Diane Lue and Robert Lue	475.00

2. Mary F. Shepard shall make restitution to any other clients from whom she has taken money and failed to provide the services for which payment was received.

3. Mary F. Shepard shall comply with the requirements set forth in SCRA 1986, 17–212, of the Rules Governing Discipline.

4. Mary F. Shepard shall pay the costs of this proceeding in the amount of $115.28 on or before December 31, 1993, with interest accruing on any

balance unpaid as of that date, at the rate of fifteen (15) percent per annum.

IT IS FURTHER ORDERED that, prior to reinstatement, Mary F. Shepard shall demonstrate by clear and convincing evidence that she has the moral qualifications, is fit to resume the practice of law, and that the resumption of her practice will not be detrimental to the integrity and standing of the bar, the administration of justice, and the public interest.

IT IS SO ORDERED.

858 P.2d 66

CONTINENTAL POTASH, INC., et al., Plaintiffs–Appellees and Cross–Appellants,

v.

FREEPORT–McMORAN, INC., et al., Defendants–Appellants and Cross–Appellees.

No. 19054.

Supreme Court of New Mexico.

Aug. 10, 1993.

Montgomery & Andrews, John B. Pound, Santa Fe, for appellants and cross-appellees.

Roth, VanAmberg, Gross, Rogers & Ortiz, Michael P. Gross, Raymond Z. Ortiz, Santa Fe, for appellees and cross-appellants.

OPINION

FROST, Justice.

The motion for rehearing filed in this matter is denied. The decision initially filed in this case is vacated and this opinion is substituted therefore.

Plaintiffs brought this breach of contract and fraud lawsuit in 1982 to recover lost royalty payments, and the jury found for the plaintiffs. Defendants asserted that the plaintiffs' claims were barred by the relevant statutes of limitations and by the doctrines of estoppel and laches. The trial court, however, denied the defendants' motion for summary judgment on these issues.[1] Defendants also moved for a directed verdict at the close of the plaintiffs' case, renewed the motion at the close of all evidence, and moved for judgment notwithstanding the verdict, all of which were denied. In these motions, the defendants primarily claimed that no implied covenants existed, which the jury found the defendants had breached. We conclude that the trial court erred on the statute of limitations issue and in submitting the issue of implied covenants to the jury. Accordingly, we reverse the trial court and vacate the jury's verdict.

1. The court granted defendants' motion for summary judgment on the claim concerning its amortization of assets of the Lea County mine and on a RICO claim.

I. *PROCEDURAL HISTORY*

This case arose from agreements made in 1948, 1949, 1951, 1953, and 1956 between the plaintiffs, Continental Potash Company (Continental) and Kansas City Testing Laboratories, Inc. (KCTL), later known as Cross Laboratories, Inc., and the defendants, Freeport Sulphur Company, predecessor to the named defendants Freeport–McMoran, Inc. and Freeport Minerals Company (Freeport), and National Potash Company (National). The agreements granted Freeport the right to explore commercial potash deposits with an option to acquire mining rights through assignment of certain prospecting permits and leases that the plaintiffs held on lands located in southeastern New Mexico. In the assignment of the leases to Freeport, the plaintiffs reserved an overriding royalty interest[2] in the net profits derived from the mining operation.

In a 1982 lawsuit, the plaintiffs alleged that the mining operation conducted by the defendants during the periods 1956–1968 and 1976–1982 should have resulted in substantial net profits instead of accumulating a $16 million net loss. Thus, the plaintiffs alleged that they suffered loss of royalties due to the defendants' breach of contract and fraud in the operation of the mine.

The issues of breach of contract and fraud were tried to a jury, but the parties stipulated that the district court would be the fact finder on all issues concerning the affirmative defenses. The jury returned a verdict in favor of the plaintiffs for breach of implied covenants and fraud. The district court then denied all of the affirmative defenses as a matter of law, finding that the statutes of limitations were tolled by the doctrine of equitable estoppel. The court based its application of the doctrine of equitable estoppel upon its finding that the defendants had fraudulently concealed from the plaintiffs the facts upon which they could have based their lawsuit within the respective limitations periods. The court further concluded that substantial evidence supported each of the jury's express and implicit findings underlying the fraudulent concealment issue.

II. *ISSUES*

The legal questions presented on appeal are whether the trial court was incorrect (1) to toll the six-year statute of limitations on the contract claims and the four-year statute of limitations on the fraud claim; and (2) to find implied covenants governing the defendants' conduct, which the defendants allege were inconsistent with the express terms of the written agreements. In addition, National challenges the award of compensatory damages ($1,816,690.23) and punitive damages ($3,000,000), and it contends that the court erred by permitting the plaintiffs to recover on the claim of a nonparty, Mary Borders Byrte. National also claims that the trial court should not have submitted the fraud issue to the jury. Because we hold that the district court erred in denying defendants' motion for directed verdict on the statute of limitations issue and in implying and enforcing contractual obligations against the defendants beyond the duties in the written agreements, it is unnecessary to address the other issues raised on appeal and on cross-appeal.

III. *FACTS*

A. *The Parties.*

In the 1940s, Walter M. Cross, the original prospector on the lands, discovered a potash deposit in southeastern New Mexico. Cross and members of his family obtained prospecting permits and leases from the federal and state governments for discovering the ore body. Shortly thereafter,

2. The term "overriding royalty" is used to describe a royalty carved out of a working interest created by an oil, gas, or mining lease. 2 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 418, at 344 (1992). Usually, the reservation of an override involves the transfer of a lease in which the lessee-assignor (in this case the plaintiffs) retains an interest in production in the form of an overriding royalty. The overriding royalty interest is an interest free of the expenses of production. 2 *id.* § 418.1, at 345. It is a nonpossessory interest in land. 2 *id.* § 418.1, at 347.

Cross incorporated Continental for the purpose of developing the ore body and assigned part of his interest in the mineral rights to Continental. Cross also assigned part of his interest in the same mineral rights to KCTL, another closely held corporation.

At about the same time, Freeport was prospecting for potash deposits in the same general area, which led to negotiations between KCTL, Continental, and Freeport about the possibility of Freeport developing both ore bodies. Negotiations resulted in the formation of a contract that was initiated by a letter agreement in 1948 and that was subsequently modified and supplemented in more formal documents in 1949, 1951, 1953, and 1956. In 1948 and 1949, the plaintiffs granted Freeport the right to explore for potash on land in Lea County, New Mexico with the option of receiving assignment of the prospecting permits and mine leases issued by the United States government and the State of New Mexico. In 1951, after initial exploration and completion of the prospecting work, KCTL and Freeport executed another agreement covering two additional mining permits with terms substantially the same as those in the 1949 agreement. Freeport exercised its option for assignment of the permits and leases.

Thus, as of the early 1950s, Freeport was the lessee of the subject mining lands, and the United States and the State of New Mexico were the lessors. KCTL and Continental held overriding royalty interests. KCTL was under the control of Walter Cross until his death in 1954, and Continental had been sold to a group of investors headed by Milton McGreevy.[3] With the consent of the federal and state governments, Freeport assigned its rights as lessee in the potash leases to National in 1955. National was a corporation equally owned by Consolidation Coal Company and Freeport, and it was created for the purpose of developing the Lea County potash deposits.

B. *The Arrangement for Payment of Royalties.*

Freeport had agreed to pay KCTL and Continental a royalty of eight percent of the divisible profits from the production and marketing of the mined potash. Sometime after the McGreevy group purchased Continental, a dispute arose between Continental and KCTL concerning their respective royalty rights. The dispute was resolved in 1956 in an agreement between the plaintiffs and National to pool all royalty interests, thus merging fractional holdings into a unified whole. The 1956 agreement expressly superseded previous royalty provisions and granted the plaintiffs a cumulative net profit royalty. Payment of royalties, however, was conditioned upon realizing a net profit during each fiscal year. Under this arrangement, whenever National was in a net profit posture, all royalty holders would receive payment without regard to whose potash was being mined, milled, and sold.

The net profit royalty provisions also included what the parties called a "net loss carry-forward," which meant that if National began production on the mining lands, it was required to pay a net profit royalty in any given fiscal year only if the net loss that had accumulated prior to that year had been overcome. By reserving a net profit royalty instead of a smaller gross receipts royalty, the plaintiffs were tied to the profitability of the mine rather than to its gross output, a fact that became pivotal when the mining operation later proved to be unprofitable.

C. *Exclusive Control and Discretion by National.*

In addition to the provisions detailed above, the parties agreed that: (1) National could elect to terminate the agreement or to surrender any permit or lease after giving proper notice to the plaintiffs; (2) National could exercise its sole judgment and discretion in determining which extensions of permits or which leases would be applied

3. The district court found Cross to be a well-educated, sophisticated businessman and inventor. McGreevy was a sophisticated and knowledgeable businessman as well. He was an original shareholder of Continental.

for; (3) if National failed to instruct the plaintiffs regarding extensions, release to the plaintiffs of any permit or lease would be automatic; (4) National could exercise exclusive control, discretion, and judgment regarding all of its mining operations, and it could determine the quantity of ore mined and the quantity left unmined; and (5) National could elect to suspend operations "for as long as it may determine whenever in its opinion economic conditions or other causes make it desirable so to do." The relevant federal and state statutes, rules, and regulations were incorporated by reference. National also agreed to furnish the royalty holders with periodic financial statements of the results of its operations to be verified by an independent certified public accounting firm and prepared in accordance with generally accepted accounting principles.

D. *Mining Operations.*

National operated the mine from the time it opened in 1956 until 1968 (first run) when operations were temporarily suspended until 1976. Immediately upon opening the mine, it became apparent that the quality of the Lea County ore was not good enough to render it marketable by itself. To produce a saleable product, National purchased higher grade ore to blend with the lower quality ore.

In 1959 Freeport acquired the right to develop another ore body in Eddy County, New Mexico. The Eddy County mine contained a higher quality ore than the Lea County mine, and National began blending ores from the two mines, which extended the life of both ore deposits. Plaintiffs never owned an interest in the Eddy County mine.

By 1965 most of National's production came from the Eddy County mine. Profits started to decline in 1967, however, and mining operations ceased at the Lea County mine in 1968. Prior to the suspension, National gave the royalty holders notice of discontinuing its mining operations. The plaintiffs never demanded that National surrender or assign the leases to them, and they never claimed that failure to surrender the leases constituted a default under the agreements. With the shutdown of the Lea County mine and production coming solely from the Eddy County mine, the royalty holders did not receive any royalty payments from 1969 to 1973.

When the potash market began to recover in the mid–1970s, National prepared to reopen the Lea County mine. National invested an additional $1.8 million in the Lea County mine and notified the plaintiffs of reopening the mine. The mine had slight production in 1974–75, but not enough to generate a net profit. The mine reopened on a full-scale basis in 1976 and operated until February 1982 (second run). The Eddy County mine was exhausted and closed permanently in 1976. Between 1976 and the closing of the Lea County mine in 1982, National's only potash production came from the Lea County mine. Due to the unprofitable nature of the mining operation, however, the plaintiffs earned no royalties during this period.

Because National had exhausted its Eddy County mine and apparently had no other source of higher grade ore to blend with the ore from the Lea County mine, National decided to "high-grade" the mine during the second run of production. High-grading is a mining term that entails selectively removing the richer grade ore from a mine. The effect is that the remaining mineral deposit is more expensive to retrieve and often impossible to retrieve commercially within a reasonable time period.

E. *The Agreement Between National and Central Farmers.*

In 1980 and 1981, the price of potash on the export market ballooned and was approximately 30% to 50% higher than National realized from its sales on the domestic market. In their lawsuit, the plaintiffs alleged that National failed to market Lea County potash on the export market in breach of its implied duty to exercise reasonable diligence. Had it done so, they argued, National would have eliminated the accumulated loss carry-forward in two years and generated significant net profits and thus substantial royalties. These lost

royalties were valued in excess of $800,000. National could not take advantage of the boom in the market, however, because it was obligated by an outputs contract.

In December 1958, National entered into a sales agreement with Central Farmers Fertilizer Company (Central Farmers), in which Central Farmers agreed to buy the entire output of the Lea County mine up to 500,000 tons per year through 1974. Central Farmers was interested in developing a continuous source of potash for re-sale to farm cooperatives across the country. National was interested in finding a steady customer for its potash, believing that a guaranteed ongoing customer would give it an advantage against fluctuations in the potash market. In addition, such an arrangement ensured that National could honor its sizable debt service.[4] The price agreed upon was "market price" less a discount to reflect the fact that National could forego employment of a sales staff to market the ore. The parties established as a benchmark for determining market price the "Carlsbad list price." [5] Thus, the price National would receive was tied to prices in the local potash market.

National and Central Farmers simultaneously executed a stock purchase and option agreement, giving Central Farmers an option to purchase enough shares in National to bring its ownership interest up to 45%. The deadline for exercising the options was June 30, 1969.

In January 1964, Central Farmers and National amended their 1958 agreement by changing the price discounting formula and extending the term of the agreement to June 30, 1980. Six months later, Central Farmers assigned its right to purchase the National stock back to National, released its option to purchase additional shares, and sold the 500 shares it then owned back to National. In July 1964, National and Central Farmers executed another contract in which Central Farmers was given another option to purchase a 45% undivided interest in the mine itself, exercisable for a period of one year after National permanently ceased mining operations. Central Farmers never exercised the option.

F. *Findings by the Jury and the Trial Court.*

The jury found that the defendants failed to act as a reasonably prudent operator and thereby breached implied covenants by (1) failing to blend Lea County ore with Eddy County ore during the second run from 1976 until shut-down; (2) high-grading the Lea County ore; (3) failing to sell Lea County ore at the highest and best price obtainable; (4) failing to account with fidelity and charging the plaintiffs' royalty account with improper charges; and (5) failing to surrender the leases when National ceased operations in 1968. The jury also found that the defendants committed fraud but that no additional damages for fraud should be awarded. The jury awarded the plaintiffs compensatory and punitive damages totaling $4,816,690.23,[6] with post-judgment interest at the rate of fifteen percent per year from the date of entry.

In support of its finding of fraudulent concealment, the trial court found that the defendants misrepresented or deliberately did not disclose to the plaintiffs: (1) the true marketing scheme in the Central Farmers contract; (2) the true reason for

4. Freeport borrowed $12,500,000 from Metropolitan Life Insurance Company and combined with $7,000,000 of its own money, it developed and equipped the Lea County mine. The loan was paid off in 1974.

5. The Carlsbad list price was the lowest price quoted and published on a given date by one Carlsbad producer and met by another Carlsbad producer. The Carlsbad list price represented the price at which Carlsbad producers were actually selling their potash at the time. By the late 1960s, the Carlsbad list price no longer represented the actual market price of potash, despite continued publication of prices by the Carlsbad producers, because of the influx into the market of foreign potash competitors with lower prices.

6. The amount of the plaintiff's compensatory damages was derived from calculations based upon the value of ore left in the ground after the high-grading process. The court found that "the remaining product tons in the ground had a then-market value of approximately $380,000,000 and a reasonable royalty value to the plaintiffs on that date in excess of $1,816,690.23."

failing to surrender the Lea County leases when the mine was temporarily closed in 1968; (3) the true risks to the plaintiffs in reopening the Lea County mine in 1976 without the benefit of higher grade ore for blending; (4) the true level of overhead allowable to the plaintiffs' royalty account from 1976 to 1982; and (5) the high-grading program.

IV. *DISCUSSION*

A. *Introduction.*

Defendants contend that the trial court erred when it refused to grant their motion for summary judgment based upon the affirmative defenses of the applicable statutes of limitations and the doctrine of laches. The defendants claim that the district court misapplied the doctrine of equitable estoppel to toll the statutes of limitations. The court found that the defendants deliberately failed to disclose material facts to the plaintiffs "on a regular, continuing and complete basis." The court also concluded that the defendants' silence, misrepresentation, omission, and concealment "constituted fraudulent concealment for purposes of the statute of limitations." To the contrary, the record shows that the plaintiffs expressed detailed concern about their contractual rights, the prospects for payment of royalties, the marketing plan under the Central Farmers contract, and accounting procedures as they pertained to their royalty account. In addition, the defendants had no fiduciary relationship with the plaintiffs and thus no duty to disclose information to them, the breach of which might have constituted fraudulent concealment. They could have filed suit within the relevant time periods.

Regarding the breach of implied covenants, the plaintiffs argue that implied covenants are the bedrock of mining law and are designed for the protection and mutual benefit of both parties. The defendants claim that implied covenants may be found only when they embody the intention of the parties and are necessary to give effect to that intention. In any event, the defendants claim that implied covenants may not exist when express contractual provisions address the same subject matter. We hold that the trial court erred as a matter of law when it enforced implied covenants against the defendants on the issues not barred by the statutes of limitations.

B. *Standard of Review.*

We review the district court's application of equitable estoppel under an abuse of discretion standard. *See Padilla v. Lawrence,* 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct.App.), *cert. denied,* 101 N.M. 419, 683 P.2d 1341 (1984) (decision whether equitable relief should be granted is within the sound discretion of trial court and will not be reversed on appeal unless clear abuse is shown). "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Newsome v. Farer,* 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). Such discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law. *Sunwest Bank of Albuquerque v. Roderiguez,* 108 N.M. 211, 213, 770 P.2d 533, 535 (1989).

We review the district court's finding of implied covenants according to whether it correctly applied the law to the facts in the case. *Farmers, Inc. v. Dal Machine & Fabricating, Inc.,* 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990). In addition, we view the district court's findings of fact most favorably for the appellee, indulging all reasonable inferences in its favor, but the conclusions of law must be based upon and supported by the findings of fact. *Id.*

C. *Tolling the Statutes of Limitations—Equitable Estoppel.*

Estoppel precludes one party from asserting a right when another party has relied to his detriment upon the acts or conduct of the first party and when asserting that right would prejudice the other who has acted thereon in reliance. *Garcia v. Garcia (In re Estates of Salas),* 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct.App. 1987). As we stated in *Capo v. Century*

Life Insurance Co., 94 N.M. 373, 610 P.2d 1202 (1980):

> The essential elements of equitable estoppel as related to the party estopped ... are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention that such conduct shall be acted upon by the other party ...; and (3) knowledge, actual or constructive, of the real facts.... As related to [the party claiming] estoppel, the essentials are: (1) lack of knowledge and of means of knowledge of the truth as to the facts in question ...; (2) reliance upon the conduct of the party estopped ...; and (3) action based thereon of such character as to change its position prejudicially.

Id. at 377, 610 P.2d at 1206; *Stuckey's Stores, Inc. v. O'Cheskey,* 93 N.M. 312, 324, 600 P.2d 258, 270 (1979), *appeal dismissed,* 446 U.S. 930, 100 S.Ct. 2145, 64 L.Ed.2d 783 (1980).

We find particularly significant here the requirements of lack of knowledge and the lack of means by which knowledge might be obtained by the party asserting estoppel. *See Garcia,* 105 N.M. at 475, 734 P.2d at 253. In addition, the party asserting estoppel must show that he relied upon conduct, and such reliance must have been reasonable. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria,* 110 N.M. 291, 297–98, 795 P.2d 502, 508–09 (1990). Equitable estoppel will be applied when the party estopped intends or expects that the innocent party will act on those representations. *Green v. New Mexico Human Servs. Dep't, Income Support Div.,* 107 N.M. 628, 629–30, 762 P.2d 915, 916–17 (Ct.App.1988). So, a party may not claim estoppel unless there is reasonable reliance upon the acts or conduct of another, and he is induced to take or forgoes from taking a position to his prejudice or detriment. *Capo,* 94 N.M. at 377, 610 P.2d at 1206.

The existence of grounds justifying a claim of equitable estoppel is a question of fact, and the party alleging and relying on such claim has the burden of establishing all facts necessary to prove it. *Garcia,* 105 N.M. at 475, 734 P.2d at 253. In the case of fraudulent concealment, the facts that a party must show are: (1) the use of fraudulent means by the party who raises the bar of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of reasonable diligence could not have known that he might have a cause of action. *See Keithley v. St. Joseph's Hosp.,* 102 N.M. 565, 570, 698 P.2d 435, 440 (Ct.App.1984), *cert. quashed,* 102 N.M. 565, 698 P.2d 435 (1985).

The party must plead the circumstances giving rise to estoppel with particularity. *Hardin v. Farris,* 87 N.M. 143, 146, 530 P.2d 407, 410 (Ct.App.1974). Bald allegations of concealment are not sufficient to make out a case of fraudulent concealment. *See* SCRA 1986, 1–009(B) (Repl.Pamp.1992). So, the party asserting estoppel must sustain the burden of showing not only that he failed to discover the cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. *See Capo,* 94 N.M. at 377, 610 P.2d at 1206; *Keithley,* 102 N.M. at 570, 698 P.2d at 440.

D. *The Breach of Contract Claim.*

After thorough and careful review of the record, proceedings, and exhibits, we are compelled to hold that the district court abused its discretion in applying the doctrine of equitable estoppel to toll the six-year statute of limitations on the breach of contract claim. The grounds upon which the plaintiffs based their claims were apparent to them many years prior to filing the 1982 complaint, and they could have commenced the action within the statutory

period.[7] The contents of the correspondence generated between the defendants and the plaintiffs throughout the relevant time period reveal the circumstances and details surrounding each fact identified by the trial court as a material fact allegedly concealed from the plaintiffs.

The plaintiffs' allegations pertaining to fraudulent concealment on the breach of contract and fraud claims overlap to some extent. For the most part, however, the plaintiffs point to circumstances surrounding the Central Farmers agreement and the defendants' failure to surrender the leases in 1968 as supporting the trial court's application of equitable estoppel to toll the statute of limitations on the breach of contract claim. Regarding the allegation of fraud, the plaintiffs claim that the defendants' misrepresentations about the prospects for future profits, especially at the beginning of the second run, support the trial court's application of equitable estoppel to toll the statute of limitations on the fraud claim.

1. *The Central Farmers Agreement.*

Plaintiffs theorize that the sales agreement between National and Central Farmers was unreasonably beneficial to Central Farmers and unduly burdensome to National. They contend that the favorable terms for Central Farmers were the result of a less than arms-length relation between the two corporations. The argument is that if National had sold its product on the open market during the period in which it was obligated by the Central Farmers contracts, it would have shown a profit and would have been able to pay royalties to the plaintiffs. The plaintiffs were aware of these facts, however, many years before 1976, which was the inception of the six-year period on the contract claim provided by the statute of limitations.

The record indicates that National made no effort to conceal from the plaintiffs its 1958 contract with Central Farmers. In fact, two weeks after the sales agreement was executed, Continental learned about it. McGreevy expressed his opinion that the sales agreement was not in the normal course of business and might adversely affect National's profits, which in turn could prejudice the royalty holders' interests. The royalty holders complained about the royalty arrangement and sought to amend the contract. In the same month, Wells, an agent of National, answered McGreevy and refused to amend the agreement, stating that the "royalty holders are in the position of sharing not only the profits from mining but also the risk ... [and that] mining on these leases has resulted in very substantial losses to this company since February 1957, when ore was first mined on them ... [which] have been a direct result of the vastly inferior quality of the ore found on these leases compared to other ore presently being mined on a commercial basis in the Carlsbad area."

In a letter dated April 4, 1960, McGreevy complained to his lawyer about the Central Farmers contract:

> In addition it seems to me it is a major item in this situation that [Freeport] sold half their stock in National Potash to a cooperative which means their profits will not be handled on a normal corporation basis and since our royalties are related to the profit, they may have by that action prejudiced our future position.
>
> * * * * * *
>
> *I am wondering if we could go into court* and reconstrue [sic] the whole situation in such a way as to protect our equitable position in that we might be entitled to a fair royalty on a basis of tonnage mined. If we don't do something like that, I am very doubtful as to whether our stockholders will have any kind of a proper recovery for their investment and for their position in this matter. [Emphasis added.]

In November 1960, McGreevy again complained to Wells specifically about the contract with Central Farmers. McGreevy wrote another letter to Wells in January

7. Generally, actions based on written contracts must be brought within six years of an alleged breach. *See* NMSA 1978, § 37-1-3(A) (Repl.Pamp.1990).

1962 complaining about the same thing. In the January 1962 letter, the plaintiffs again expressed detailed concerns about the Central Farmers arrangement, the discretion to operate the mine that was granted to the defendants under the agreements, and the alleged accounting inequities. The letter states in part:

> [W]e made some legal investigation ... and we have not gone to great expense to employ accountants to exhaustively study this situation or attorneys to explore it fully, but we did develop some rather strong and persuasive decisions of law ... that the operator must conduct his operations in such a way as to be fully fair and equitable to the royalty owner....
>
> * * * * * *
>
> We think that your operations have been without proper regard to our position ... and that we have enforceable rights to correct this situation.... [W]e feel very strongly that under the fiduciary relationship that exists between National Potash and [the royalty interest holders], the former has not only failed to protect the interests of the latter but has subordinated them to what has most suited your company with resultant prejudice to the [royalty interest holders]. This certainly could never have been the purpose of our agreement.

Wells answered in March 1962 and vigorously defended National, advising McGreevy in no uncertain terms that National was not going to renegotiate the contracts or pay a "settlement" to the royalty holders.

By letter of March 1962, the defendants responded in detail to each ground that the plaintiffs addressed, in particular the history of the Lea County mine, the lack of profits, and the reasons for the long-term contract with Central Farmers. Moreover, in a 1963 letter to the plaintiffs, their attorney "summarize[d] the exchange of correspondence and arguments with National Potash Company" and suggested a response. In 1963, one of the royalty interest holders, in summarizing his conversation with one of the defendants' agents, stated:

> the question of a law suit has in fact been mentioned from time to time in discussion among the [royalty interest holders], but none of them would be desirous of taking such course of action if it could be avoided.
>
> Even if legal action was taken, the sentiment would not be one of ill will or anger but rather as a result of a feeling of frustration. It would be the same as if having exhausted all possible avenues of reaching a friendly settlement, there was nothing left but to test the validity of the contract through the Courts. In this connection, the [royalty interest holders] might feel that there was nothing to lose by trying this.

Despite all of this, the plaintiffs waited until 1982 to file a lawsuit alleging breach of contract. Clearly, at least by 1962, plaintiffs were aware of the Central Farmers marketing plan and possessed sufficient knowledge upon which to base a breach of contract action against the defendants.

McGreevy's letters quoted above also indicate an awareness of a possible conflict of interest arising from the agreement between National and Central Farmers. McGreevy specifically addressed the conflicts of interest in a subsequent letter to Wells. The plaintiffs were also aware that National was according multiple discounts to Central Farmers over and above the discount specified in the outputs contract. In addition, the plaintiffs complained that the price structure in the Central Farmers agreement decreased and that they had no way, absent disclosure from National, to discover the true price at which National sold potash to Central Farmers. The plaintiffs stated that no one outside the potash industry could learn the price of potash. Yet, McGreevy sat on the board of directors of a company that was also in the potash market. Thus, if the plaintiffs were not aware of material facts, McGreevy and the others could have discovered the material facts through exercise of due diligence.

2. *The Failure to Surrender the Leases.*

Any breach of contract or implied covenant for failure to surrender the leases occurred in 1968 at the end of the first run. National contemporaneously notified the plaintiffs of the shut-down, but they failed to demand surrender of the leases. Being aware of the shut-down, the plaintiffs had the option of immediately demanding surrender or filing suit based upon this factor within six years after the 1968 shut-down.

The plaintiffs claim that the true facts surrounding the nonsurrender were not communicated to them, but in fact, they were informed of the mounting losses after 1968. The gravamen of the plaintiffs' lawsuit was to recover royalties that should have resulted from a profitable mining operation. Yet the plaintiffs were aware of the escalating debt from the financial reports from 1968 to 1976, and still they waited until 1982 to file their lawsuit premised upon lost profits due to the nonsurrender of the leases in 1968. This is a classic example of "sitting on one's rights."

3. *The Absence of Fraudulent Concealment.*

As stated above, the plaintiffs were aware of certain material facts upon which to base their breach of contract claim in the early 1960s. Their argument that the defendants misrepresented those facts to them, therefore, fails to support the application of equitable estoppel. In addition to claiming that the defendants affirmatively misrepresented facts to them, the plaintiffs claim that the defendants failed to disclose certain other material facts, which also constituted fraudulent concealment.

To invoke the doctrine of equitable estoppel by silence, the party must first establish that there was a duty to speak, and he must show that the silent party knew that he was relying upon that silence. *Capo,* 94 N.M. at 377, 610 P.2d at 1206. If there is a confidential or fiduciary relationship between the parties, the failure to disclose material facts or the suppression of material facts when required to disclose them, which induces detrimental reliance, may constitute fraudulent concealment giving rise to equitable estoppel. *Keithley,* 102 N.M. at 570, 698 P.2d at 440. Absent a fiduciary duty to speak on the part of the defendants, however, silence, nondisclosure, or denials of alleged fraudulent conduct are insufficient to constitute fraudulent concealment so as to toll a statute of limitations. *Capo,* 94 N.M. at 377, 610 P.2d at 1206.

The plaintiffs confuse the issue here by claiming that an implied covenant of good faith, which the trial court found existed, imposed a duty upon National to disclose material information. National's systematic failure to disclose material information in breach of its implied covenant of good faith, the plaintiffs argue, constitutes fraudulent concealment, thereby tolling the statutes of limitations. The issue of implied covenants in this case, however, goes to whether a breach of contract existed, not to whether National had a duty to disclose material information, the breach of which might have constituted fraudulent concealment. Unlike fiduciary duties, covenants of good faith do not require an exclusive operator to subordinate its interest to that of the royalty holders. *Murdock v. Pure-Lively Energy 1981-A, Ltd.,* 108 N.M. 575, 579, 775 P.2d 1292, 1296 (1989). Even though the defendants owed contractual duties to the plaintiffs and also owed them a duty of good faith and fair dealing, a fiduciary relationship did not automatically arise from these circumstances in which the defendants were essentially handling their own property. *See Garfield v. True Oil Co.,* 667 F.2d 942, 945 (10th Cir.1982). Given the type of agreement at issue here and the legal relationship between the parties, albeit heavily tilted in favor of National, no fiduciary duty existed, and the trial court so found. Without a fiduciary duty, no duty to disclose or speak existed. Thus, silence or failure to disclose certain information to the plaintiffs here could not operate to toll the statutes of limitations.

Notwithstanding our holding that no duty to disclose existed, the record does not demonstrate that throughout the relationship between the parties from 1948 to 1982,

the defendants intentionally and deliberately concealed facts with the hope that the plaintiffs would forego bringing legal action. As has been demonstrated, the plaintiffs contemplated legal action in the 1960s predicated upon the Central Farmers agreement, and any issues presented in their 1982 lawsuit based upon nonsurrender were apparent to them in 1968 when National shut the Lea County mine down, but in any event before 1976. Defendants' conduct and representations, therefore, cannot be characterized as concealing facts material to a determination by the plaintiffs about whether to file suit. The trial court, therefore, erred in applying the doctrine of equitable estoppel in light of the terms of the contract, the duties and obligations attendant thereto, and the knowledge demonstrated by the plaintiffs in the 1960s.

E. *The Fraud Claim.*

The defendants assert that the plaintiffs failed to allege fraud at trial and that their only claim below was for breach of implied covenants. The defendants claim that the trial court confused the issue when it submitted the issue of substantive fraud to the jury when the only issue before the court was whether the defendants were guilty of fraudulent concealment to support the application of equitable estoppel to toll the statute of limitations on the contract claims. Distinguishing fraud from fraudulent concealment, the defendants claim that fraud should not have been an issue in the case at all. The jury found that the defendants committed fraud, however, and the trial court sustained its finding. Accordingly, we will review that decision.

The plaintiffs allege that the defendants committed fraud in operating the Lea County mine and base that claim primarily upon the defendants' representations of the prospects for royalties during the second run of production. As discussed above, however, the plaintiffs demonstrated sufficient knowledge of these issues more than four years before the complaint was filed in 1982.[8] Consequently, they were time-barred from pursuing a fraud claim on these grounds as well.

1. *Representations about Future Profits.*

The record contains additional statements by Wells, in a November 1956 letter, that can be properly characterized as expressions of opinion and speculation about the mining operation and its relationship to royalties for the plaintiffs. On November 15, 1960, McGreevy expressed in a letter his concerns about the accounting techniques, the relationship between National and Central Farmers, and the lack of profits in 1960. This letter demonstrates an awareness of additional grounds upon which the plaintiffs based their fraud claim.

Again in 1963, at a royalty holders' meeting, it was acknowledged that another deficit from the Lea County mine was possible, but that "no immediate action should be taken on a lawsuit at this time" presumably based upon the plaintiffs' hope that royalties would begin to flow in 1964. Another of the defendants' letters, dated February 1966, candidly expressed the facts that production at the Lea County mine was low, that "[f]urther expansion does not seem likely," and that the level of mineralization from the Lea County mine was "unusually low." A discussion of accounting procedures relating to the Lea County mine was also included in the letter to McGreevy. In 1967, the plaintiffs were aware that it "was doubtful that there would be any profit to [the royalty interest holders] for the next two years and perhaps even a slight loss." In that letter, the issue of the defendants' discretion to operate the mine was raised again. After approximately $78,000 was paid in royalties during the mid-1960s, National went into a net loss position that steadily grew during the late 1960s and early 1970s. Most significantly, the plaintiffs had knowledge of the accumulating losses from the annual

8. Fraud actions must be brought within four years of the event, NMSA 1978, Section 37-1-4 (Repl.Pamp.1990), or from the time the fraud is discovered, Section 37-1-7.

financial statements that they received from National.

The plaintiffs were notified that the July 1968 shutdown of the Lea County mine was "a result of market condition." In 1968, when National closed the mine, the plaintiffs obviously were aware of the impossibility of realizing a profit from a closed mine. In January 1973, Rothwell, an official of National, wrote McGreevy predicting bad times for the American potash industry due to intense price competition from Canada, and reminded him that National may never reopen the mine. Rothwell's letter of January 29, 1973, tells McGreevy that the Canadian potash producers were expected to bring down the price of potash to a point where National would not be able to compete. Rothwell said nothing that any reasonable person could read as guaranteeing future net profits, thus lulling the plaintiffs into repose. He certainly said nothing that would give a reasonable person the impression that any future net profit would be large enough or consistent enough to wipe out the then existing accumulated loss. In an August 1974 letter to McGreevy, Wells worded his comments on reopening the mine in conditional terms and stated that the mine might not reopen. The letter cannot be read as giving a guarantee of sustained, significant profit. Rather, it was more akin to an opinion than to fact, which the plaintiffs confirm by continually referring to the alleged actionable statements by the defendants as "puffing." Fraud cannot be predicated upon the expression of an opinion. *See Agnew v. Landers,* 59 N.M. 54, 66, 278 P.2d 970, 977 (1954).

2. *The plaintiffs' fraud claim was time-barred.*

Any allegation of fraud should have been filed in the late 1960s or early 1970s when the correspondence between the parties demonstrates the plaintiffs' awareness of facts upon which they eventually based their fraud claim, specifically the absence of profits. The 1956 agreement contained no guarantee of a net profit, but it did openly contemplate the possibility of net losses and the accumulation of a growing net loss. It specifically addressed a net loss carry-over arrangement, which clearly meant that no royalty would be paid until the entire accumulation was eliminated, and the plaintiffs indicated that they understood this arrangement. By 1976, with the mine open again and functioning on a full-scale basis, the net loss had grown substantially. The plaintiffs were aware or should have been aware of this from the financial records they received from National from 1975 to 1977. Any cause of action for fraud based upon the facts articulated by the plaintiffs, therefore, clearly arose before 1978, more than four years prior to filing the complaint.

F. *The Breach of Implied Covenants—Blending and High-Grading.*

Our conclusion that the statutes of limitations barred the plaintiffs' contract and fraud claims cannot logically reach two issues: the failure to blend and high-grading during the second run of production. Because the second run did not begin until 1976, the plaintiffs' contractual claims concerning blending and high-grading necessarily fall within the six-year limitations period. In addition, the plaintiffs claim that they did not discover that National had performed high-grading until after they filed their complaint in 1982.

The jury found and the trial court held that the defendants failed to act as a reasonably prudent operator when they failed to blend ore during the second run of production beginning in 1976. The court also held that the defendants acted in bad faith and failed to act as a reasonably prudent operator when they began high-grading ore in 1978. On appeal, the plaintiffs claim that the trial court correctly implied a duty of reasonable diligence and care upon the defendants, which the defendants breached when they failed to blend and failed to refrain from high-grading. The defendants claim that the express agreements between the parties supersede and foreclose the existence of any implied covenants.

1. *Construction of Contracts.*

In interpreting mining agreements, courts generally have applied the rules for interpreting contracts and leases. 4 *American Law of Mining* § 130.04, at 130–9 (2d ed. 1992). That is, courts will give effect to the intent of the parties, and when the terms of the agreement are clear and unambiguous, courts try to ascertain the intent of the parties from the ordinary meaning of the language in the agreement. *Id.* This has long been the rule in New Mexico: "The primary objective in construing a contract is to ascertain the intention of the parties." *Mobile Investors v. Spratte,* 93 N.M. 752, 753, 605 P.2d 1151, 1152 (1980). "The purpose, meaning and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive. The court's duty is confined to interpretation of the contract which the parties made for themselves and may not alter or make a new agreement for the parties." *Davies v. Boyd,* 73 N.M. 85, 87–88, 385 P.2d 950, 951 (1963).

We are impressed with a Texas court's analysis of whether an implied covenant exists in the context of mining law, and we adopt it. The Texas Court of Civil Appeals has stated:

> In the outset it should be noted that when parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole. An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole.

Kingsley v. Western Natural Gas Co., 393 S.W.2d 345, 350–51 (Tex.Civ.App.1965) (quoting *Danciger Oil & Refining Co. of Tex. v. Powell,* 137 Tex. 484, 154 S.W.2d 632 (1941)).

2. *Implied Covenants.*

Thus, implied covenants are not favored in law, especially when a written agreement between the parties is apparently complete. *Stern v. Dunlap Co.,* 228 F.2d 939, 942 (10th Cir.1955). The general rule is that an implied covenant cannot coexist with express covenants that specifically cover the same subject matter. *Kingsley,* 393 S.W.2d at 350.

When it is clear, however, from the relevant parts of the contract taken together and considered with the facts and circumstances surrounding the execution of the agreement, that the obligation in question was within the contemplation of the parties or was necessary to effect their intention, then such obligation may be implied and enforced. *Stern,* 228 F.2d at 942–43. But when the contract between the parties speaks to the obligation sought to be implied, courts will not write that implied obligation into the contract. *Kerr–McGee Corp. v. Bokum Corp.,* 453 F.2d 1067, 1073 (10th Cir.1972). Stated conversely, there may be "an implied covenant on the part of the lessee (*in the absence of any expressed on the subject as in this lease*)...." *State ex rel. Shell Petroleum Corp. v. Worden,* 44 N.M. 400, 404, 103 P.2d 124, 126 (1940) (emphasis added).

3. *The provision granting defendants exclusive control.*

We believe that the express provisions in the contract according the defen-

dants exclusive discretion and control in the mining operations left no room for the implied covenants that the trial court enforced against the defendants. The situation here is very similar to that discussed in an often-cited treatise.

> Instead of imposing duties upon the operator for the benefit of the owner of a nonoperating interest, the instrument creating the interest may contain a clause relieving the operator from certain obligations which might otherwise be alleged to exist. Such clauses take a variety of forms; typical is the following:
>
> > "Development of, and operations on the premises, if any, and the extent and character thereof, as well as the preservation or forfeiture of the leasehold, shall be solely at the will of said (assignee) or its successors or assigns...."

2 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 429, at 489–90 (1992). Here, the contract specified that "the nature and extent of all work done by Freeport on the Mining Lands and the time and manner of doing the same shall rest in the sole judgment and discretion of Freeport." The contract also stated that "the nature and extent of all exploration, development and mining operations and the time and manner of performing the same shall be as Freeport in its sole judgment and discretion shall determine and Freeport shall have the right at all times to determine the quantity of ore to be mined and what ore is to be left unmined...." In addition, the contract provided that National "may at any time and from time to time suspend mining operations or other operations for as long as it may determine whenever in its opinion economic conditions or other causes make it desirable so to do."

These express provisions supersede any implied obligation regarding operation of the mine and preclude the implication of any implied covenants advocated by the plaintiffs and enforced by the trial court. The implied covenants were not necessary to give effect to the intentions of the parties as reflected in the language of the contract. On the contrary, the implied covenants were inconsistent with the intentions of the parties as expressed in the written agreements. Given the specific language in the written agreements between the parties, it was error for the trial court to imply obligations that were inconsistent with the unambiguous language expressing the intention of the parties to extend the defendants absolute control over mining operations.

4. *The Lessor–Lessee Cases.*

Were it not for the express contractual provisions governing the relationship between the plaintiffs and the defendants and superseding any implied covenants, the plaintiffs' argument would still fail. Much of the precedent that the plaintiffs cite in support of the implied covenants pertains to the relationship and the concomitant duties between a lessor and a lessee, not between the holder of an overriding royalty interest and a working interest (lessee), which was the relationship between the parties here. The trial court found that there was "no lessor-lessee relationship at any time" between the parties. Again, we find guidance from Williams & Meyers:

> The owner of an overriding royalty is not entitled to the benefit of the covenants of the base lease, express or implied, in the absence of an express provision in the instrument creating the overriding royalty. The benefits of such express and implied covenants of the lease touch and concern the lessor's estate and the burdens of such covenants touch and concern the lessee's estate. The assignment, either in whole or in part of the burdened estate, will not permit enforcement of the covenants which burden the assigned estate by a person other than the lessor or claimants through him of a portion or all of the benefitted estate.

2 *id.* § 420, at 356–57. Because the plaintiffs' cases pertain to the legal relationship between a lessor and lessee and not the rights of a lessee and a holder of an overriding royalty, the plaintiffs' cases are not persuasive.

There are occasions, however, when courts will imply covenants to protect the interests of an owner of an overriding royalty that is carved out of a working interest such as the case here. 2 *id.* § 420.1, at 356.1. The only instance in which courts seem to be in universal agreement is in implying a covenant against drainage in an oil and gas lease. *See, e.g., Cook v. El Paso Natural Gas Co.,* 560 F.2d 978 (10th Cir.1977).

The plaintiffs rely heavily upon *Cook,* but we find the analogy from the covenant against drainage in an oil and gas lease to the mineral lease here untenable. The plaintiffs cite *Cook* for two propositions: that a lessee-operator has an implied duty to act in compliance with the reasonably prudent operator standard for the benefit of the nonoperator royalty holder; and that an express covenant does not necessarily negate the existence of an implied covenant. In *Cook,* however, the Tenth Circuit Court of Appeals held that an implied covenant obligating the lessee to act as a reasonably prudent operator did not apply. *Id.* at 984. Rather, the court held that an implied covenant existed obligating the operator to refrain from depleting gas on the owner's property by drainage from the operator's adjacent leasehold. Courts generally will uphold an implied covenant to protect against drainage because drainage is tantamount to conversion. *See id.* at 983. In addition, the *Cook* court did not go so far as to state categorically that an express covenant is always subject to implied obligations; rather, the court simply construed the express provision at issue in that case as ambiguous and found that it did not supersede an implied covenant against drainage. *Id.* at 986.

The plaintiffs also rely upon *Darr v. Eldridge,* 66 N.M. 260, 346 P.2d 1041 (1959), as upholding the trial court's finding of an implied covenant to exercise reasonable diligence. In *Darr,* this Court stated that "courts have developed the implied covenant 'to make diligent efforts to market the production in order that the lessor may realize on his royalty interest.' " *Id.* at 263, 346 P.2d at 1044 (citing *Libby v. De Baca,* 51 N.M. 95, 99, 179 P.2d 263, 265 (1947)). The plaintiffs' reliance again is misplaced; this is another lessor-lessee case. Nevertheless, the holding in *Darr* might support the plaintiffs' claim on the surrender breach (failing to market potash when National terminated production in 1968), but we have held that the six-year statute of limitations barred plaintiffs' claim on that issue. The plaintiffs were notified of the shut-down in 1968, and they could have brought an action supported by *Darr* and *Libby,* if any, then or six years thereafter, but that claim was time-barred by the time they filed their complaint in 1982.

5. *The Implied Covenant of Good Faith and Fair Dealing.*

In the absence of any covenants implied into the agreement between the parties, the owner of an overriding royalty interest is not without protection. Whether express or not, every contract in New Mexico imposes the duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract. *Watson Truck & Supply Co. v. Males,* 111 N.M. 57, 60, 801 P.2d 639, 642 (1990). The breach of this covenant requires a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party. *Id.* The trial court found that the defendants acted in wanton disregard of the plaintiffs' interests by high-grading the ore in the Lea County mine. We cannot agree with the trial court that the defendants acted in bad faith by high-grading when the contract expressly gave them exclusive discretion in mining operations.

The covenant of good faith and fair dealing does not impose affirmative duties upon one party to protect another; instead, it proscribes action that in this case would have resulted in avoiding royalty payments. *See Tidelands Royalty "B" Corp. v. Gulf Oil Corp.,* 804 F.2d 1344, 1354 (5th Cir.1986). To show bad faith in this case, for example, the plaintiffs would have had to prove that the defendants would not have conducted a high-grading

program in the absence of the overriding royalty interest, that by high-grading the defendants somehow sought to avoid making royalty payments.

Merely asserting that National failed to take action that might have been beneficial to the royalty holders does not show bad faith. Instead, the plaintiffs would have to prove that *but for* the pecuniary advantage of avoiding the royalty payments, the defendants would not have performed high-grading at the Lea County mine. *See id.* Adopting the plaintiffs' position (implying a duty to refrain from high-grading) would be the same as imposing a fiduciary duty upon the defendants, which we already have stated did not exist. The defendants were not obligated to act to their economic detriment for the benefit of the plaintiffs. *See Murdock v. Pure–Lively Energy 1981–A, Ltd.*, 108 N.M. 575, 579, 775 P.2d 1292, 1296 (1989) (covenants of good faith, unlike fiduciary duties, do not require exclusive operator to subordinate its interest to that of royalty holders). In fact, it could be said that high-grading was in furtherance of the royalty holders' interests. The aim of high-grading as the plaintiffs admitted is profits, albeit short-term profits. As long as the defendants were seeking profits, that was beneficial for the royalty holders and in furtherance of their interests. Any resulting inconvenience in the retrieval of the remaining ore might constitute waste, but that would be actionable only by the lessor, not the holders of an overriding royalty interest.

6. *No Implied Covenants Existed.*

It was beyond question that the parties left the mining operation within the sole discretion of the defendants. National could exercise exclusive control, discretion, and judgment regarding all its operations and performance, and it could determine the quantity of ore mined and the quantity left unmined. In addition, National could elect to suspend operations "for as long as it may determine whenever in its opinion economic conditions or other causes make it desirable so to do." Implied covenants generally exist only in a lessor-lessee relationship, and covenants will not be implied when express contractual provisions govern, with the one exception of a covenant against drainage. Thus, the trial court erred as a matter of law in finding and enforcing implied covenants against the defendants that were inconsistent with the provisions of the written agreements. The trial court also erred when it held that the defendants' high-grading constituted bad faith when the contract allowed the defendants to conduct mining operations at their discretion. It would be incongruous to hold that the defendants acted in bad faith in acting in accordance with an express contractual provision.

V. *CONCLUSION*

As we have pored through the record in our consideration of the statute of limitations issue, we have tried to distinguish between what the plaintiffs knew or should have known and what the defendants did. We sympathize with the plaintiffs about the unfortunate events surrounding their agreement with the defendants, but the law requires a proper application of the doctrine of equitable estoppel for purposes of tolling statutes of limitations. Plaintiffs hoped, as did National, that the potash market would be favorable and that the Lea County mine would be highly profitable. While we might speculate now about what the defendants should or should not have done relative to their contractual duties, any breach of those duties was apparent to the plaintiffs long before 1976.

Although the circumstances turned out otherwise, as a matter of law the plaintiffs cannot second-guess business decisions made years ago in an attempt to recover damages unless they could prove that National concealed material facts and circumstances from them. The correspondence between the parties, however, shows a clear understanding on the part of both parties that they were dealing with an unpredictable market. The correspondence also demonstrates that the plaintiffs were aware of the defendants' alleged breaches, but failed to assert their legal rights until it was too late. The record indicates that

the plaintiffs were or should have been aware of sufficient information upon which to allege a breach of contract claim as early as the 1960s.

Thus, the plaintiffs' claim of fraudulent concealment based upon alleged affirmative misrepresentations by the defendants fails because they were aware of those facts. Concerning the facts that the plaintiffs claim were not disclosed to them by the defendants, the defendants had no affirmative duty to disclose to the plaintiffs. Thus, there was no fraudulent concealment arising from the breach of a fiduciary duty either.

Pertaining to the blending and high-grading issues, the contracts between the parties were specific and unambiguous, leaving no room for the existence of implied covenants dealing with the same duties and obligations. The implied covenants imposed by the trial court were inconsistent with the express contractual provisions. National had the right to exercise exclusive control, discretion, and judgment regarding all mining operations, thus defeating the plaintiffs' claim as to blending. In addition, the defendants could determine the quantity of ore mined and the quantity left unmined, thus foreclosing the plaintiffs' argument regarding high-grading. It is not the function of the courts in this state to rewrite a contract by implying covenants between parties when an express written agreement exists. "There are some things the court cannot do and one is to do for the parties what they failed to do for themselves." *Kimberly, Inc. v. Hays,* 88 N.M. 140, 145, 537 P.2d 1402, 1407 (1975). Thus, the trial court incorrectly applied the law to the facts in this case by implying covenants against the defendants.

In sum, the trial court erred in holding that the breach of contract claims and the fraud claim were not barred by the applicable statutes of limitations. The trial court abused its discretion in tolling the statutes of limitations. The record does not support the trial court's finding of fraudulent concealment nor the application of equitable estoppel to preclude the defendants from asserting the statute of limitations defenses. The trial court also erred as a matter of law in finding and enforcing implied covenants against the defendants. Accordingly, we vacate the jury's verdict and reverse the trial court's judgment that ratified the verdict.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

858 P.2d 86

CITIZENS FOR INCORPORATION, INC., and Jean Rodgers, Petitioners–Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF BERNALILLO, Respondents–Appellees,

and

George Walker, Robert Si Nanninga, and Clara Louise Nanninga, Intervenors–Appellees.

No. 13061.

Court of Appeals of New Mexico.

June 2, 1993.

Certiorari Denied July 20, 1993.

Anthony J. Ayala, Albuquerque, for petitioners-appellants.

William J. Darling, Margaret P. Armijo, William J. Darling & Associates, P.A., Albuquerque, for respondents-appellees.

K. Lee Peifer, Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg,

P.A., Albuquerque, for intervenors-appellees.

OPINION

APODACA, Judge.

Petitioners Citizens for Incorporation, Inc., and Jean Rodgers (collectively referred to as Petitioners) appeal a judgment of the district court affirming the decision of the Bernalillo County Board of Commissioners (Board) to refuse Petitioners' request that an incorporation election be held. Petitioners raised three issues on appeal, two of which we have consolidated as one issue: whether the district court (1) correctly upheld the Board's decision to deny Petitioners' request for an election on incorporation, and (2) properly dismissed Petitioners' claim that they should be reimbursed for the cost of conducting a census of the area proposed for incorporation.

Because the issues on appeal raised the question of the appropriate standard this Court should use in reviewing the Board's action, we requested the parties to provide supplemental briefs addressing this standard of review question. Having considered the supplemental briefs, we now determine that the focus of our review should be, not on the Board's decision, but on the district court's decision and findings.

We hold that the district court properly (1) upheld the Board's decision because Petitioners' petition did not comply with the pertinent statutory requirement, and (2) denied Petitioners' claim for reimbursement because Petitioners were required to provide the funds for a census. We thus affirm the district court's decision. We deny Petitioners' motion contained in their supplemental brief for permission to file an additional brief.

BACKGROUND

In 1989, Petitioners filed with the Board a petition and map for incorporation of an area known as Albuquerque's "South Valley." The petition stated:

> WE the undersigned, as qualified electors who have resided within the territory described below for a period of six months or more prior to signing this petition, declare our intent to incorporate all of the unincorporated territory not presently in the City of Albuquerque and described as follows:
>
> Beginning at the southwest corner of the sect. 26, T10N, R2E, then north along section line to the Albuquerque City Limits at Bridge Blvd. SW, then east on Bridge Blvd. to the point where the Albuquerque City Limits turn north, then north and east following the city limits to the Rio Grande, then south following City Limits along the Rio Grande, then east across Rio Grande following City Limits to west right-of-way of I–25, then south along I–25 to its intersection with Broadway SW then south to the north boundary of the Isleta Indian Reservation, then west along north boundary of Isleta Indian Reservation to west side of sect. 3, T8N, R2E, then north on sect. line to north boundary of the Pajarito Land Grant, then east on Land Grant boundary to west side of sect. 16, T9N, R2E, then north to northwest corner of sect. 16, then east to northeast corner of sect. 16, then north along section line to the Albuquerque City Limits at Flora Vista SW, then east along Albuquerque City Limits to Coors Rd. SW, then south following Albuquerque City Limits to point of beginning.
>
> This incorporated area shall be known as Las Plazas del Valle in accordance with the attached map.
>
> PRINTED NAME SIGNATURE STREET ADDRESS
>
> (as it appears on voter registration records)
>
> [Signature lines deleted.]

A map of the area intended to be incorporated was printed in the back of the petition. The petition was signed by 1,863 people; the Bernalillo County Clerk certified that 883 of the signatures were valid.

On April 25, 1989, the Board voted to require a census of the area proposed for incorporation. On May 9, 1989, Petitioners filed their original complaint in the district court, appealing the Board's decision to require a census. Nonetheless, a census

paid for by Petitioners was performed and the results submitted to the Board on September 19, 1989. By letter dated October 3, 1989, the district court requested the parties to address the issue of whether the controversy was now moot because a census had been taken. The record does not reflect the parties' response to this letter. On October 4, 1989, after discussion, the Board voted not to allow an election on the issue of incorporation on the basis that the petition for incorporation did not meet the statutory requirements for an incorporation petition. *See* NMSA 1978, § 3–2–1 (Repl.Pamp.1987). On October 12, 1989, Petitioners moved to amend their complaint. The amended complaint requested a declaration that Petitioners were not required to conduct a census, a refund of the funds paid to conduct the census, and a court order that the election be conducted. On October 27, 1989, Petitioners filed in district court a second notice of appeal and petition for review of the Board's decision. George Walker, Clara Louise Nanninga, and Robert Si Nanninga (collectively referred to as Intervenors) moved to intervene in the second action, requesting a declaratory judgment from the district court that the relevant statutes were unconstitutional. This motion to intervene was granted and the two actions were consolidated.

Petitioners and Intervenors later filed separate motions for summary judgment, which were consolidated. The hearing on the consolidated motions was transmuted into a hearing on the merits when the district court and counsel for the parties agreed that there were no disputed facts and that an evidentiary hearing was unnecessary. Subsequently, the district court entered a final judgment dismissing Petitioners' complaint and upholding the validity of the Board's action. This appeal followed.

DISCUSSION

I. *Standard of Review.*

Because the issue of what standard of review should be applied to a board of county commissioners' decision to deny a petition to hold an election on incorporation was one of first impression in New Mexico, we requested the parties to provide supplemental briefs addressing this issue.

In its supplemental brief, the Board argues that the appropriate standard of review is the deferential standard applied to legislative actions because actions involving the creation and extension of municipal boundaries are functions of the legislative power. *See Torres v. Village of Capitan,* 92 N.M. 64, 69, 582 P.2d 1277, 1282 (1978). Additionally, it argues that the type of decision made here falls squarely within the definition of a legislative decision as stated in *Dugger v. City of Santa Fe,* 114 N.M. 47, 51, 834 P.2d 424, 428 (Ct.App.), *writ quashed,* 113 N.M. 744, 832 P.2d 1223 (1992). It further claims that, whichever standard of review is applied, the Board's decision should be upheld.

Petitioners argue in their supplemental brief that, although a legislative standard apparently applies because incorporation of municipalities, like annexation, lies within the authority of the legislature, *see Leavell v. Town of Texico,* 63 N.M. 233, 235, 316 P.2d 247, 248 (1957), the Board's duty under Section 3–2–1 is quasi-judicial, *see Dugger,* 114 N.M. at 50, 834 P.2d at 427 (describing the trappings often associated with quasi-judicial action), and thus the administrative standard of review applies. *See Perkins v. Department of Human Servs.,* 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct.App.1987). Petitioners likewise argue that, whichever standard is applied, the Board's refusal to call an election was improper.

The Board's decision is not clearly legislative or administrative in nature. Although the Board is clearly a legislative body and generally a decision regarding municipal boundaries is legislative in nature, *see, e.g., Torres,* 92 N.M. at 69, 582 P.2d at 1282, here the statute requires the Board not to determine whether or not to incorporate but, rather, to review a petition and determine if certain statutory criteria have been met before ordering an election. *See Dugger,* 114 N.M. at 50, 834 P.2d at 427. However, we find it unnecessary to determine the appropriate standard of re-

view of the Board's decision in this case because we agree with Intervenors' supplemental brief that the focus of our appellate review should be on the district court's decision, not on that of the Board.

The district court apparently applied the arbitrary-and-capricious standard of review to the Board's action. Because we determine that the district court's findings that the petition did not comply with the statutory requirements was supported by substantial evidence, the Board's decision would be upheld under either standard of review. *Compare id.* at 53, 834 P.2d at 430 (discussing deferential "reasonableness" standard of review as applied to city council's decision to deny petition for annexation) *with Mutz v. Municipal Boundary Comm'n,* 101 N.M. 694, 697, 688 P.2d 12, 15 (1984) (applying administrative standard of review to decision of the Boundary Commission). Under either standard, the court does not make an independent inquiry into the wisdom of the decision or substitute its judgment for that of the decision-maker below. *Dugger,* 114 N.M. at 53, 834 P.2d at 430; *Mutz,* 101 N.M. at 697, 688 P.2d at 15. Therefore, under the facts of this case, we assume, but do not decide, that reviewing the Board's decision under the standard of *Perkins* was proper.

Petitioners argue that the district court exceeded its jurisdiction because it made findings that had not been explicitly made by the Board, and point to the language of NMSA 1978, Section 3–2–5(F) (Repl.Pamp.1987). That statute states that "[t]he signers of the [incorporation] petition ... may appeal *any determination* of the board of county commissioners to the district court." *Id.* (emphasis added). Petitioners contend that the findings made by the district court went beyond those made by the Board. We disagree that the district court exceeded its jurisdiction in making more-specific findings. It properly reviewed the Board's determination that the petition did not meet the statutory requirements. *See City of Pascagoula v. Scheffler,* 487 So.2d 196, 200 (Miss.1986) ("The power vested in the chancery court is the judicial function of deciding that a petition [for incorporation] is sufficient and that the statutory jurisdictional requirements have been met."). Additionally, as discussed below, the statutory prerequisites to incorporation are jurisdictional and can be raised at any time. *See State ex rel. Clancy v. Porter,* 23 N.M. 508, 512, 169 P. 471, 472 (1917).

II. *The District Court Properly Determined that the Petition Did Not Comply with the Statutory Requirements.*

At the close of the October 4 meeting, the Board voted four to one that "all the requirements of the New Mexico State Statute have not been met to the satisfaction of ... the Bernalillo County Commission." The district court held that:

> The refusal to order an election for the proposed municipality of [Las] Plazas del Valle was appropriate because both the petition for incorporation and the map attached to the petition are deficient. The petition failed to comply with [the] provisions of N.M.Stat.Ann. §§ 3—1–5(C)(4) [sic] and 3–2–1(A)(4)(a) (1978 Comp.), in that the requisite language concerning a penalty statement and an oath or affirmation was absent from the petition. The map attached to the petition failed to rise to the level of an accurate map or plat by which the acreage or boundaries of the proposed land to be incorporated might be determined.

Petitioners argue that the Board's failure to indicate at earlier meetings that the petition was deficient estops the Board from litigating the sufficiency of the petition. However, it is well established in New Mexico that the filing of a proper petition for incorporation is jurisdictional and objections to the petition's sufficiency may be raised at any time. *State ex rel. Clancy,* 23 N.M. at 512, 169 P. at 472. An incorporation attempted under a petition that does not comply with the statutory prerequisites is null and void. *Id.* This principle is the basis for the general rule in other jurisdictions that strict compliance with the statutory prerequisites to incorporation is required. *See, e.g., In re Village*

of Frankfort Square, 166 Ill.App.3d 146, 116 Ill.Dec. 653, 657, 519 N.E.2d 721, 725 (1988); *Donald v. City of Glenview,* 723 S.W.2d 861, 863 (Ky.Ct.App.1986); *Friendship Village v. State,* 738 S.W.2d 12, 13–14 (Tex.Ct.App.1987). We thus conclude that the Board was not estopped from denying the petition or litigating its deficiencies by the Board's failure to point out the defects at an earlier stage of the proceedings.

Additionally, Petitioners allege that the county clerk's filing of the map and petition was prima facie evidence that the petition was acceptable and approved. However, the final decision concerning whether the petition met the statutory requirements rested with the Board, not with the county clerk. *See* § 3–2–5(C). Thus, we decline to hold that the acceptance of the petition by the county clerk established that the petition met the statutory requirements.

The applicable statute states in part:

A. The residents of territory proposed to be incorporated as a municipality may petition the board of county commissioners of the county, in which the greatest portion of the territory proposed to be incorporated lies, to incorporate the territory as a municipality. The petition shall:

. . . .

(4) be signed by . . .:

(a) not less than two hundred qualified electors, each of whom shall, on the petition, 1) swear or affirm that he has resided within the territory proposed to be incorporated for a period of six months immediately prior to the signing of the petition and 2) list the street address of his residence; or

. . . .

B. The petition shall be accompanied by:

(1) an accurate map or plat which shall show the boundary of the territory proposed to be incorporated; and

(2) money in an amount determined by the board of county commissioners to be sufficient to conduct a census in the territory proposed to be incorporated. The money shall be deposited with the county treasurer for payment of the census required in Section 3–2–5 NMSA 1978.

Section 3–2–1.

The district court found that the petition offered by Petitioners was deficient in two respects: (1) the signers did not "swear or affirm" on the petition that they were residents for the previous six months of the area proposed to be incorporated, *see* § 3–2–1(A)(4)(a)(1), and (2) the attached map was not accurate, *see* § 3–2–1(B)(1). We agree.

Section 3–2–1(A)(4)(a)(1) requires signers of the petition to "swear or affirm" that they are residents of the area proposed to be incorporated. A sworn statement is one made under penalty of perjury. *See* NMSA 1978, § 14–13–1 (Repl.Pamp.1988); NMSA 1978, § 30–25–1 (Repl.Pamp.1984); 58 Am.Jur.2d *Oath and Affirmation* § 7 (1989). An affirmation substitutes for a sworn statement when the person has conscientious scruples against taking an oath. NMSA 1978, § 14–13–2 (Repl.Pamp.1988). However, it too is made under penalty of perjury. *Id.* The petition does not contain any language indicating that persons who provide false information on the petition might be subject to the penalty of perjury. The petition also fails to include the statement that any person knowingly giving false information on the petition is guilty of a fourth degree felony, as required by NMSA 1978, Section 3–1–5(C)(4) (Repl.Pamp.1987).

Petitioners argue that the "positive statement" contained in the petition was substantial compliance with the requirement that signers "swear or affirm" their residency. We disagree. There is no indication on the petition that the giving of false information was perjurious. Additionally, Petitioners argue that the requirement is not very important because the persons whose signatures were disallowed were not prosecuted for perjury. However, the function of the court is to determine and give effect to the legislative intent, *Wellborn Paint Mfg. Co. v. New Mexico Employment Sec. Dep't,* 101 N.M. 534,

537, 685 P.2d 389, 392 (Ct.App.1984), not to question the wisdom of the legislature's requirements. *See McGeehan v. Bunch,* 88 N.M. 308, 310, 540 P.2d 238, 240 (1975).

Finally, Petitioners contend that a petition for incorporation need not comply with the requirements of Section 3–1–5 because it is superseded by the more-specific requirements of Section 3–2–1. *See, e.g., Production Credit Ass'n v. Williamson,* 107 N.M. 212, 213, 755 P.2d 56, 57 (1988) (more-specific statute considered exception to general statute and more-specific statute governs). However, this rule of statutory construction applies only when the statutory provisions are conflicting. *See State ex rel. Stratton v. Gurley Motor Co.,* 105 N.M. 803, 805, 737 P.2d 1180, 1182 (Ct. App.), *cert. denied,* 105 N.M. 781, 737 P.2d 893 (1987). If the statutes can be harmonized so that each can be given effect, this Court should do so. *Id.* In this appeal, there is no conflict between Sections 3–1–5 and 3–2–1. Additionally, Section 3–1–5(A) states that it applies to petitions that trigger municipal special or general elections under the Municipal Code, NMSA 1978, Chapter 3, "except as otherwise expressly provided by law." Section 3–2–1 does not specify that incorporation petitions are exempt from the requirements of Section 3–1–5. Accordingly, we construe Section 3–2–1 as providing for additional requirements for petitions for incorporation, and not as superseding those of Section 3–1–5.

The district court also correctly concluded that the map accompanying the petition was not "an accurate map or plat" as required by Section 3–2–1(B)(1). A map is insufficient for incorporation purposes if people are misled or cannot determine whether their property is included in the area proposed to be incorporated. *See Taylor v. Pile,* 154 Colo. 516, 391 P.2d 670, 674 (1964) (en banc). The map attached to the petition is a rough sketch drawn by hand on an essentially inaccurate scale that reduces entire sections of land to half-inch squares. Hand-lettering on the map states that 35,600 acres are included within a territory described as "all area not in city limits from Central Ave. to Isleta Indian Reservation, from I–25 freeway to city limits west of Coors along section lines to Isleta Reservation." In addition, there is uncontroverted expert evidence in the record that "it is not possible [from the map] to accurately determine boundaries from [the map] or to accurately determine the acreage contained within such boundaries." Finally, because the map cannot be used to determine boundaries, it cannot be reconciled with the description contained in the petition so that persons reviewing the map and petition can determine with certainty whether their property is to be included or excluded from the proposed municipality.

Relying on *People ex rel. Village of Worth v. Ihde,* 23 Ill.2d 63, 177 N.E.2d 313, 315 (1961), Petitioners argue that the map was sufficient because, when combined with the description contained in the petition, it fairly apprised the public of the property involved. We are not persuaded by this argument. The statutory requirements that the petition contain a written description and an accurate map are separate and distinct. *See* § 3–2–1(A)(3) & (B)(1). This Court will apply the statutory language as written unless it is ambiguous. *See Johnson v. Francke,* 105 N.M. 564, 566, 734 P.2d 804, 806 (Ct.App.1987). We thus conclude that the legislature intended both requirements to be complied with. Additionally, the requirement that the map itself be accurate and fairly apprise the public of the property to be included in the proposed municipality is reasonable because not all members of the public will necessarily understand the legal description of the proposed municipality. We therefore decline to follow *Ihde.*

We thus hold that the district court properly determined that the petition did not meet the statutory requirements. In light of this conclusion, we necessarily also reject Petitioners' contention, which relies on *McManus v. Skoko,* 255 Or. 374, 467 P.2d 426, 428 (1970), that the district court denied area residents the right to vote for improper political reasons. *See also* 56 Am.Jur.2d *Municipal Corporations, Counties, and Other Political Subdivi-*

sions § 31 (1971) ("[P]ower to vote upon the acceptance of the [municipal] charter is a privilege and not an inherent right.").

III. *The District Court Properly Dismissed Petitioners' Request for a Refund of the Money Spent Conducting a Census.*

Petitioners argue that the district court incorrectly dismissed its claim for a refund of the money it spent to have a census conducted.

When construing a statute, the entire act is to be read together so that each provision is to be considered in relation to the others. *Winston v. New Mexico State Police Bd.*, 80 N.M. 310, 311, 454 P.2d 967, 968 (1969). When Article 2 of the Municipal Code, NMSA 1978, Chapter 3, is read as a whole, it is clear that the funds for a census were required and that Petitioners were required to provide them. Section 3–2–1(B)(2) requires that the petition for incorporation be accompanied by payment for a census. Section 3–2–5(B)(2) requires that a census be taken. There is no provision allowing a refund of or reimbursement for such expenses if the petition is not granted.

Petitioners argue that they should be reimbursed because NMSA 1978, Section 3–2–4 (Repl.Pamp.1987) relieves them of the burden of conducting a new census. Instead, Petitioners contend, the pertinent statute permitted them to rely on the last decennial census. Section 3–2–4 states:

> Notwithstanding any provisions of Sections 3–2–3, 3–2–5 and 3–57–9 NMSA 1978 to the contrary, the residents of a contiguous, undivided territory within a class A county may incorporate that territory into a new municipality with boundaries closer than five miles to or coterminous with the boundary of an existing municipality *by following all other provisions of the law governing incorporation,* if the territory proposed to be incorporated has a population, as shown by the last decennial census, of fifteen thousand or more. (Emphasis added.)

We do not read Section 3–2–4 as supplanting NMSA 1978, Section 3–2–3 (Repl.Pamp.1987); Section 3–2–5; or NMSA 1978, Section 3–57–9 (Repl.Pamp.1984). We note that all three of these statutes require persons attempting to form a local government body or incorporate within five miles of an existing municipality to obtain that municipality's permission. *See* §§ 3–2–3(B)(1), 3–2–5(B)(2) & 3–57–9. Thus, we conclude that Section 3–2–4 is an exception to this requirement that allows residents of an area within five miles of or coterminous with an existing municipality in a class A county to incorporate without complying with Section 3–2–3(B) if the area proposed for incorporation has a population of 15,000 persons or more. The last decennial census is used only to initially determine whether the area has a population of 15,000 or more so that the incorporators can determine if they must comply with Section 3–2–3(B). Additionally, Section 3–2–4 states that it is an exception only to "contrary" provisions and further explicitly states that residents of such an area must comply with "all other provisions of the law governing incorporation." That would include payment for a new census as required by Sections 3–2–1(B)(2) and 3–2–5(B)(2). The requirement that a new census be conducted before an incorporation election is held is not "contrary" to Section 3–2–4.

Petitioners argue that NMSA 1978, Section 3–2–2 (Repl.Pamp.1987) does not impose any requirement that a census be conducted and further argue that the legislature's 1991 amendment to Section 3–2–2 to allow reliance on the 1990 decennial census indicates that Petitioners were entitled to rely on the 1980 federal census and not conduct a new one. The version of Section 3–2–2 in effect when Petitioners filed their petition for incorporation stated that "[a]ny territory proposed to be incorporated as a municipality shall: A. not be within the boundary of another municipality; B. have a population density of not less than one person per acre; and C. contain not less than one hundred fifty persons." In 1991, the legislature amended Subsection B. The requirement that the area proposed for incorporation have a population density of

one person per acre was modified to allow an exception for class B counties that in 1990 had a net taxable value of property of more than $95,000,000 and a population of less than 10,000 according to the 1990 federal decennial census. Section 3–2–2(B) (Cum.Supp.1991). An area in such a county can incorporate with a population density of only one person per four acres. *Id.* Thus, either version of Section 3–2–2 merely sets out the characteristics required of any territory proposed to be incorporated; it does not address the incorporation proceedings themselves. As already noted, under Section 3–2–1(B)(2), a petition for incorporation must be accompanied by money for a census of the proposed area for incorporation. This money is used to conduct the census required by Section 3–2–5(B)(2). The 1991 amendment to Section 3–2–2 does not indicate that the legislature intended to eliminate the requirement of conducting a new census of the proposed area for incorporation; it merely indicates the legislature's conclusion that the most-recent federal decennial census was adequate for making certain initial determinations.

"We ought not read language into [a] statute where ... the statute makes sense as written." *Wellborn Paint Mfg.,* 101 N.M. at 539, 685 P.2d at 394. It is not unreasonable for the legislature to determine that the most-recent federal decennial census was adequate for making preliminary determinations but that a current census was desirable for making the final decision. We thus decline to add language to the statutes as proposed by Petitioners.

Additionally, we have uncovered no statutory authority for the proposition that the Board was required either to pay for the census or to refund the money paid by Petitioners for the census. Petitioners, as the parties requesting the incorporation, were required to provide the funds for the census. *See* § 3–2–1(B)(2). We thus conclude that the district court properly dismissed Petitioners' request that it order the Board to refund the money paid for the census.

IV. *Petitioners' Request for a Determination that the Census Can Be Used with a Subsequent Petition.*

The issue of whether the census conducted in connection with this petition can be used in conjunction with another petition for incorporation is not properly before this Court because no such additional petition has been presented to the Board. We therefore decline to consider this argument.

CONCLUSION

We hold that the district court did not err in upholding the Board's decision to deny Petitioners' request for an election on incorporation because the petition and map did not comply with the statutory requirements. We also hold that the district court correctly concluded that the Board properly required a new census to be paid for by Petitioners. We therefore affirm the district court's judgment.

IT IS SO ORDERED.

BIVINS and FLORES, JJ., concur.

858 P.2d 94

STATE of New Mexico, Plaintiff–Appellee,

v.

Albert RAMOS, Defendant–Appellant.

No. 13505.

Court of Appeals of New Mexico.

June 8, 1993.

Certiorari Denied July 20, 1993.

Tom Udall, Atty. Gen., Mary Catherine McCulloch, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from his convictions for kidnapping and two counts of second degree criminal sexual penetration (hereinafter "CSP"). He raises several issues on appeal: (1) denial of his motion to produce the complaining witness's psychotherapy records; (2) refusal to admit portions of emergency room records; (3) double jeopardy bar on punishment for kidnapping as a separate offense and use of kidnapping as the underlying felony of CSP; (4) failure to instruct the jury on the definitions of sexual intercourse and anal intercourse; and (5) denial of his motion for new trial based on prosecutorial misconduct. 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.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We affirm.

FACTS

Defendant met the complaining witness (hereinafter "B.D.") in a bar. During the course of the evening they played pool, drank beer, and danced together at various locations. B.D. also claims they smoked marijuana cigarettes that night. Near closing time, B.D. and Defendant left the bar together. B.D. testified that after Defendant's truck left the bar parking lot, Defendant refused to take her home and no longer spoke to her. She asserts that when she started to object, Defendant grabbed her by the neck and hair, told her he was going to have sex with her, and drove to a secluded location in the desert.

B.D. testified that after Defendant parked his vehicle, he started removing her clothing, pulled her out of the cab by her hair, and placed her in the bed of his truck. She claims he held her by the throat and told her not to scream and, after removing the rest of her clothing, penetrated her vagina. Next, B.D. testified that when Defendant observed car headlights approaching, he threw B.D. on the ground and put dirt in her mouth so that she would not yell out. Once the approaching car passed,

B.D. testified that Defendant picked her up by the hair and throat and put her back in the bed of the truck and penetrated her anus. B.D. then claims that Defendant closed the tailgate and began to drive off while B.D. was naked in the bed of the truck. She claims that when Defendant stopped at a main road, she jumped out and demanded her clothes from inside the passenger compartment. B.D. testified that Defendant threw the clothes at her and drove off after telling her that she had better not tell anyone about what had happened.

Defendant offers a different version of the events of that night. Defendant testified that B.D. consented to the sexual acts. Defendant claims that after they had sex, B.D. told him that she had a sexually transmittable disease. Defendant then claims that he told B.D. that she should have told him earlier about the ailment. Defendant asserts that this statement enraged B.D. and that at this point she walked away from the truck, called Defendant names, and threw a rock at his vehicle. Next, Defendant testified that after failing to persuade B.D. to get back in his truck, he drove off and left her.

B.D. walked to a nearby house and called the police. The police took B.D. to a hospital where she was examined by Dr. Angela Gardner.

DISCUSSION

Following trial before a jury, Defendant was convicted of two counts of criminal sexual penetration and one count of kidnapping contrary to NMSA 1978, Sections 30–9–11 (Cum.Supp.1992) and 30–4–1 (Repl.Pamp.1984). Defendant raises five issues on appeal which we consider separately.

I. B.D.'s Psychological Report

During pretrial discovery, Defendant learned that B.D. responded to a question contained on the hospital's Suspected Rape Report form that she was sexually assaulted as a child by her father. Further, the questionnaire revealed that B.D. received psychotherapy treatment which ended three months prior to the alleged assault by Defendant. Thereafter, Defendant filed pretrial motions to produce all psychological and psychiatric evaluations of B.D., to present evidence of B.D.'s past sexual conduct, and to require B.D. to submit to a psychological examination. The State acknowledged that B.D. received counseling at Southwest Counseling Center; however, B.D. invoked the psychotherapist-patient privilege to prevent disclosure of the information requested by Defendant. *See* SCRA 1986, 11–504 (Cum.Supp.1992).

After an evidentiary hearing concerning these motions, the trial court conducted an in camera review of B.D.'s psychotherapy records. After the in camera review, the trial court found that there was nothing in the records that justified their disclosure to Defendant. Thus, the trial court ordered that these materials not be disclosed and denied Defendant's remaining motions.

Defendant argues that the trial court erred in failing to compel disclosure of B.D.'s psychotherapy records because, as his appellate briefs state, "the victim's psychotherapy records may well contain evidence of psychotic or hallucinatory behavior relevant to credibility." Defendant offers no New Mexico authority in support of his proposition for direct review of the requested information. Instead, Defendant cites decisions originating in Pennsylvania and one from California to advance his position. However, we do not find the cases cited by Defendant dispositive of the issue presently before this Court.

At issue in the present case is a rule of privilege adopted by our Supreme Court pursuant to authority vested in it by the state constitution, *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), rather than a common-law privilege. To the extent that Defendant now argues that the New Mexico Constitution requires greater access to psychological records than that afforded by the United States Constitution, that claim was not made below. *See State v. Sutton*, 112 N.M. 449, 454, 816 P.2d 518, 523 (Ct.App.) (contention that New Mexico

Constitution provides greater Fourth Amendment rights than the United States Constitution was not preserved), *cert. denied,* 112 N.M. 308, 815 P.2d 161 (1991). Therefore, we decline to address that issue at this time.

■ However, we do not intend to suggest that trial courts in all instances are prohibited from allowing defense counsel to review the type of material at issue here, either in camera or otherwise, upon proper request. We have previously recognized that defense counsel is generally in a better position than the trial judge to make the determination of what may or may not be useful to the defense. *State v. Romero,* 87 N.M. 279, 282, 532 P.2d 208, 211 (Ct. App.1975). On the other hand, in view of the sensitive and personal nature of the material here sought, and the policy of this state to allow victims to keep their private affairs private, *see* NMSA 1978, Section 30–9–16 (Repl.Pamp.1984); *State v. Romero,* 94 N.M. 22, 26, 606 P.2d 1116, 1120 (Ct. App.1980) (hereinafter "*Romero*"), trial courts must exercise their discretion carefully to balance the legitimate interests of all concerned.

Defendant cites *People v. Reber,* 177 Cal. App.3d 523, 223 Cal.Rptr. 139 (1986), to suggest that his trial defense was actually prejudiced by the trial court's failure to create an adequate record for review of its order denying Defendant access to B.D.'s psychotherapy records. In *Reber,* the California court correctly noted that "there are circumstances where the psychotherapist-patient privilege must yield to a criminal defendant's right to confrontation and cross-examination." *Id.* 223 Cal.Rptr. at 144. As that court noted,

> "The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. If as a result of a mental condition such capacity has been substantially diminished, evidence of that condition before, at and after the occurrence ... is ordinarily admissible for use by the trier in passing on the credibility of the witness."

Id. at 144–45 (quoting *State v. Esposito,* 192 Conn. 166, 471 A.2d 949, 955 (1984), *cert. denied sub nom. Pierson v. Connecticut,* 489 U.S. 1016, 109 S.Ct. 1131, 103 L.Ed.2d 193 (1989)). The present appeal, however, is not one of those instances.

■ We have reviewed the records before the trial court judge and concur with his determination that there was no material that justified disclosure or that should be disclosed in light of Defendant's constitutional rights. We find absolutely nothing in those documents which suggests that B.D. suffered from mental disorganization affecting credibility or any other matter of import. *See also People v. Pack,* 201 Cal. App.3d 679, 248 Cal.Rptr. 240 (1988) (a person's credibility is not in question merely because he or she is receiving treatment for a mental health problem).

Defendant argues that in *Commonwealth v. Lloyd,* 523 Pa. 427, 567 A.2d 1357 (1989), the Pennsylvania Supreme Court found that the denial of access to a rape victim's psychotherapy records violated the defendant's right to confrontation and compulsory process. In *Lloyd,* the defendant sought to obtain the psychotherapy records of a six-year-old girl whom he allegedly had raped. The trial court denied his request. The Pennsylvania Supreme Court reversed, holding that the defendant's state constitutional rights to confrontation and compulsory process required that he be permitted to inspect the records.

However, the Pennsylvania Supreme Court later recognized in *Commonwealth v. Wilson,* 529 Pa. 268, 602 A.2d 1290 (Pa.), *cert. denied sub nom. Aultman v. Pennsylvania,* — U.S. —, 112 S.Ct. 2952, 119 L.Ed.2d 574 (1992), "*Lloyd* was concerned with a common law privilege which could not defeat a defendant's constitutional rights." *Id.* 602 A.2d at 1297. "Implicit in the distinction drawn by the *Lloyd* court is the recognition that the existence of a statutory privilege is an indication that the legislature acknowledges the significance of a particular interest and has chosen to protect that interest." *Id.* at 1297–98. Therefore, *Lloyd* does not assist Defendant in the present case because of the existence

of New Mexico's privilege against disclosure of communications between a patient and a psychotherapist. SCRA 11–504.

Defendant claims that *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), supports his allegation that he should have access to B.D.'s psychotherapy records. The defendant in *Ritchie* was charged with various sexual offenses against his minor daughter. The defendant in that case sought access to a file in possession of a protective agency established by the State of Pennsylvania relating to the reported abuse. The trial court conducted a partial in camera review of the file in question. The Pennsylvania Supreme Court held that, by denying access to that file, the trial court had violated both the Confrontation and Compulsory Process Clauses of the Sixth Amendment.

However, a careful reading of *Ritchie* reveals that the United States Supreme Court held that the defendant in that case was entitled to have the trial court review the entire file in question in order "to determine whether it contains information that probably would have changed the outcome of his trial." *Id.* at 58, 107 S.Ct. at 1002. Moreover, the Supreme Court clarified that "[a]n *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations." *Id.* at 61, 107 S.Ct. at 1003. Therefore, in the present case, the trial court's in camera complete review of B.D.'s records satisfies *Ritchie,* and we disagree with Defendant's broad interpretation of the holding of this case.

Finally, Defendant cites *Romero,* a second degree CSP case involving the use of a knife, as support for access to B.D.'s records. *See* § 30–9–11(B)(5) (perpetrator armed with a deadly weapon). In that case, the defendant was allowed to introduce evidence, including reports of the complaining witness's treating psychologist, which tended to establish several facts bearing on her mental condition. Apparently, the complaining witness did not claim that any of this evidence was privileged, and as a result, the question of the relevance of the psychologist's report, or the defendant's entitlement to the report, was not litigated. Therefore, we believe the present facts are clearly distinguishable, and we do not agree that *Romero* supports the claim that Defendant should have had access to these records in order to argue relevance.

We believe the trial court was in the best position to assess the probative value of the evidence as it relates to the particular case before it and to weigh that value against the interest in confidentiality of the records. *State v. Kelly,* 208 Conn. 365, 545 A.2d 1048, 1055 (1988). We hold that the trial court's ultimate ruling on Defendant's discovery motion was not an abuse of discretion. *Cf. State v. Ortega,* 112 N.M. 554, 572–73, 817 P.2d 1196, 1214–15 (1991) (statements made to psychologist at state correctional institution properly excluded from trial).

II. Exclusion of Portions of the Emergency Room Records

As noted above, an entry on the hospital's Suspected Rape Report form included B.D.'s admission that she was sexually assaulted by her father as a child and that she had received psychotherapy treatment up to three months prior to the incident at issue in this case. The trial court excluded this portion of the completed form from introduction into evidence.

Defendant takes issue with the trial court's determination that the proffered evidence related to B.D.'s past sexual conduct. *See* § 30–9–16 (limitations on admissibility of evidence of victim's past sexual conduct). We are not persuaded by Defendant's argument on this point. Section 30–9–16 applies to "all forms of past sexual conduct." *State v. Montoya,* 91 N.M. 752, 753, 580 P.2d 973, 974 (Ct.App.), *cert. denied,* 91 N.M. 751, 580 P.2d 972 (1978). Defendant also argues that the only policy of the rape shield law is to prevent an inference that the victim must have consented because she had sex before, and that since the evidence was introduced

for another purpose, Section 30–9–16 does not apply. We disagree; the statute is also designed to minimize intrusive inquiry into a rape complainant's private life. *State v. Johnson,* 102 N.M. 110, 692 P.2d 35 (Ct. App.1984), *overruled on other grounds by Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989).

Defendant cites several New Mexico cases dealing with admissibility of prior allegations of rape. These cases are not applicable because here it was the fact of prior sexual abuse, not the allegation, which Defendant sought to establish through the proffered evidence. *See, e.g., Manlove,* 108 N.M. at 475 n. 2, 775 P.2d at 241 n. 2; *State v. Scott,* 113 N.M. 525, 530, 828 P.2d 958, 963 (Ct.App.1991), *cert. quashed,* 113 N.M. 524, 828 P.2d 957 (1992).

Having determined that the report of childhood sexual abuse was part of B.D.'s prior sexual conduct, the trial court was required to determine its relevance and then balance its probative value against its prejudicial nature. *See Scott,* 113 N.M. at 527–28, 828 P.2d at 960–61. We agree with the trial court on this issue and fail to see how the fact that B.D. was sexually abused as a child by her father was probative of any material issue in this case. Moreover, Defendant has not explained how instances of childhood abuse would affect B.D.'s ability to comprehend, know, and correctly relate the truth about a recent experience. Therefore, we hold that the trial court did not abuse its discretion in excluding the evidence of childhood sexual abuse. *See State v. Valdez,* 83 N.M. 632, 637, 495 P.2d 1079, 1084 (Ct.App.) (exclusion of evidence is a matter within the discretion of the trial court), *aff'd,* 83 N.M. 720, 497 P.2d 231, *cert. denied,* 409 U.S. 1077, 93 S.Ct. 694, 34 L.Ed.2d 666 (1972); SCRA 11–402.

Defendant contends that the excluded evidence of mental problems and treatment was relevant to B.D.'s credibility and that the trial court's ruling deprived him of an opportunity to impeach her. Again, Defendant relies on *Romero* to argue that the trial court abused its discretion. However, since the issue of the relevance of facts bearing on the complaining witness's mental condition in *Romero* was not litigated, that case does not support Defendant's claim that evidence of B.D.'s treatment history is relevant here. *Cf. Romero,* 94 N.M. at 32–33, 606 P.2d at 1126–27 (Sutin, J., concurring in part and dissenting in part) (doctor's report was not relevant evidence).

Defendant cites several out-of-state cases in which evidence of a witness's psychological history was erroneously denied admission at trial. All of the cases cited by Defendant are distinguishable from the facts before this Court. In *People v. Di Maso,* 100 Ill.App.3d 338, 55 Ill.Dec. 647, 426 N.E.2d 972 (1981), the defendant proffered evidence contained in medical records relating to the key eyewitness's habitual drug use, alcoholism, and resulting disorientation. The reviewing court noted that habitual drug use is a significant factor in evaluating credibility because it is generally probative of abilities to perceive and recall accurately. Evidence that the witness's alcoholism triggered blackouts plus evidence that he was drinking at the time of the events about which he testified was probative of his sensory capacity. In *Wagner v. Commonwealth,* 581 S.W.2d 352 (Ky.1979), *overruled on other grounds by Estep v. Commonwealth,* 663 S.W.2d 213 (Ky.1983), the complaining witness had been committed to a psychiatric hospital prior to the alleged rape for attempted suicide, severe depression, and drug use, and at the time of the trial she was under psychiatric care and was receiving shock treatments which affected her memory.

■ In *Di Maso* and *Wagner* the evidence offered was clearly probative of the witnesses' credibility. That is not the case here. B.D.'s need for psychological assistance in dealing with a childhood trauma was not evidence casting doubt on her ability to recall or relate the incidents at issue. *See Pack,* 248 Cal.Rptr. at 243–44. Thus, we cannot say that the evidence of treatment was relevant. *See* SCRA 1986, 11–402 (evidence which is not relevant is not admissible).

III. Kidnapping as Underlying Felony and as Separate Charge

Defendant argues that he was subjected to multiple punishments by virtue of the use of the kidnapping offense, raising CSP from a third degree to a second degree felony, *see* § 30–9–11(B)(4) (CSP in the commission of any other felony), as well as an independent felony. In *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991), our Supreme Court established the two-part test for determining legislative intent to punish, the sole limitation on multiple punishments. The controlling question under the facts before us is whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes. This question depends to a large degree on the elements of the charged offenses and the facts presented at trial. "[S]imilar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish[es] that the jury reasonably could have inferred independent factual bases for the charged offenses." *Id.* at 14, 810 P.2d at 1234 (citing *State v. McGuire,* 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990)).

B.D. testified that after Defendant completed the drive into the desert against her will, during which time Defendant restricted her movements, Defendant tried to remove B.D.'s clothes and told her that he was going to have sex with her. As in *McGuire,* the jury could have inferred from facts other than the CSP itself that Defendant intended to hold the victim against her will from the moment of the abduction. *See also Swafford,* 112 N.M. at 15–16, 810 P.2d at 1235–36 (conduct underlying offenses of assault with intent to commit rape and CSP was not unitary where victim was bound, struck, and threatened for a period of time prior to the sexual act). Since we cannot say that the conduct underlying the offenses is unitary, the double jeopardy clause does not prohibit multiple punishments in this case. *See id.*

IV. Definitional Jury Instructions

The trial court did not instruct the jury on the definitions of the sexual acts which Defendant was charged with committing. Defendant's claim of reversible error is 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). However, Defendant did not tender any definitional instructions or object to the trial court's failure to so instruct the jury. Therefore, as a result, Defendant failed to preserve this issue for our review. *See State v. Tarango,* 105 N.M. 592, 734 P.2d 1275 (Ct.App.) (failure to give a definitional instruction is not failure to instruct on an essential element; the issue must be preserved by tendering an instruction or objecting to the failure to give an instruction), *cert. denied,* 105 N.M. 521, 734 P.2d 761 (1987), *and overruled on other grounds by Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990).

V. Prosecutorial Misconduct

Defendant acknowledges that he did not object to two remarks made by the prosecutor during trial. Instead, Defendant argued prosecutorial misconduct in a motion for a new hearing. Generally, unless a prosecutor's remark constitutes fundamental error, review by an appellate court must be predicated upon a timely objection by a defendant. *State v. McGuire,* 110 N.M. 304, 313, 795 P.2d 996, 1005 (1990); *State v. Clark,* 108 N.M. 288, 296, 772 P.2d 322, 330 (1989). However, "where the trial court addresses an untimely motion on the merits, an appellate court may review the question presented." *State v. Diaz,* 100 N.M. 210, 212, 668 P.2d 326, 328 (Ct.App.1983) (citing *State v. Ramirez,* 92 N.M. 206, 585 P.2d 651 (Ct.App. 1978)).

The comments made by the prosecutor in question are:

> And is this an easy crime to charge? I have an ethical obligation as a prosecutor not to file just because any woman walks into my office and says, "I've been raped." I have an ethical obligation not to do that. I must base it on something,

and something that I as a prosecutor, one must have a good basis for filing charges. It is not the easiest charge to file. It may be the easiest allegation to make by a woman, but not to charge.

. . . .

Did he turn into a Dr. Jekyll and Mr. Hyde? You're damn right he did. He sure did. That's a rapist. A rapist doesn't politely rape you. He is not nice about it. He's not a, you know, kinda come on, come on, come on. A rapist becomes a sudden rapist, but they walk around everywhere in the community. I mean, sometimes have you ever heard of somebody and think God, like for example Mr. Kennedy, President Kennedy's nephew I think it was, and you think God, wow. It kind of shocks you, kind of surprises you. Sometimes you think of a neighbor or somebody that got into trouble and think God, you're kidding, he's such a nice person. That's what happens. You don't really know a person completely. And so this stuff about Dr. Jekyll and Mr. Hyde, that's exactly what a rapist does. He becomes suddenly violent.

The standard of review of the denial of a motion for new trial is abuse of discretion. *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 will not disturb the trial court's denial of Defendant's motion for a new trial unless the ruling is arbitrary, capricious, or beyond reason. *State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979). The process of our review is as follows: first we determine whether there was legal error; and then we consider whether the error was substantial enough to warrant the exercise of the trial court's discretion. *Ferguson,* 111 N.M. at 192, 803 P.2d at 677; *State v. Gonzales,* 105 N.M. 238, 731 P.2d 381 (Ct. App.1986), *cert. quashed,* 105 N.M. 211, 730 P.2d 1193 (1987). Here, while we can agree that the prosecutor's remarks were improper, we cannot say that the trial court was required to find that they denied Defendant a fair trial.

A. Comment Concerning the Basis For a Charge of Rape

As for the first comment, we note that Defendant argued at closing that it is easy to bring a charge of rape because all that is needed is an allegation and evidence of intercourse. The prosecutor responded with the comment noted above that she has an ethical obligation to have some basis, other than just a woman's allegation, to file charges. The trial judge agreed with Defendant that the prosecutor's comment was an expression of the prosecutor's personal opinion. *See State v. Vallejos,* 86 N.M. 39, 519 P.2d 135 (Ct.App.1974) (expression of personal opinion of defendant's guilt is impermissible). While we believe that the topic of the prosecutor's comment was invited, we cannot say that the trial court's determination was incorrect. *See Ferguson,* 111 N.M. at 195, 803 P.2d at 681 (trial court in best position to determine this question).

B. Reference to William Kennedy Smith

Next, during closing argument, Defendant challenged the State's theory of the case by arguing that it was unreasonable to believe that Defendant "turned into a different person" after they had a good time together during the course of the evening. The prosecutor responded that Defendant did suddenly become violent and that such sudden behavior is typical of a rapist. In addition, the prosecutor argued that it was also a shock and a surprise to hear that a person like President Kennedy's nephew was involved in a rape case.

Defendant contends that the prosecutor's remark was improper because it compared him to a famous "wrongdoer." To the extent that the State argues that the topic of the response was invited, we agree. The harder question is whether the manner of the State's response was proper. The State argues that the prosecutor did not draw a direct link between Defendant and a specific rapist, rather that the comment referred to the sometimes shocking or surprising nature of the crime of rape.

We note that the trial court did not expressly rule on the question of whether this comment of the prosecutor was error. However, we assume for the purposes of this review that the trial court could have resolved this question in Defendant's favor. *See, e.g., Gonzales,* 105 N.M. at 240, 731 P.2d at 383 (improper reference to bad acts of President of United States in response to politician's claim that he would not have raped anybody because he had too much to lose). Therefore, it is not necessary for us to determine whether this particular comment was error and we turn to the dispositive inquiry.

C. Prejudice

Following from the proposition that the two comments were error, was the trial court required to find that the impact of both errors was substantial and denied Defendant a fair trial? *See Ferguson,* 111 N.M. at 192, 803 P.2d at 678 (standard of review); *see also Vallejos,* 86 N.M. at 43, 519 P.2d at 139 (effect of cumulative impact of three items of misconduct considered). The trial court is in the best position to evaluate any possible prejudice, and the defendant has the burden of demonstrating an abuse of discretion. *See Gonzales,* 105 N.M. at 243, 731 P.2d at 386.

In support of the State, there is the fact that the topic of the two comments was invited by defense counsel's closing argument and the fact that Defendant did not request a timely cure. *See id.* In addition, the comments were brief and made only once. *Cf. State v. Cummings,* 57 N.M. 36, 253 P.2d 321 (1953) (improper remarks repeated three times); *State v. Henderson,* 100 N.M. 519, 673 P.2d 144 (Ct.App.1983) (improper comments were "lengthy").

Defendant argues that this case, like *Gonzales,* was a swearing match between himself and the complaining witness. In *Gonzales* the physical evidence supporting the complaining witness's version of events was that a clasp on her slacks was bent at an angle, she had an abrasion on her thumb, and she had some vaginal trauma consistent with forced sexual intercourse. However, the bent clasp testimony depended on the complaining witness's credibility, and the doctor who testified to the trauma was impeached with his inconsistent testimony from an earlier trial.

Here, Dr. Gardner, the emergency room physician who examined B.D. on the night of the incident, testified that B.D. had recent abrasions and bruises on her forearms, elbows, and knees, plus superficial scratches on her back. In addition, Dr. Gardner testified that B.D.'s hair was disheveled and twisted and that she had dirt on her face. Dr. Gardner also testified that B.D. had a laceration along the edge of her rectum that was consistent with forced intercourse. Therefore, we believe that this testimony is of a sufficiently inculpatory quality to distinguish this case from *Gonzales.*

In support of Defendant, there is only the fact that the comments were improper. *See Gonzales,* 105 N.M. at 243, 731 P.2d at 386. Thus, we cannot say as a matter of law that the trial court's denial of the motion for new trial was a clear and manifest abuse of discretion. *See id.*

CONCLUSION

We affirm Defendant's convictions for kidnapping and two counts of second degree criminal sexual penetration.

IT IS SO ORDERED.

MINZNER, C.J., and PICKARD, J., concur.

858 P.2d 103

G.E.W. MECHANICAL CONTRACTORS, INC., Plaintiff–Appellant,

v.

The JOHNSTON COMPANY, and John Johnston, Defendants–Appellees.

No. 13445.

Court of Appeals of New Mexico.

June 30, 1993.

James A. Chavez, W. Daniel Schneider, Schneider & Schneider, Albuquerque, for plaintiff-appellant.

Victor R. Ortega, Bruce Herr, Montgomery & Andrews, P.A., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Judge.

Plaintiff, G.E.W. Mechanical Contractors, Inc., appeals from an order granting summary judgment and dismissing its amended complaint against Defendants, The Johnston Company, a corporation, and John Johnston, individually. Two issues are presented on appeal: (1) whether the trial court erred in granting summary judgment and refusing to allow the joinder of Louie Petelski, doing business as G.E.W. Sheet Metal, a sole proprietorship (Petelski), as a plaintiff in the action; and (2) whether the trial court erred in finding that Plaintiff's claim against Defendants, alleging violation of the Unfair Trade Practices Act, was groundless, thus permitting an award of attorney's fees to Defendants. We affirm in part and reverse in part.

Plaintiff filed suit against Defendants and Joy Technologies, Inc., alleging that it submitted a bid on a sheet metal subcontract at the University of New Mexico Hospital; that it had sought and obtained prices for preparing its bid from Defendants; and that it was an unsuccessful bidder because Defendants had improperly and unfairly given it pricing information higher than that of other competing bidders. Plaintiff also alleged that Defendants' acts violated the New Mexico Price Discrimination Act, the New Mexico Unfair Trade Practices Act, and unlawfully interfered with the corporation's valid expectancy of a business relationship with the hospital.

In its amended complaint, Plaintiff additionally alleged that Defendants inflated their quotation of prices given to Plaintiff over that given to Plaintiff's competitors and the winning bidder, and that Defendants gave a lump-sum price to Plaintiff, but gave itemized prices to Plaintiff's competitors. Defendants filed a motion for summary judgment, asserting that Plaintiff was not a licensed contractor and was legally barred from performing under the contract, that it was Petelski who had, in fact, submitted the bid in question, and that Plaintiff's complaint failed as a matter of law to state a claim under the Price Discrimination Act.

Following the filing of Defendants' motion for summary judgment, Plaintiff moved to join Petelski as an additional plaintiff in the action. After a hearing on the motions, the trial court denied Plaintiff's motion to join Petelski and granted Defendants' motion for summary judgment. A third Defendant, Joy Technologies, Inc., was dismissed by Plaintiff without prejudice.

I. *Award of Summary Judgment and Refusal to Permit Joinder*

Plaintiff argues that the trial court erred in granting Defendants' motion for summary judgment and in denying its motion to join Petelski as an additional plaintiff to the action. In reviewing this claim, we first consider the applicable standard of review for (1) an order granting summary judgment; (2) denial of a motion to allow joinder of an additional party plaintiff; and (3) analyze the propriety of the trial court's ruling on each motion in light of those standards.

Defendants' motion for summary judgment was grounded, among other things, on their contention that Plaintiff was not the entity that submitted the bid referred to in its lawsuit. Defendants' motion for summary judgment was accompanied, inter alia, by an affidavit of M. Eliza Stewart reciting that she obtained a certificate from the New Mexico Construction Industries Division, which she appended to her affidavit, stating that Plaintiff is not a licensed contractor in the State of New Mexico and was not a licensed contractor when the subcontract was bid. Plaintiff did not controvert this factual contention.

Plaintiff's brief-in-chief jointly argues that the trial court erred in granting Defendants' motion for summary judgment and denying its motion, pursuant to SCRA 1986, 1–017(A) and 1–021 (Repl.1992), to join Petelski as an additional party plaintiff. We begin our analysis by noting that it is undisputed that Petelski, and not Plaintiff, submitted the bid referred to in Plaintiff's amended complaint. Although

Plaintiff admits that it mistakenly named the incorrect plaintiff, it asserts that the trial court erred in granting summary judgment, rather than granting its motion under SCRA 1–021 permitting it to correct the misjoinder by substituting and joining Petelski as the plaintiff herein.

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the burden shifts to the nonmoving party to demonstrate that a genuine, triable issue of material fact exists. *Koenig v. Perez,* 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). At this point, the nonmoving party may not rely on its pleadings, but must come forward to show that a material issue of fact remains in dispute. *Oschwald v. Christie,* 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980). Plaintiff failed to meet this requirement. However, while it is clear that the trial court's decision to grant summary judgment against Plaintiff was supported by the uncontested fact that it was not a real party in interest having authority to pursue the claim herein, because Plaintiff filed a motion to join Petelski as a party plaintiff, we must also examine Plaintiff's claim that the court abused its discretion in not permitting the joinder.

Following the hearing on Defendants' motion for summary judgment and Plaintiff's motion to permit joinder of Petelski as a party plaintiff, the trial court granted the motion for summary judgment and denied Plaintiff's motion to join Petelski. In denying the motion for joinder, the trial court stated in its letter to counsel:

> It is the court's position that if Mr. Petelski desires to pursue a claim, it should be done by filing an amended complaint or filing a separate suit. This is a cleaner way to proceed for the court can then make a determination of propriety of attorneys' fees through this date, and separately the propriety of attorneys' fees as to the claim of the individual and a better method to clearly set forth the individual's claim rather than a band-aid attempt to modify the existing complaint by a mere joinder.

Plaintiff argues that the trial court erred in denying its motion for joinder of Petelski and that if the court had permitted the joinder, the order granting summary judgment and dismissal of the action would have thereby been rendered improper. In advancing this argument, Plaintiff reasons that although generally the decision of whether to permit joinder of an additional party plaintiff to an action under SCRA 1986, 1–019(A) (Repl.1992) rests within the sound discretion of the trial court, *see C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc.,* 112 N.M. 89, 91, 811 P.2d 899, 901 (1991), nevertheless, in the instant case, the trial court abused its discretion in denying its motion to join Petelski as a real party in interest.

SCRA 1–017(A) specifies, in applicable part:

> Every action shall be prosecuted in the name of the real party in interest.... Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

SCRA 1–021 governs situations where there has been a misjoinder or nonjoinder of parties. This rule provides:

> *Misjoinder of parties is not ground for dismissal of an action.* Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately. [Emphasis added.]

We agree with Plaintiff that, in the instant case, SCRA 1–017(A) and 1–021 should be read together, *cf. Prager v. Prager,* 80 N.M. 773, 775, 461 P.2d 906, 908 (1969) (observing that rules involving joinder should be read together with other applicable rules), and that joinder of an indispensable or necessary party is favored

in order to avoid multiplicity of suits. *Cf. United Nuclear Corp. v. Fort,* 102 N.M. 756, 761, 700 P.2d 1005, 1010 (Ct.App.1985) (public policy favors avoidance of multiplicity of suits).

As observed by 3A James W. Moore et al., *Moore's Federal Practice* Paragraph 19–05[2], at 19–82 (1993) [hereinafter *Moore's Federal Practice*], "If a timely objection is made for non-joinder of a necessary party, when joinder is feasible, the claimant should be given an opportunity to add the non-joined person and if he fails to do so the claim should be dismissed." *See also Heath v. Aspen Skiing Corp.,* 325 F.Supp. 223, 229 (D.Colo.1971) (philosophy underlying enactment of Rule 19 is to avoid dismissal wherever possible); *Gonzalez v. Fireman's Fund Ins. Co.,* 385 F.Supp. 140, 144–45 (D.P.R.1974) (if court drops misjoined party, no amended complaint is necessary). Similarly, *Moore's Federal Practice* Paragraph 21.03[1], at 21–4, –5, states:

> Rule 21 reflects a repudiation of the overly technical common law rule under which misjoinder was fatal to a lawsuit. Thus the Rule provides that "[m]isjoinder of parties is not ground for dismissal of an action." Under Rule 21, the misjoined party may be dropped at any stage of the action on such terms as the court deems just, either on motion of a party or on its own initiative. [Footnotes omitted.]

The above interpretation is mirrored by 7 Charles A. Wright et al., *Federal Practice and Procedure* Section 1688, at 467 (1986), which notes: "A defect in parties must be specifically raised and should not be argued indirectly through a motion for summary judgment under Rule 56."

Although we agree with Plaintiff that under SCRA 1–021, misjoinder of G.E.W. Mechanical Contractors, Inc., rather than Petelski as the named plaintiff, was not a proper ground for dismissal under SCRA 1–021, we conclude that this issue has been rendered moot by reason of Petelski's decision to file a separate action asserting such claims. As set forth in the trial court's letter to the parties, the court indicated that in light of its decision granting summary judgment, Plaintiff could file an amended complaint setting forth Petelski's claim or file a separate action. Petelski chose the latter option. Plaintiff's reply brief concedes that Petelski filed a separate suit but, without citation of authority, denies that the issue is moot. We disagree. It is undisputed that Plaintiff in the instant case was not the real party in interest. Thus, it has failed to demonstrate how the trial court's ruling, even if erroneous, resulted in prejudice to Plaintiff. "To be reversible, error must be prejudicial." *In re Rhonda A.,* 110 N.M. 228, 233, 794 P.2d 371, 376 (Ct.App.), *rev'd on other grounds,* 110 N.M. 454, 797 P.2d 243 (1990); *Heron v. Conder,* 77 N.M. 462, 464, 423 P.2d 985, 986 (1967).

Plaintiff also argues that the trial court failed to consider whether, with Petelski joined in the action as an additional plaintiff, the corporation could have maintained an action for damages against Defendants. We find this argument unpersuasive. Plaintiff has acknowledged that it "mistakenly failed to join [Petelski] as a plaintiff," thus, there was a misjoinder of parties. Nothing in the pleadings demonstrates that Plaintiff was the real party in interest or was legally authorized to pursue this action. Under this posture, Plaintiff has failed to rebut Defendants' prima facie showing of entitlement to summary judgment. Under the circumstances, the trial court's order dismissing Plaintiff's action did not constitute reversible error.

II. *Award of Attorney's Fees*

Following the granting by the trial court of Defendants' motion for summary judgment, the court conducted an evidentiary hearing on Defendants' motion for attorney's fees and costs. Defendants sought an award of attorney's fees and costs, relying on the provisions of NMSA 1978, Section 57–12–10(C) (Repl.Pamp.1987) of New Mexico's Unfair Trade Practices Act. This subsection provides in part: "The court shall award attorneys' fees and costs to the party charged with an unfair or deceptive trade practice or an unconscionable trade

practice *if it finds that the party complaining of such trade practice brought an action which was groundless.*" *Id.* (emphasis added).

The trial court found that "plaintiff's action was groundless within the meaning of the New Mexico Unfair Trade Practices Act ... [Section] 57–12–10(C) ... and that Defendants should be awarded $12,300.00, as attorneys' fees and costs of $656.07...." Plaintiff argues that the trial court erred in awarding attorney's fees and costs, and asserts that its action was not "groundless" within the meaning of Section 57–12–10(C). Plaintiff has not challenged the trial court's award of costs. It argues that although it was guilty of a technical error and misjoinder in naming Plaintiff, a corporation, rather than Petelski as plaintiff herein, nevertheless, under the facts existing here, its claim cannot be considered groundless within the contemplation of Section 57–12–10(C) so as to permit an award of attorney's fees.

The question of what constitutes a "groundless" action within the contemplation of Section 57–12–10(C) of the New Mexico Unfair Trade Practices Act presents an issue of first impression. Both parties correctly cite the general rule that each party to an action is required to bear its own attorney's fees unless by statute, contractual agreement, or court rule an award of attorney's fees is authorized. *Reed v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302, 1308–09 (10th Cir.1981); *see also Hickey v. Griggs*, 106 N.M. 27, 30, 738 P.2d 899, 902 (1987).

Plaintiff, relying upon *City of Farmington v. L.R. Foy Construction Co.*, 112 N.M. 404, 408–10, 816 P.2d 473, 477–79 (1991), observes that while Section 57–12–10(C) has not previously been interpreted, our Supreme Court has construed a similar statute, NMSA 1978, Section 59A–16–30 (Repl.Pamp.1988), contained in the State Insurance Code. The Court determined that, under such statute, a defendant who successfully defends against a claim alleging that it engaged in unfair or deceptive insurance trade practices is not entitled to an award of attorney's fees absent a showing of subjective knowledge on the party of the plaintiff that when the action was filed he knew the claim was groundless. *Id.* In *City of Farmington* the Court held:

> Section 59A–16–30 contemplates a discretionary award of attorneys' fees not for the pursuit of an action ultimately found to be groundless, but if the complainant "has *brought* an action which he *knew* to be groundless." (Emphasis added.) In other words, the statute expresses the clear legislative intent that for plaintiffs to be sanctioned with attorneys' fees it must be shown they subjectively knew at the time the suit was filed that the complaint was groundless....
>
> The groundlessness of a suit should not be determined in retrospect. Merely because in hindsight it may appear obvious that no facts or law support a judgment for the plaintiff, a suit may not necessarily be groundless. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–22, 98 S.Ct. 694, 700–01, 54 L.Ed.2d 648 (1978). A claim may appear meritorious to a plaintiff based on the initial pleadings, although as facts and legal theories develop it may become apparent that the suit is in fact groundless.

Id. at 407–08, 816 P.2d at 476–77 (footnote omitted).

In response to Plaintiff's arguments, Defendants contend that since the amended complaint was filed by G.E.W. Mechanical Contractors, Inc., and it could not have prevailed in an action for damages against Defendants, the trial court properly determined that the complaint was groundless both in law and fact. Defendants also assert that the decision in *City of Farmington* is not controlling in the present case because Section 59A–16–30 (Repl.Pamp.1992), unlike Section 57–12–10(C), contains language which authorizes attorney's fees to be awarded to the prevailing party only when the party brought an action "that he knew to be groundless," or where a party "has willfully engaged in [a] violation" of the act.

We agree with Defendants that Section 57–12–10(C) differs from the language

of Section 59A–16–30. Under the latter statute, a prerequisite for an award of attorney's fees to a defendant who has successfully defended against a claim alleging unfair insurance competition or deceptive insurance practices, is a showing that when the action was commenced, the plaintiff knew the action was without any valid basis in law or fact to support the claim. In interpreting Section 57–12–10(C), however, we do not read the statute to authorize an award of attorney's fees to Defendants merely because they successfully prevailed against the claims asserted by Plaintiff. Instead, we conclude that the purpose of Section 57–12–10(C) in authorizing an award of attorney's fees to a defendant where the action is determined to have been "groundless," is to reimburse a party for the expense of defending a frivolous action and to dissuade parties from filing actions where there is no arguable basis in law or fact to support the cause of action and the claim is not supported by a good-faith argument for the extension, modification, or reversal of existing law.

In enacting Section 57–12–10(C), we believe the legislature intended the term "groundless" to have the same meaning as "frivolous," as used in SCRA 1986, 16–301 (Repl.Pamp.1991). The latter rule provides in applicable part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *Id.; cf. Scott v. Mego Int'l, Inc.*, 524 F.Supp. 74, 75 (D.Minn.1981) (affirming trial court's denial of award of attorney's fees in action alleging infringement of trademark and violation of Minnesota's Deceptive Trade Practices Act, where there was no showing that Plaintiff's claims were groundless, frivolous, or pursued in bad faith); *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 63, 582 P.2d 1270, 1276 (1978) (construing term "frivolous" contained in former Civil Appellate Rule 20 to mean "without merit"); *Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc.*, 80 N.M. 646, 649, 459 P.2d 350, 353 (1969) (determining purpose of statute authorizing award of attorney's fees to prevailing party in suits on open account is to discourage litigation as a tactic to either avoid paying just debts or to enforce false claims); *see generally* Debra E. Wax, Annotation, *Award of Attorney's Fees in Actions Under State Deceptive Trade Practice and Consumer Protection Acts*, 35 A.L.R.4th 12, § 7 (1985).

Viewed by the above standards, we cannot say that, at the time Plaintiff filed its action herein, the action was initiated in bad faith or that there was no credible evidence to support its claim. Moreover, in view of the admonition contained in SCRA 1–021 that "[m]isjoinder of parties is not ground for dismissal of an action," there has been no showing that had the action been commenced by the real party in interest such action would have been groundless or initiated in bad faith. Thus, we conclude that the trial court erred in awarding attorney's fees under the circumstances existing herein.

CONCLUSION

We affirm the trial court's order of dismissal and denial of Plaintiff's motion for joinder. We reverse the award of attorney's fees.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

858 P.2d 401

In the Matter of Tom CHERRYHOMES. An attorney licensed to practice law before the courts of the state of New Mexico.

No. 16153.

Supreme Court of New Mexico.

Aug. 17, 1993.

Sally E. Scott, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Gary C. Mitchell, Ruidoso, for respondent.

OPINION

PER CURIAM.

This matter is before the Court for consideration of the Disciplinary Board's recommendations in two consolidated disciplinary proceedings. Both involve dishonest conduct by Tom Cherryhomes. The discipline recommended by the Disciplinary Board—indefinite suspension with conditions precedent to reinstatement—is determined to be appropriate.

The first proceeding began with a complaint from James Mackovich that Cherryhomes charged him an excessive fee. Mackovich retained Cherryhomes in December 1989 to defend him on state criminal charges, for a fee of $7,500. After bonding out on all state charges, Mackovich was held in the Eddy County jail on a federal detainer. Mackovich alleged that approximately one month later, a few days before he was released, Cherryhomes offered to defend him on the federal charges for an additional $7,500. Mackovich agreed and arranged to have the additional fee paid to Cherryhomes in cash.

What Mackovich did not know was that, at the time he agreed to the additional fee, the federal charges already had been dismissed, *sua sponte*, by the Assistant United States Attorney. Cherryhomes did nothing to bring about dismissal of the federal charges. The Assistant United States Attorney testified at the hearing on the Mackovich complaint that he had no contact with Cherryhomes concerning dismissal of the charges and that he did not know Cherryhomes was representing Mackovich at the time he dismissed the charges. The only action taken by Cherryhomes was to arrange to have a copy of the dismissal sent to Eddy County via telecopier. This occurred approximately one month after the charges were dismissed.

Throughout the investigation of the Mackovich complaint, Cherryhomes falsely represented to disciplinary counsel that he was responsible for the dismissal of the federal charges, and that he thereby earned the fee paid by Mackovich. At the hearing on the Mackovich complaint, Cherryhomes continued to maintain that he obtained the dismissal of the federal charges.

The hearing committee found that Cherryhomes charged an unreasonable fee in violation of SCRA 1986, 16–105(A), and, because he refused to refund the unearned fee, that he violated Rule 16–116(D) by failing to protect his client's interests at

the termination of the representation. The more serious violations found by the committee related to dishonesty: That Cherryhomes knowingly made false statements of material fact in connection with a disciplinary matter in violation of Rule 16–801(A) and that he violated Rule 16–804(C) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The committee also found that Cherryhomes violated Rule 16–804(D) by engaging in conduct prejudicial to the administration of justice and Rule 16–804(H) by engaging in conduct that adversely reflects on his fitness to practice law. The committee recommended Cherryhomes be indefinitely suspended, that he make restitution to Mackovich in the sum of $7,500, and that he pay the costs of the disciplinary action.

The Mackovich case then was assigned to a panel of the Disciplinary Board for oral argument. At the request of Cherryhomes' counsel, Gary C. Mitchell, by whom Cherryhomes was represented after the Mackovich hearing, an order of continuance, remand, and consolidation was entered by the Board panel. The matter was remanded to the hearing committee for the purpose of receiving mitigating and aggravating evidence and argument on the appropriate discipline to be imposed.

Certain stipulated conditions also were contained in the remand order. Cherryhomes was to deposit the sum of $10,000 in the trust account of his attorney. This sum was intended to cover $7,500 for the recommended restitution to Mackovich, plus costs. Cherryhomes did not deposit the money as agreed.

It was further stipulated that Cherryhomes would receive a psychological evaluation and, if therapy was recommended, he would follow that recommendation. The initial psychological evaluation was conducted by Robert H. Walters, Ph.D., a psychologist selected by Cherryhomes and his attorney. He then was evaluated by William E. Foote, Ph.D., a psychologist selected by disciplinary counsel. Both psychologists recommended that Cherryhomes undergo psychotherapy. Walters also recommended that Cherryhomes undergo a neurological evaluation because of a head injury he suffered in August 1991. Cherryhomes did not receive psychotherapy as agreed and did not undergo a neurological examination.

The remanded Mackovich case was consolidated with a second disciplinary matter, which arose out of Cherryhomes' application to practice law in the state of Arizona. As part of the application process, Cherryhomes was required to submit a certificate signed by a physician, stating that the physician had examined Cherryhomes and found him to be "mentally and physically able to engage in the active and continuous practice of law."

The physician's certificate submitted to the Arizona Bar by Cherryhomes was not signed by a physician. Instead, Cherryhomes forged the name of a physician, Dr. Ron Hoffman, on the form he submitted. Cherryhomes has admitted he forged the signature of Dr. Hoffman on the physician's certificate.

The hearing committee found that Cherryhomes knowingly made a false statement of material fact in connection with a bar admission application, in violation of SCRA 1986, 16–801(A), and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 16–804(C).

The committee also made conclusions of law concerning aggravation and mitigation. The committee concluded that Cherryhomes had a prior disciplinary record,[1] that he had engaged in bad faith obstruction of the disciplinary process by intentionally failing to comply with orders of the Disciplinary Board panel, and that he had committed multiple offenses.

The committee again recommended that Cherryhomes be indefinitely suspended, that he be ordered to make restitution to Mackovich in the sum of $7,500, and that he pay the costs of the action. In addition, the committee recommended that Cherry-

1. Cherryhomes was formally reprimanded in 1985 for three incidents involving physical and verbal abuse of participants in legal proceedings in which he was involved.

homes be required to take and satisfactorily complete the multi-state ethics exam, and that he proceed with the recommendation that he receive psychotherapy and undergo a neurological examination.

Thereafter, oral argument on the consolidated proceedings was heard by the Disciplinary Board. The Board adopted the findings and conclusions of the hearing committee with one reservation—that suspension from the practice of law would not be justified if the only issue was the excessive or unearned fee in the Mackovich matter. However, "the evidence of active misrepresentation to the Disciplinary Board and its counsel and to the admissions committee of the Supreme Court of the State of Arizona raise much more serious concerns of [Cherryhomes'] dishonesty. Those violations, whether taken by themselves or in combination with the other matters in the record, call for the suspension of [Cherryhomes] from the practice of law and other sanctions recommended by the hearing committee."

The Court always regrets the necessity of imposing discipline on attorneys, particularly those who have a reputation for working long and hard for their clients, as does Cherryhomes. Nonetheless, the Court finds the recommendations of the Disciplinary Board to be well taken. Cherryhomes clearly made false representations during the disciplinary process and his conduct in forging a physician's signature on the certificate of fitness required by the Arizona bar application process is reprehensible.

This Court previously has indicated that an attorney found to have engaged in intentional conduct involving dishonesty or misrepresentation is a strong indication that the person is unfit for membership in the bar. *In re Ayala,* 102 N.M. 214, 693 P.2d 580 (1984). "Intentional dishonesty by an attorney will not be tolerated." *In re Klipstine,* 108 N.M. 481, 483, 775 P.2d 247, 249 (1989); *see also In re Siler,* 106 N.M. 292, 742 P.2d 504 (1987) (attorney suspended indefinitely with conditions after forging names of co-tenants on warranty deed). Cherryhomes engaged in intentionally dishonest conduct, which shall not be tolerated, and such conduct strongly indicates that, at this time, he is unfit for membership in the State Bar of New Mexico.

IT IS THEREFORE ORDERED that, effective the 23rd day of December, 1992, Tom Cherryhomes be and hereby is indefinitely suspended from the practice of law in the State of New Mexico pursuant to the provisions of SCRA 1986, 17–206(A)(3) and 17–206(B)(1).

IT IS FURTHER ORDERED that Tom Cherryhomes shall make restitution to James Mackovich in the sum of $7,500 pursuant to SCRA 1986, 17–206(C).

IT IS FURTHER ORDERED that Tom Cherryhomes shall take and satisfactorily complete the multi-state ethics examination.

IT IS FURTHER ORDERED that Tom Cherryhomes shall comply with the recommendations of psychologist Robert W. Walters, Ph.D.:

> that he enter psychotherapy to address his psychological problems; that he undergo neurological examination, including computerized tomography scan, to ascertain the extent of any brain injury suffered in an accident in August of 1991.

IT IS FURTHER ORDERED that the costs of this action, in the sum of $4,476.31, are assessed against Cherryhomes and should be paid to the Disciplinary Board no later than December 31, 1993. Interest of fifteen percent (15%) per annum will be assessed against any amount unpaid by that date until the costs are paid in full.

IT IS FURTHER ORDERED that reinstatement shall be upon application as provided in SCRA 1986, 17–214(B), upon proof of compliance with all of the above and foregoing terms of this order.

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.

858 P.2d 404

In the Matter of Frank C. GABELL. An attorney suspended from the practice of law before the courts of the state of New Mexico.

No. 21278.

Supreme Court of New Mexico.

Aug. 17, 1993.

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

Frank C. Gabell, pro se.

OPINION

PER CURIAM.

This matter is before the Court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17–101 to –316 (Repl.Pamp.1991), in which attorney Frank C. Gabell, previously suspended from the practice of law for failure to pay bar dues but licensed at the time of the actions giving rise to this opinion, was found to have violated numerous provisions of the Rules of Professional Conduct, SCRA 1986, 16–101 to –805 (Repl.Pamp.1991 & Supp.1992). We adopt the recommendation of the Disciplinary Board that Gabell be disbarred pursuant to Rule 17–206(A)(1) and assessed the costs of this action.

Gabell was hired in early 1985 by attorney George G. Duncan to assist Duncan with a class action lawsuit in which Duncan was representing numerous plaintiffs before the U.S. District Court for the District of New Mexico. In June 1986, the court awarded Duncan slightly more than $2.5 million in attorney fees for his successful prosecution of the plaintiffs' case; of this amount, Duncan paid Gabell over $173,000 in fees and gross receipts taxes for his 614 hours of assistance.

Although the class action suit was at an end, Duncan permitted Gabell to occupy space in his law offices and occasionally associated with him on other cases or referred cases to him. This arrangement ended in February 1988, when Gabell demanded that he be paid additional monies for his work on the class action case. A dispute ensued between Duncan and Gabell, and Gabell was asked to vacate the office he had occupied.

Gabell persisted in his efforts to extract more money from Duncan and, when his efforts were unsuccessful, filed a lawsuit against Duncan claiming that a partnership or joint venture had existed between them and demanding a formal accounting and a division of the profits of the "partnership."

During the course of formal discovery, Gabell was requested by Duncan's attorney to produce copies of all gross receipts tax forms and federal and state income tax returns filed by him for the years 1985 through 1988. Gabell produced, among other things, three gross receipts tax forms for the period of January through June 1986 and two federal and two state income tax returns for 1986.

The original gross receipts tax form filed on July 1, 1986, declared income of $166,844 and gross receipts taxes in the amount of $8,043.75. The first amended gross receipts tax form, filed in January 1987, indicated that Gabell over-reported his January–June 1986 income by $60,000 and overpaid his gross receipts taxes by $2,924.99. The federal and state income tax returns for 1986, filed on April 15, 1987, comported with the amended gross receipts tax form and fraudulently under-reported Gabell's 1986 income by approximately $60,000.

The second amended gross receipt tax form, ostensibly filed in January 1990, cor-

rectly reflected Gabell's income during the first six months of 1986 as did the amended 1986 federal and state income tax returns shown as having been filed on November 20, 1990.

In January 1991, Gabell's deposition was taken, and he was questioned about the 1986 tax returns. He freely admitted under oath that he had under-reported his income for 1986 to the Internal Revenue Service and to the State of New Mexico by approximately $60,000 and that he had filed the inaccurate first amended gross receipts tax form to comport with his income tax forms. He did this, he said, because he felt he "should reserve a certain sum of money" for himself. He claimed, however, that he had taken steps to correct these misstatements by filing the second amended gross receipts tax form and the amended income tax returns for 1986. Gabell acknowledged as well that he had accepted a refund of the gross receipts taxes he claimed to have overpaid.

We note in passing that Gabell was convicted in federal court of the crime of making a false statement on his 1986 federal income tax return contrary to 26 U.S.C. Sec. 7206(1). This conviction, having occurred after the disciplinary hearing in this matter, does not provide the basis for our decision to disbar Gabell. Nonetheless, attorneys have in the past been disbarred for tax-related crimes. *See, e.g., In re Norrid,* 100 N.M. 326, 670 P.2d 580 (1983).

The discovery process also uncovered evidence that Gabell manufactured another of the documents he submitted to Duncan's attorney and lied under oath regarding the facts of the underlying controversy and matters bearing on his credibility. Because of Gabell's apparent propensity to distort the truth and willingness to fabricate evidence, Duncan's attorney made inquiry of state and federal tax officials regarding the authenticity of Gabell's 1986 gross receipts and income tax returns. Gabell was ordered by the district court to assist with these efforts, although he strenuously resisted doing so. Ultimately, it was discovered that the second amended gross receipts tax returns never had been filed by Gabell. The copies submitted to Duncan's attorney were in fact documents Gabell fraudulently manufactured for use in his litigation against Duncan.

Upon learning of Gabell's many efforts at deception, the district court judge dismissed his lawsuit with prejudice and reported his actions to the office of disciplinary counsel, noting in the complaint that Gabell had shown "no remorse and no sense of the wrongfulness of his actions" and expressed her belief "that Frank Gabell is utterly unfit to practice law." We agree with this assessment.

By his conduct Gabell has violated Rules 16-303(A)(4), 16-304(B), and 16-804(B) and (C) of the Rules of Professional Conduct, all of which prohibit various intentional acts of dishonesty. Such dishonesty often results in an attorney's disbarment. *In re Duffy,* 102 N.M. 524, 697 P.2d 943 (1985); *In re Ayala,* 102 N.M. 214, 693 P.2d 580 (1984); *see also ABA Standards for Imposing Lawyer Sanctions,* Standard 6.11 ("Disbarment is generally appropriate when a lawyer, with the intent to deceive a court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.")

When false evidence is presented during the course of litigation, the adversarial system is compromised. The effectiveness of our system of justice depends upon a full and truthful disclosure of facts at all stages of a legal proceeding. Only in this way can justice be attained and public confidence in the legal system be preserved. When an attorney, who is an officer of the court and whose duty it is to protect the integrity of the system, intentionally lies under oath and manufactures documents designed to achieve an advantage in litigation, that attorney demonstrates a complete lack of fitness to practice law. As one court has noted, "Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to

truth." *Office of Disciplinary Counsel v. Grigsby,* 493 Pa. 194, 425 A.2d 730 (1981).

NOW, THEREFORE, IT IS ORDERED that Frank C. Gabell be, and he hereby is, disbarred from the practice of law pursuant to SCRA 1986, 17–206(A)(1), effective June 30, 1993.

IT IS FURTHER ORDERED that any motion for permission to apply for reinstatement that Gabell may file pursuant to SCRA 1986, 17–214(A), must be accompanied by a showing that he has paid the costs assessed herein.

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

The cost of this action in the amount of $230.88 are assessed against Gabell and should be paid to the Disciplinary Board no later than December 31, 1993. Interest of fifteen percent (15%) per annum will be assessed against any amount unpaid by that date until the costs are paid in full.

IT IS SO ORDERED.

FRANCHINI, J., not participating.

FROST, J., not participating.

858 P.2d 406

CITY OF ALBUQUERQUE, a municipal corporation, Petitioner–Appellant,

v.

PCA–ALBUQUERQUE # 19 and Chavez Properties, Respondents–Appellees.

No. 13155.

Court of Appeals of New Mexico.

March 19, 1993.

Certiorari Denied May 5, 1993.

David S. Campbell, City Atty., Robert I. Waldman, Kevin J. Curran, Asst. City Attys., Albuquerque, for petitioner-appellant.

Tito N. Quintana, Albuquerque, Michael H. Anderson, Dallas, TX, Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, for respondents-appellees.

OPINION

HARTZ, Judge.

The City of Albuquerque (the City) appeals from an award of $246,000 to PCA–Albuquerque # 19 (PCA) and Chavez Properties, a Georgia general partnership (the Partnership), on the City's petition for condemnation. In the condemnation proceeding the City acquired two easements, each measuring five feet by ten feet, on a fifteen-acre parcel (the Property) fronting on the west side of Yale Boulevard across from the entrance to the Albuquerque airport. The Partnership had been using the Property as a parking facility. The City needed the easements to install foundations for support posts for signs above Yale Boulevard directing airport traffic. PCA owned the Property at the time the City filed its petition. The Partnership thereafter acquired the property from PCA.

The City asks for a new trial on the grounds that the district court erred by (1) permitting the Partnership to call expert witnesses who were not disclosed until the first day of trial, (2) permitting Manuel Chavez, one of three partners in the Partnership, to testify as to the value of the Property, and (3) permitting expert witness Frank Bona Sr. to state his opinion of the percentage decrease in value of the Property due to the taking by the City. We summarily reject the City's contentions with respect to the Chavez testimony. We find reversible error in the admission of the Bona testimony. We need not address the City's first claim of error.

I. CHAVEZ TESTIMONY

The City's brief-in-chief raises interesting challenges to Chavez's testimony. Our review is limited, however, to objections made at trial, SCRA 1986, 11–103(A)(1), and is further limited to only those objections that are referred to in the City's brief-in-chief. SCRA 1986, 12–213(A)(3) (Repl.1992). We have reviewed those objections and find no reversible error.

II. BONA TESTIMONY

To put the Bona testimony in perspective, we briefly recite the governing substantive law. The parties agree that the proper measure of damages is the difference between the value of the Property immediately before the taking and the value of the Property immediately after the

taking.[1] *See City of Clovis v. Ware,* 96 N.M. 479, 480, 632 P.2d 356, 357 (1981); *City of Albuquerque v. Chapman,* 76 N.M. 162, 166, 413 P.2d 204, 206–07 (1966); SCRA 1986, 13–704 (Repl.1991) (uniform jury instruction on measure of damages in partial taking). "The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put." *City of Clovis,* 96 N.M. at 480, 632 P.2d at 357; *accord Chapman,* 76 N.M. at 169, 413 P.2d at 209; SCRA 1986, 13–711 (uniform jury instruction defining fair market value) (Repl.1991); SCRA 1986, 13–714 (Repl.1991) (uniform jury instruction on highest and best use). Determination of the highest and best use should be made with " 'regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.' " *State ex rel. State Highway Comm'n v. Pelletier,* 76 N.M. 555, 560, 417 P.2d 46, 49–50 (1966) (quoting from what is now Julius L. Sackman & Patrick J. Rohan, 4 *Nichols' The Law of Eminent Domain* Section 12B.12, at 12B–117 (rev. 3d ed. 1990) [hereinafter *Nichols*]).

The Partnership called Bona as an expert witness. Bona had substantial experience in buying, owning, operating and selling off-premises airport parking facilities in several states, not including New Mexico. His first visit to Albuquerque was to testify in this trial. He viewed the Property the morning before he testified. He had arrived in town the preceding night. He testified that the traffic signs supported by the posts on the easements blocked the view of the Property and would distract drivers from noticing signs on the Property. As a result, the value of the Property would be decreased by seven or eight percent.

As explained by trial counsel for the Partnership, the purpose of the testimony was to establish a basis for computing the reduction in the value of the Property caused by the condemnation. Once a figure was set for the value of the Property before the condemnation, one would multiply that figure by seven or eight percent to obtain the reduction in value. In other words, Bona was offered to the jury as an expert on the decrease in the fair market value of the Property resulting from the condemnation.

The City objected on several grounds, including that Bona was not qualified to testify on these matters because of his lack of knowledge of Albuquerque and because of an inadequate foundation for his testimony. The court overruled the objections, although it later sustained an objection to similar testimony by another out-of-state expert witness called by the Partnership.

We recognize that a district court has wide discretion with respect to the admissibility of expert testimony in condemnation cases. *See City of Santa Fe v. Gonzales,* 80 N.M. 401, 403, 456 P.2d 875, 877 (1969). Nevertheless, there are limits. We hold that the district court abused its discretion in permitting Bona to testify to his opinion of the percentage decrease in the value of the Property caused by the condemnation. Because Bona lacked knowledge of property values in the vicinity of the Property, he was not qualified to express an opinion quantifying the decrease in value of the Property in either actual dollar or percentage terms.

The general rule is stated in 5 *Nichols* Section 23.07, at 23–64 to –65:

> While dealers in real estate, local officials and other witnesses who are supposed to have a special expertise and skill in appraising real estate are commonly spoken of as "real estate experts," they are not expert witnesses in the narrower meaning of the phrase. In other words, the general skill and knowledge that such persons are supposed to possess is not, in itself, enough to qualify them to give an opinion of value in an

1. We need not address whether NMSA 1978, § 42–2–15(A), which provides that the right to damages is deemed to accrue when the petition for condemnation is filed, conflicts with SCRA 13–704. That issue, which was not raised by the parties, is pending before our Supreme Court in *County of Dona Ana v. Bennett, cert. accepted* (N.M. Jan. 9, 1992) (No. 20,308).

> eminent domain proceeding. *They must, in addition to such general knowledge, be acquainted with values in the vicinity of the land in controversy,* and be familiar with the property itself, or at least have examined it at or about the time of the taking. (Emphasis added.) (Footnotes omitted.)

See id. § 23.04, at 23–36 (non-expert witness must have knowledge of market value in the vicinity); 23.07[3], at 23–87 (expert witness "should detail the circumstances which have given him knowledge of values in the vicinity of the property taken").

There may be exceptions to the general rule that an expert witness on value in a condemnation case must be familiar with property values in the vicinity of the condemned land. For example, *Nichols* notes authority for the proposition that if evidence establishes that the full structural value of a building is one item of the market value of the property, then a carpenter not familiar with general property values could testify to the building's structural value. *Id.* § 23.07, at 23–69; *see, e.g., State ex rel. State Highway Comm'n v. Martinez,* 81 N.M. 442, 468 P.2d 413 (1970) (contractor could testify as to reproduction costs of improvements). Yet, the Partnership has not directed us to any authority permitting expert testimony on the value of *land* by one not familiar with local land values, and we have found no such authority ourselves. Perhaps in certain exceptional circumstances a court could properly admit opinion testimony regarding land value (or change in land value) by an expert not familiar with local land values. In this case, however, the Partnership has not shown such exceptional circumstances. The general rule reflects a presumption that local conditions are so likely to affect property values that a person unfamiliar with local conditions could do no more than speculate in providing testimony quantifying value. That presumption was not rebutted here. The record in this case provides no factual basis upon which the district court could have concluded that local conditions would be immaterial to the percentage change in value about which Bona testified. On the contrary, the record suggests at least two respects in which Bona's testimony was speculative.

First, Bona based his estimate of the decrease in value on the reduced visibility of the Property to persons traveling on Yale Boulevard; he said that the traffic signs would distract the attention of travelers and would obstruct their view of the Property. Yet, a number of local factors have an apparent direct relevance to the business consequences of a reduction in visibility of the Property to automobile travelers on Yale Boulevard; e.g., the demand in Albuquerque for off-premises airport parking, the supply of such parking facilities, the percentage of clientele that is repeat business, the percentage of clientele that comes from travel agency referrals, the percentage of clientele that chooses a parking facility while driving to the airport, etc. Bona may have expertise on such matters with respect to cities in which he has owned or managed airport parking facilities, but he did not establish either that such factors are irrelevant to the value of a parking facility or that they are essentially constant from city to city.

Secondly, Bona's expertise was limited to off-premises airport *parking facilities.* Although he mentioned that he "occasionally" was involved "on other type of airport property development," he established no expertise with respect to airport property in general and his testimony regarding the percentage decrease in value of the Property was clearly based on the Property's value as a parking facility. His only reference to the effect of the condemnation on other uses of the Property was a comment during his redirect testimony that the condemnation could also affect access to a hotel on the Property. As stated above, however, the value of the Property remaining after condemnation must be based on its *highest and best* use. Even if the condemnation made the Property totally worthless as a parking facility, the owner might be entitled to only a small sum for compensation if the Property would be almost as valuable as a hotel site as it was before condemnation of the easement.

Certainly, expertise regarding the Albuquerque market would be necessary before rendering an opinion on the highest and best use of the Property. *See Pelletier*, 76 N.M. at 560, 417 P.2d at 49–50 (determine best use with "regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future"). We note that no other witness testified that the highest and best use of the Property was as a parking facility. Chavez testified "a higher and better use for the property in question is to build a hotel." He said that he had not acquired the Property primarily to get a parking lot, but as an investment. The City's expert appraiser testified that "the most probable highest and best use of the [Property] is the holding for resale and commercial development," which included, but was not limited to, use as a parking lot.

Our purpose in discussing the shortcomings in the foundation for Bona's testimony is not to suggest that we expect the district court to engage in detailed analysis in determining whether to allow expert testimony on land value in condemnation cases by one who is unfamiliar with the value of land in the locality. Our purpose, rather, is only to indicate the number of potential pitfalls for such testimony. In future cases the general rule for the district court to follow is simply to exclude expert testimony on land value by one who is not familiar with property values in the area. Because we cannot foresee every possible circumstance, we leave open the opportunity for the proponent of such an expert witness to establish exceptional circumstances that justify admission of the expert's opinion. But we expect such circumstances to be rare, if not nonexistent.

In light of the foregoing analysis, we can readily distinguish the cases upon which the Partnership relies to support the admission of Bona's testimony. In *United States v. 77,819.10 Acres of Land*, 647 F.2d 104 (10th Cir.1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982), the issue was compensation for the taking of an evacuation estate ("an interest in land enabling the condemnor to require occupants to periodically vacate the land," *id.* at 106 n. 1) in rural range land caused by missile overflights from a local military base. The Tenth Circuit Court of Appeals approved the admission of testimony by an expert witness that the condemnation would reduce by fifty percent the rental value of the land for ranching. His testimony did not provide before-and-after values for the property. The expert witness, however, owned a nearby ranch and was familiar with values of New Mexico ranch property. Moreover, the commission that received the testimony in that case (whose chairman, by coincidence, is a member of this panel) found that the highest and best use of the land was for grazing and ranching. *Id.* at 107; *cf. Coronado Oil Co. v. Grieves*, 642 P.2d 423 (Wyo.1982) (disallowing admission of such percentage testimony). Here, as already stated, Bona had no knowledge of local land values and the testimony at trial would not support a finding that the highest and best use of the land was as a parking lot.

The Partnership cites *City of Santa Fe v. Gonzales*, 80 N.M. 401, 456 P.2d 875 (1969), for the proposition that there is "no fixed or magic number of times the witness must see property in order to form an opinion about it." In that case the city's expert appraiser visited the property on a number of occasions, took photographs, made measurements, etc. Nevertheless, the trial court disallowed his testimony since he had not been inside the apartments. The Supreme Court reversed, stating that the testimony of Rogers was not based on conjecture, speculation, or surmise. The problem with Bona's testimony is not, however, the number of times he visited the property; it is his lack of familiarity with land values in the community.

III. HARMLESS ERROR

Finally, the Partnership contends that any error in the admission of Bona's testimony was harmless because the verdict is supported by other, admissible evidence—namely, the Chavez testimony. It relies on *Levy v. Disharoon*, 106 N.M. 699, 749 P.2d 84 (1988); *Jewell v. Seidenberg*,

82 N.M. 120, 477 P.2d 296 (1970); and *Hansen v. Skate Ranch, Inc.*, 97 N.M. 486, 641 P.2d 517 (Ct.App.1982). *Jewell* discussed harmless error in the context of an erroneous jury instruction. *Levy* and *Hansen* are more in point because they addressed allegedly inadmissible evidence and have language that might seem to support the Partnership's position. Nevertheless, we are confident that the appellate courts in those two cases had carefully reviewed the record and applied the proper test for harmless error when evidence is improperly admitted or excluded. That test appears in SCRA 11–103(A), which states, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" *See* SCRA 1986, 1–061 (Repl.1992). In *Hansen* the court actually found the challenged evidence to be admissible before it applied harmless-error analysis and concluded that the evidence was cumulative. 97 N.M. at 492, 641 P.2d at 523. In *Levy* the court wrote that "any error could not have changed the ... result." 106 N.M. at 705, 749 P.2d at 90.

Bona's testimony was a significant part of the Partnership's case. Only two other witnesses testified as to value. Thomas Shipman, the City's expert, testified that the Property had a value before the taking of $5,115,000, and a value after the taking of $5,114,300—a difference of $700. The other witness, Chavez, accepted Shipman's pre-condemnation value of $5,115,000 and then testified that the Property was reduced in value by $750,000, leaving a value after condemnation of $4,365,000. Using the agreed upon pre-condemnation value of $5,115,000, the percentage decrease in value testified to by Bona translates to a figure between $358,050 and $409,200. The jury verdict was closer to Bona's figures than to either of the figures provided by Shipman and Chavez. Moreover, as noted by Judge Weinstein, "[T]he testimony of one person may have much more of an impact on a judge or jury than the testimony of another, particularly when one witness may be an expert and another may be a party, officer of a party, friend or relative." Jack B. Weinstein & Margaret A. Berger, 1 *Weinstein's Evidence* ¶ 103[06], at 103–80 (1992). Bona was an expert and Chavez was essentially a party. In these circumstances there is a high probability that Bona's testimony influenced the verdict. The improper admission of his testimony affected a "substantial right" of the City. SCRA 11–103(A). We therefore must set aside the judgment.

IV. CONCLUSION

For the reasons stated above, we reverse the judgment against the City and remand for further proceedings consistent with this opinion.[2]

IT IS SO ORDERED.

BIVINS, J., (specially concurring).

MINZNER, C.J., (joining in Special Concurrence).

BIVINS, Judge (Specially concurring).

We concur in both the reasoning and the disposition of Judge Hartz' opinion, and write only to point out an additional and related reason for rejecting the Bona testimony.

This Court rejects the Bona opinion testimony on the basis that, because Bona lacked knowledge of property values in the vicinity, he was not qualified to express an opinion quantifying the decrease in value in either actual dollars or percentage terms. The following exchanges would seem to further illustrate why the Bona testimony should have been rejected as incompetent based on lack of qualifications.

When asked how he would apply his experience with off-premises airport parking facilities in other states with the particular property he viewed on the morning of trial, Bona said:

> A: Well, I tried to look at it if it were my property. And what my—and I had my hard dollars on it and I had signature on it with a banking institution and

2. The author's sole disagreement with the special concurrence is that he does not believe that the issue discussed in the concurrence was preserved below.

> they—I may owe two or three million dollars, what my reaction would be to that sign and how would it affect me personally and financially.... But if any governmental entity were to put a like sign on one of my properties near one of my entrances to my facility, I would have a very negative belligerent attitude about it.

When asked to give a percentage of the total value that the property was diminished by the placement of the signs, the following exchange occurred:

> A: May I preface it with some comment?
>
> Q. Certainly. I understand this is subjective.
>
> A: It's difficult to give a precise percentage. It's not an exact science. But I feel that *if it were my property* I would put a percentage of depreciation of the value anywhere between 5 and 10 percent and probably come up with a compromise in between there of maybe 7 or 8 percent. (Emphasis added.)

The property's worth to its owner is an incorrect basis for an opinion. *Utah State Road Comm'n v. Johnson,* 550 P.2d 216, 217 (Utah 1976). "The price fixed by a reluctant owner, not a willing seller, hardly meets the test for evidence of market value which requires a willing seller." *Coronado Oil Co. v. Grieves,* 642 P.2d 423, 434 (Wyo.1982), *supersession by statute on other grounds noted in L.U. Sheep Co. v. Board of County Comm'rs,* 790 P.2d 663, 669–72 (Wyo.1990).

Because Bona based his opinion on a subjective standard—how he would feel if it was his property being condemned—his opinion testimony should have been rejected as incompetent and without proper basis.

We realize that the objections lodged at trial technically may not have called to the district court's attention the specific problem discussed above. As noted in Judge Hartz' opinion, the City objected to the Bona testimony on several grounds, including that Bona was not qualified to testify on these matters because of his lack of knowledge of Albuquerque and because of an inadequate foundation for his testimony. While it is correct that an otherwise qualified expert may have his opinion stricken if based on an improper standard, it may not follow that the improper basis or standard automatically renders the witness disqualified as an expert. In this case, we believe it does. When Bona tied his opinion expressly to a nonmarket value premise, i.e., Bona's own personal feelings, this said that Bona was not qualified to render an opinion on value. Thus, we would add, as an additional ground for holding the Bona testimony incompetent, the fact that, without a market value basis, the witness was not qualified to give an opinion.

MINZNER, C.J., concurs.

858 P.2d 412

STATE of New Mexico, Plaintiff–Appellant,

v.

Quinton GRAHAM, Defendant–Appellee.

No. 14373.

Court of Appeals of New Mexico.

April 13, 1993.

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

R.E. Richards, R.E. Richards, P.A., Hobbs, for defendant-appellee.

OPINION

APODACA, Judge.

The State appeals from the trial court's order dismissing the charge of aggravated battery against Defendant. Our second calendar notice proposed summary affirmance and the State has filed a memorandum in opposition. The State also filed a motion to supplement authority, which we grant. Having considered the arguments presented in the State's memorandum in opposition, we hold that the trial court did not abuse its discretion in dismissing the charges. We therefore affirm the order of dismissal.

Defendant was charged with aggravated battery based on his alleged involvement in a shooting incident. At the preliminary hearing, Greg Fritts (Fritts) testified; he was the only witness who could place the gun in Defendant's hand during the incident. Fritts originally was charged with tampering with the evidence as a result of the same incident. However, he was allowed to plead to a misdemeanor charge so that he could join the Army. Following the resolution of the charge against him, Fritts enlisted in the Army.

A jury trial for Defendant was scheduled for November 2, 1992, and a subpoena was issued for Fritts in September to secure his attendance at that trial. Meanwhile, our Supreme Court granted the State's motion for an extension of time until November 6, 1992, in which to try Defendant.

In late October 1992, the State learned that Fritts was in the Army and supposedly stationed in Germany. An investigator for the State later learned that Fritts was stationed in Kentucky. Because the State could not contact Fritts directly, it contacted his first sergeant a week before the trial. The sergeant assured the State that Fritts would be present for Defendant's trial. The State then sent by facsimile transmittal a copy of the New Mexico subpoena for Fritts to the first sergeant and also mailed a prepaid airline ticket to him.

On Friday, October 30, 1992, Fritts' attorney contacted the State and informed it that Fritts did not want to attend the trial. The State informed Fritts' attorney that the first sergeant had assured it that Fritts would be present. The next day, Fritts's attorney left a message informing the

State that his client would in fact not appear.

The day of the trial, when Fritts did not appear, the State informed the trial court of the situation. The trial court ruled that Fritts' preliminary hearing testimony could not be used. *See generally* SCRA 1986, 11–804(A)(5) (witness is unavailable if he is absent and proponent of statement has been unable to secure his attendance by process or other reasonable means). The trial court also refused to grant the State's motion for a continuance. Instead, the trial court dismissed the charge against Defendant because the State was not ready to proceed due to the failure of its material witness to appear. The State appealed.

The State argues that the trial court erred in denying its motion to use Fritts' preliminary testimony at trial, in denying its motion for a continuance, and in dismissing the case against Defendant. We disagree.

The trial court has discretion to determine whether the burden of showing that a witness is unavailable has been met before allowing a witness's prior testimony to be used at a later court proceeding. *See State v. Martinez,* 102 N.M. 94, 97, 691 P.2d 887, 890 (Ct.App.), *cert. denied,* 102 N.M. 88, 691 P.2d 881 (1984). In making such a determination, the trial court can consider whether the procedures under NMSA 1978, Section 31–8–3 (Repl.Pamp.1984), were used or whether the facts were such that due diligence and good faith were shown without resort to that statutory provision. *Martinez,* 102 N.M. at 97, 691 P.2d at 890. Section 31–8–3 provides the mechanism for securing the attendance of a material witness from another State to testify in a criminal prosecution or grand jury proceeding in New Mexico. The procedure entails a New Mexico judge issuing a certificate under court seal specifying the facts and the number of days the witness will be required. *See* § 31–8–3. The certificate may include a recommendation that the witness be taken into immediate custody to ensure his or her attendance. *Id.* Once the certificate is prepared, it is presented to a judge of a court of record in the county of the state in which the witness is found. *Id.*

In its docketing statement and memoranda in opposition, the State stresses that Fritts' testimony was crucial to its case against Defendant because he was the only witness who could place the gun in Defendant's hand at the time of the shooting. However, in its memorandum in opposition to the first calendar notice, the State admits that it made no effort to secure Fritts' attendance under the procedures outlined in Section 31–8–3. The only steps it took to secure this crucial witness's presence was contacting Fritts' first sergeant, faxing the Sergeant a copy of a New Mexico court subpoena, and sending him a prepaid airline ticket for Fritts.

The State admits that this informal process did not comply with Section 31–8–3 and was not a valid method of out-of-state service. *See State v. Waits,* 92 N.M. 275, 277, 587 P.2d 53, 55 (Ct.App.1978) (subpoena that is not in accordance with statute to secure attendance of out-of-state witness and that is issued in New Mexico but served in another state has no legal effect). In *Waits,* we held that action similar to the State's action in this appeal did not constitute good faith or due diligence on the part of the State in attempting to secure the presence of an out-of-state witness. *Id.* Therefore, under Section 31–8–3 and *Waits,* the trial court could reasonably determine that the State did not meet the good faith and due diligence standards that would allow it to use Fritts' preliminary testimony at Defendant's trial.

We next address whether the State met the good faith and due diligence standards through reasonable means other than Section 31–8–3. *See Martinez,* 102 N.M. at 97, 691 P.2d at 890. In *Martinez,* the witness had responded to ordinary subpoenas three previous times and had confirmed that he was going to respond a fourth time the day before he was scheduled to arrive for trial. *Id.* Based on those facts, we distinguished the State's actions in *Waits* from the factual scenario in *Martinez* and determined that the trial court did not abuse its discretion in ruling that the State had exercised

due diligence and in admitting the witness's prior testimony. *Id.*

The facts of this case are not even remotely similar to *Martinez* because Fritts never responded to ordinary subpoenas. In fact, the State was unable to contact Fritts directly and instead communicated initially with his first sergeant. As we noted earlier, these efforts had no legal effect. *See Waits,* 92 N.M. at 277, 587 P.2d at 55. The closest the State came to communicating with Fritts directly was with his attorney, who initially stated that Fritts did not want to attend Defendant's trial and then confirmed that his client would not appear. Despite these communications, the State did not make any other efforts, under Section 31–8–3 or otherwise, to secure Fritts' attendance. *See State v. Fernandez,* 56 N.M. 689, 248 P.2d 679 (1952). The trial court could properly determine that the State's efforts to secure Fritts' attendance through means other than Section 31–8–3 did not constitute due diligence. *Cf. Martinez,* 102 N.M. at 97, 691 P.2d at 890 (State's failure to use Uniform Act before trial did not constitute lack of due diligence where out-of-state witness had previously responded to three ordinary subpoenas and confirmed that he would respond a fourth time shortly before trial). We thus conclude that the trial court did not abuse its discretion in determining that the State had not met its burden of showing Fritts' unavailability so that his preliminary hearing testimony could be admitted at Defendant's trial. *See id.; see also State v. Brionez,* 91 N.M. 290, 293, 573 P.2d 224, 227 (Ct.App.) (abuse of discretion occurs when ruling is clearly against the logic and effect of the facts and circumstances before the trial court), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977).

The State argues that its efforts were the only means that offered any probability of commencing trial on November 2, 1992, with Fritts present. It further argues that the calendar notices' proposed analysis fails to recognize the time limits and circumstances faced by the State when it finally located Fritts. We disagree.

Initially, we note that the State's informal efforts to secure Fritts' attendance at trial were not reasonable with respect to guaranteeing Fritts' presence in time to commence trial. As we observed earlier, these efforts had no legal effect. *See Waits,* 92 N.M. at 277, 587 P.2d at 55. Rather, if the State wanted to guarantee Fritts' attendance once it had located him in Kentucky but was unable to contact him directly, it should have used the procedures outlined in Section 31–8–3. We are not saying these steps would have guaranteed Fritts' attendance at the trial; however, on the day trial was to commence, if the State had been able to show that it had used Section 31–8–3 to secure Fritts' presence, it could have made a stronger argument to the trial court to grant a continuance based on its due diligence and good faith efforts. Because the State could rely only on efforts that had no legal effect and did not constitute due diligence, resulting in its crucial witness being absent, the trial court did not err in denying the State's motion for continuance. *See generally State v. Pruett,* 100 N.M. 686, 687, 675 P.2d 418, 419 (1984) (denial of motion for continuance based on lack of evidence is within discretion of trial court).

The final issue we address is whether the trial court abused its discretion in dismissing the charge against Defendant. *See generally Mathis v. State,* 112 N.M. 744, 747–48, 819 P.2d 1302, 1305–06 (1991) (dismissal of criminal charges judged by abuse of discretion standard). We realize that dismissal is an extreme sanction to be used only in exceptional circumstances. *See State v. Bartlett,* 109 N.M. 679, 680, 789 P.2d 627, 628 (Ct.App.1990). However, the dismissal here was not a sanction imposed by the trial court for the State's failure to either proceed under Section 31–8–3 or exercise due diligence and good faith in other ways to secure Fritts' presence. Rather, the trial court's dismissal was based on the fact that the State's only material witness had failed to appear and, as a result, the State was not ready to proceed to trial due to its lack of evidence to support the charge. Under these facts, we conclude that the trial court did not

abuse its discretion in dismissing the charge against Defendant.

For these reasons, the dismissal of the charge against Defendant is affirmed.

IT IS SO ORDERED.

DONNELLY and BLACK, JJ., concur.

858 P.2d 416

STATE of New Mexico, Plaintiff–Appellant,

v.

Darnell SMITH, Defendant–Appellee.

No. 14151.

Court of Appeals of New Mexico.

June 2, 1993.

Certiorari Denied Aug. 12, 1993.

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

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

MINZNER, Chief Judge.

The State appeals from an order granting Defendant's motion to dismiss pursuant to the Interstate Agreement on Detainers (IAD). NMSA 1978, § 31–5–12 (Repl.Pamp.1984). Defendant successfully moved for dismissal of the indictment on the grounds that he was not brought to trial within the 180–day limit set forth in Section 31–5–12 Article 3(A). We hold that Defendant did not take adequate steps to trigger the IAD. We reverse.

Defendant was charged by information with four felonies in Dona Ana County and failed to appear for trial on December 13, 1990. He was arrested in El Paso on local charges and was incarcerated in the El Paso County Detention Center (EPCDC) on January 5, 1991. His Texas parole from a prior conviction was revoked on March 27, 1991, and he remained in EPCDC pending disposition of the local Texas charges. On August 26, 1991, he requested final disposition of all pending charges in Dona Ana County by giving notice to the EPCDC custodial officer. He apparently received no response.

The last pending Texas charge against Defendant was dismissed on October 21, 1991, and he was transported to the Texas Correctional Facility (TCF) in Huntsville pursuant to the parole revocation. On October 24, 1991, Defendant wrote a letter, which showed his address as EPCDC, to State District Court Judge Robles in Las Cruces requesting that any outstanding charges against him be disposed of as soon as possible. Judge Robles sent a copy of the letter to the prosecutor's office. Defendant finished his Texas sentence at TCF, was arrested on a Dona Ana County bench warrant on March 31, 1992, and then was returned to New Mexico to answer the charges pending in this case.

The parties stipulated at the hearing on the motion that "[o]n October 24, 1991, defendant caused to be delivered to Deputy District Attorney Alfred Perez a request for final disposition." They also stipulated that the prosecutor actually received the letter on November 18, 1991. In order to satisfy the provisions of the IAD, Defendant was required to establish that (a) he entered upon a term of imprisonment in a Texas penal or correctional institution; (b) during the continuance of that term of imprisonment the New Mexico charges in this case were pending against him; (c) a detainer based on the New Mexico charges was lodged against him; and (d) he caused written notice of the place of his imprisonment and his request for a final disposition of the New Mexico charges to be delivered to the appropriate prosecuting official and court in New Mexico. *See generally* Donald M. Zupanec, Annotation, *Validity, Construction, and Application of Interstate Agreement on Detainers,* 98 A.L.R.3d 160 (1980). We find it unnecessary to discuss all of these elements. In this case, the dispositive issue is whether the notice given was adequate. We hold that it was not. We do address the point at which the 180–

day limit began to run. Then we discuss the notice Defendant provided.

The IAD is not applicable where a person is in custody on an accusation that he has committed a crime. *See State v. Duncan,* 95 N.M. 215, 217, 619 P.2d 1259, 1261 (Ct.App.1980) (IAD does not apply to prisoner awaiting trial or sentence); *United States v. Dobson,* 585 F.2d 55, 61 (3rd Cir.), *cert. denied,* 439 U.S. 899, 99 S.Ct. 264, 58 L.Ed.2d 247 (1978) (IAD does not apply to a parole violator detainee until he is recommitted and sentenced to serve the balance of his sentence from which he had once been paroled). Here, Defendant was being held both on local charges and also because his parole had been revoked. There is no indication from the record that a final sentence was imposed as a result of the parole revocation prior to October 21, 1991, when the local charges were dismissed. Furthermore, Defendant did not enter the TCF, the institution to which he was committed, until after that date. *See United States v. Wilson,* 719 F.2d 1491, 1494–95 (10th Cir.1983). Absent final sentencing and entry into the TCF, the protections of the IAD were not applicable on August 26, 1991. However, as of the date of Defendant's incarceration in the TCF, he did become covered by the terms of Article 3(A) of the IAD. *See Wilson,* 719 F.2d at 1494–95; *see also State v. Maggard,* 16 Kan.App.2d 743, 829 P.2d 591, 595 (1992) (180–day period began when the defendant was returned from county jail to state prison where he was serving a sentence as a result of parole violations). Therefore, we conclude that Defendant had entered on a term of imprisonment at the time he wrote Judge Robles. We next address the adequacy of the letter as notice under the IAD.

State v. Tarango, 105 N.M. 592, 596–97, 734 P.2d 1275, 1279–80 (Ct.App.), *cert. denied,* 105 N.M. 521, 734 P.2d 761 (1987), *overruled on other grounds, Zurla v. State,* 109 N.M. 640, 645, 789 P.2d 588, 593 (1990), discusses three methods by which a prisoner can satisfy his obligations for activating the IAD: (a) transmission of his written notice and request for final disposition to the appropriate custodial officials; (b) substantial compliance with the IAD's requirements that certain documents be filed with the proper authorities in the receiving state; or (c) actual notice by the receiving state. While this case was pending on appeal, the United States Supreme Court issued its decision in *Fex v. Michigan,* — U.S. ——, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993). In *Fex* the Court interpreted the meaning of the Article 3(A) phrase " 'within one hundred and eighty days after he shall have caused to be delivered.' " *Id.* at ——, 113 S.Ct. at 1088. The Court decided that "the 180–day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." *Id.* at ——, 113 S.Ct. at 1091. Because of the potential impact of *Fex* on *Tarango* and on this case, we ordered supplemental briefing. Both parties have filed supplemental briefs in response to the order; both agree that the issue resolved in *Fex* is not before this Court, since whatever date we use, that date precedes the day Defendant filed his motion to dismiss by more than 180 days. We agree. We note, however, that *Fex* impacts the analysis in *Tarango.* There we said that "a prisoner need only transmit the written notice and request for final disposition to the appropriate custodial officials to complete his or her responsibility under the agreement." *Id.,* 105 N.M. at 596, 734 P.2d at 1279.

The IAD is a congressionally-sanctioned interstate compact enacted under federal law. In construing it, we have looked to United States Supreme Court cases for guidance. *See State v. Sparks,* 104 N.M. 62, 65, 716 P.2d 253, 256 (Ct. App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986). In *Fex* the Supreme Court said that the 180–day time period commences upon delivery. As a result, we modify our prior ruling in *Tarango* and hold that transmitting the written notice and request for final disposition to the appropriate custodial officials, absent facts establishing

substantial compliance or actual notice, is insufficient to activate the time constraints of the IAD. We do, however, discuss both substantial compliance and actual notice, the two alternative methods discussed in *Tarango.* At the hearing on the motion the judge observed that there was no factual issue regarding whether the New Mexico prosecuting officer and appropriate court received notice. This comment suggests that the trial court found that Defendant properly activated the IAD because the appropriate New Mexico authorities had actual notice. On the other hand, the trial judge's last comment at the hearing was that there was "substantial, although not complete, compliance" by Defendant.

Since there was no evidence that Defendant transmitted the certificate of status described in Article 3(A), *see Tarango,* 105 N.M. at 597, 734 P.2d at 1280 (substantial compliance requires filing of certificate of status), affirmance of the order of dismissal rests on the possibility that the appropriate New Mexico officials had "actual notice." There is no dispute regarding whether the appropriate New Mexico officials had actual notice of Defendant's October 24, 1991 request for processing under the IAD. Defendant argues that actual notice of his request alone is sufficient. The State contends that Defendant's communication was deficient in that it afforded no notice that he was confined in a penal or correctional facility or that he was serving a sentence rather than awaiting disposition of local Texas charges. We agree.

Tarango did not involve a close question of actual notice; there was no evidence that any IAD request was ever sent to the appropriate New Mexico prosecutor and court. In addition to finding that the New Mexico officials did not have actual notice of the defendant's request, we held that the defendant did not substantially comply with the statutory requirements of the IAD.

The actual notice rule stems from *Wise v. State,* 30 Md.App. 207, 351 A.2d 160 (1976). Wise was incarcerated in the Maryland State Penitentiary when he was notified of an *intrastate* detainer lodged against him in connection with local charges filed in Baltimore. A week later the defendant sent the criminal court clerk a letter, and the clerk sent the prosecutor a copy. The letter informed the trial court and the prosecutor of the defendant's intention to invoke detainer disposition. The defendant did not supply the required inmate status form, of which he had no knowledge. The Maryland court noted that the language of the intrastate detainer act was similar to that of the IAD with respect to the requirement of an inmate status form. It recognized that the status form would be helpful in aiding a prosecutor's decision whether to initiate costly extradition proceedings, but that the same information was much more accessible to a prosecutor in an intrastate detainer situation. The actual notice provided by the defendant's letter was held to be adequate to trigger the protections of the intrastate detainer act.

Later, in *Isaacs v. State,* 31 Md.App. 604, 358 A.2d 273 (1976), *overruled on other grounds, State v. Dean,* 42 Md.App. 155, 399 A.2d 1367, 1372 (1979), the question presented was whether a status certificate was necessary in an IAD context. A Georgia penitentiary prisoner's demand for speedy trial in Maryland was not accompanied by a certificate and the prosecutor replied that it was his opinion that compliance with the IAD was necessary to make the request for trial effective. The 180-day period for trial was held to have commenced when the status certificate was produced some four months later. The *Isaacs* court noted both that *Wise* was strictly concerned with intrastate detainers and that it is not always easy for a prosecutor to ascertain information about an out-of-state prisoner.

The State suggests that *Isaacs* should be read to require that a prisoner must supply a status certificate in order to establish actual notice on the part of the trial court and prosecutor. We do not interpret *Isaacs* so broadly. *But see McBride v. United States,* 393 A.2d 123, 128 (D.C.Ct.App.1978) (characterizing

Isaacs as requiring strict compliance), *cert. denied sub nom., Thomas v. United States,* 440 U.S. 927, 99 S.Ct. 1260, 59 L.Ed.2d 482 (1979). When the Maryland prosecutor received the defendant's request for IAD processing, he was not furnished with sufficient information to charge him with actual knowledge of the specifics of the defendant's status which would establish eligibility under the IAD. In other words, actual notice of the defendant's request alone did not put the recipients on inquiry notice of the information that would be included in a status certificate. The prosecutor reacted reasonably by soliciting the certificate. However, since that inquiry did not yield any information for four months, the prosecutor could not be charged with knowledge of the information during that period.

All that was furnished to the New Mexico authorities in this case was notice of Defendant's prior incarceration in EPCDC and his request for IAD processing. This was insufficient to trigger the time requirements of the IAD and failed to constitute "actual notice." "Actual notice" has been defined to include both information positively proven to have been given, plus that which the recipient "is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry." *Black's Law Dictionary* 1061–62 (6th ed. 1990); *Martinez v. City of Clovis,* 95 N.M. 654, 659, 625 P.2d 583, 588 (Ct.App.1980) (Sutin, J., specially concurring) (to prove actual notice it is sufficient to show by circumstances that the party to be charged knew the facts or should have known them, if proper inquiry were made having knowledge of facts putting the party on inquiry). While we do not believe that Defendant had to furnish the certificate required by the IAD to give the prosecutor and the district court actual notice, he did have an obligation to furnish the information that would be contained therein. *Cf. Isaacs,* 358 A.2d at 278 (neither the status certificate nor the information required to be included in the certificate was sent to the receiving state authorities). Since the Dona Ana prosecutor and the district court did not have actual notice of critical information, such as the fact that Defendant was presently incarcerated in the TCF, Defendant was not relieved of his burden of substantially complying with the requirements of the IAD, a burden which we have already stated he did not meet. *See Tarango,* 105 N.M. at 597, 734 P.2d at 1280; *see also Patrick v. Rice,* 112 N.M. 285, 289, 814 P.2d 463, 467 (Ct.App.), *cert. denied,* 112 N.M. 308, 815 P.2d 161 (1991) (the adequacy of notice is a question of law).

Since there is no basis in the record for a determination that Defendant properly activated the IAD, we reverse.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

858 P.2d 420

STATE of New Mexico, Plaintiff–Appellee,

v.

Martha SIZEMORE, Defendant–Appellant.

No. 13674.

Court of Appeals of New Mexico.

June 28, 1993.

Tom Udall, Atty. Gen., Patricia A. Gandert, 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

MINZNER, Chief Judge.

Defendant appeals her conviction for receiving stolen property over $2,500, contrary to NMSA 1978, § 30–16–11(A) (Cum. Supp.1992), challenging the sufficiency of the evidence to support her conviction. Because the State failed to prove that Defendant was in actual or constructive possession, which is required to support her conviction under Section 30–16–11, we hold that her conviction is not supported by sufficient evidence, and we reverse.

FACTS

The items stolen, which were taken from three different businesses on three different occasions, included fifteen handguns, two knives, a pair of binoculars, and a saw. Defendant's boyfriend, Jimmy Clark, was implicated in the three burglaries. The police received an anonymous tip regarding the burglaries that led them to place several individuals under surveillance. After watching several residences, police began to follow a car driven by Clark. Defendant was sitting in the front passenger seat. When the police attempted to stop the vehicle, a high-speed car chase ensued. The car chase eventually ended with Clark stopping his vehicle, getting out of the vehicle, and attempting to flee on foot. He was apprehended shortly thereafter. Defendant stayed in the car and police found a duffle bag containing fourteen handguns in the vehicle at her feet. Another handgun was found next to the bag on the passenger-side floorboard of the car. Defendant was arrested.

Subsequently, the two stolen knives were found in a back bedroom of Defendant's mother's house. One knife was between the mattress and box spring of the bed, and the other was found in a closet that also contained clothes belonging to Defendant's

mother and Defendant's mother's niece. Both knives were hidden from view. The saw was also found in the house. Defendant and Clark had spent the previous night at Defendant's mother's house. Clark testified that he placed all the stolen property in the bedroom and in the car. Defendant's mother testified that she believed Defendant spent the night before the search in the bedroom where the knives were found. Defendant, on the other hand, testified that she spent the night prior to the search on her mother's living room couch. Defendant, who helped Clark pawn the binoculars, also testified that Clark told her the binoculars belonged to his brother and that she helped Clark pawn them because he did not have the required driver's license. Clark corroborated Defendant's testimony.

ELEMENTS OF THE CRIME

In order to obtain a conviction in New Mexico for receiving stolen property, the State must prove that the defendant intentionally received, retained or disposed of stolen property, knowing or believing that it had been stolen, unless the property is received, retained, or disposed of with the intent to return it to its owner. Section 30–16–11(A); *State v. Zarafonetis,* 81 N.M. 674, 675, 472 P.2d 388, 389 (Ct.App.), *cert. denied,* 81 N.M. 669, 472 P.2d 383 (1970). In this case, the jury was instructed, pursuant to SCRA 1986, 14–1650, that guilt depended on the State having proved beyond a reasonable doubt that, among other things, Defendant kept possession of property when she knew or believed it to have been stolen. Section 30–16–11(A); SCRA 14–1650; *see State v. Garcia,* 114 N.M. 269, 837 P.2d 862 (1992) (test for sufficiency of evidence is whether any rational trier of fact could find evidence to support a guilty verdict beyond a reasonable doubt).

In this context, and the jury was so instructed, possession requires proof that Defendant knew what the object was, knew that the object was on her person or in her presence, and that she exercised control over it. SCRA 1986, 14–130. The State's case against Defendant depends on the applicability of the concept of constructive possession, defined as knowingly having the power and intention at a given time to exercise dominion and control over the given property, from which the requisite actual dominion and control are inferred. *See Nelson v. State,* 628 P.2d 884, 889 (Alaska 1981); *Riddle v. State,* 303 Ark. 42, 791 S.W.2d 708, 709 (1990). *See generally* Caroll J. Miller, Annotation, *What Constitutes "Constructive" Possession of Stolen Property To Establish Requisite Element of Possession Supporting Offense of Receiving Stolen Property,* 30 A.L.R. 4th 488 (1984); Ray A. Brown, *The Law of Personal Property* § 2.6 (Walter B. Raushenbush auth., 3d ed. 1975). Our statute is not unique, *see, e.g., Austin v. State,* 26 Ark. App. 70, 760 S.W.2d 76, 77 (1988), nor are the facts of this case uncommon. *See Nelson,* 628 P.2d at 889.

At trial and on appeal, the State relies on the same circumstantial evidence to prove both possession of the property, which by law includes an element of knowledge, *see* SCRA 14–130, and knowledge that the property was stolen, which is a distinct statutory requirement. The knowledge or intent component of possession is distinct from the statutory requirement that the State prove Defendant knew or had reason to know that property of which she kept possession was stolen. *See id.; Riddle,* 791 S.W.2d at 709. In this opinion, we will refer to the former as intent and the latter as knowledge. Although knowledge (that the property is stolen) may be circumstantially proved by unexplained possession, *Zarafonetis,* 81 N.M. at 675, 472 P.2d at 389, we should not infer knowledge from possession or possession from knowledge without having some basis in fact for the initial inference. *See State v. McCaughey,* 14 Wash.App. 326, 541 P.2d 998, 1000 (1975) ("It is illogical to extrapolate the inferred fact of defendant's knowledge into the inferential conclusion of defendant's possession."). We conclude that the State failed in its burden of proof because the jury was required to infer Defendant's knowledge and possession from circumstances that do not as a matter of law support such inferences.

The State relies on Defendant's proximity to the duffel bag in the car, her previous presence in her mother's back bedroom, and her participation in the pawning of the binoculars to prove possession and knowledge. We discuss each in turn. We note that the jury instructions do not distinguish between the stolen items or even identify them. We assume, but need not decide, that had the State proved possession and knowledge of the guns, the knives, or the binoculars, the conviction should stand. *See Nelson,* 628 P.2d at 889.

THE GUNS

Presence in the proximity of stolen goods is insufficient to support a conviction for receiving stolen property. *State v. Browder,* 83 N.M. 238, 239, 490 P.2d 680, 681 (Ct.App.1971). This is particularly true when the area is shared with other people. *Id.; see also State v. Brietag,* 108 N.M. 368, 370, 772 P.2d 898, 900 (Ct.App.1989) (defendant's possession of drugs cannot be inferred solely from discovery at quarters shared with others).

Defendant's close proximity to the duffel bag might support an inference of knowledge in the present context, but not of the requisite possession. A person has knowledge of stolen property if he or she either (1) actually knows the property is stolen, (2) believes the property is stolen, or (3) has his or her suspicions definitely aroused and refuses to investigate for fear of discovering that the property is stolen. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 401 (3d ed. 1982).

The State argues Defendant's knowledge can be inferred from the fact she borrowed her uncle's car so that Clark could transport the guns. We disagree. There is no evidence that directly or circumstantially proves that Defendant even knew of the guns' existence, much less their provenance, when she asked to borrow the car. Relying on the third possibility listed above, the jury could have found that Defendant gained the requisite knowledge after she entered the car, based on the evidence that two guns were visible in the bag's opening. However, we do not think the jury could have determined that Defendant possessed the guns at or after that point. We note that Clark testified he placed the stolen property in the car and that he was in control of the car during the car chase. "The reasonableness of any hypothesis of constructive possession based solely on circumstances is particularly suspect in the face of undisputed direct proof of exclusive possession in some other person." *McCaughey,* 541 P.2d at 1000; *see also State v. Kimbrough,* 109 N.J.Super. 57, 262 A.2d 232, 234–36 (1970).

We have previously held that a jury can draw an inference of guilt from unexplained flight. *State v. Kenny,* 112 N.M. 642, 646, 818 P.2d 420, 424 (Ct.App.), *cert. denied,* 112 N.M. 499, 816 P.2d 1121 (1991); *State v. Hardison,* 81 N.M. 430, 432, 467 P.2d 1002, 1004 (Ct.App.1970); *see also State v. Trujillo,* 95 N.M. 535, 541–42, 624 P.2d 44, 50–51 (1981) (evidence of flight, an aborted plan of flight, or escape from incarceration is admissible and relevant because it tends to show consciousness of guilt). In this case, however, Defendant was a passenger in the car when Clark attempted to elude the police. During the chase, the car was traveling at a high rate of speed. Officers testified that no one could have exited the car during the car chase without incurring great bodily harm. When the chase ended and Clark exited the car and fled on foot, Defendant stayed in the car. If flight can be used to infer guilt, it would seem logical that the failure to flee might indicate the lack of a consciousness of personal guilt. *Cf. Commonwealth v. Scudder,* 490 Pa. 415, 416 A.2d 1003 (1980) (fact that van in which defendant was a passenger fled from police could not be used to infer guilt without evidence that defendant directed, encouraged, or consented to the flight).

Moreover, the statutory element of control allows for conviction only when the defendant knowingly procures or receives the thing possessed or was aware of his or her control over the item for a sufficient period to have been able to terminate the possession. *See State v. McCoy,* 116 N.J. 293, 561 A.2d 582, 585 (1989); *cf. State v. Lopez,* 109 N.M. 578, 787 P.2d 1261 (Ct. App.1990) (recognizing that defendant's

"intent to return" stolen items to their rightful owner is a valid defense to charge of receiving stolen property). That is not true of Defendant, who cannot be said to have had an opportunity to exercise meaningful control over the duffle bag.

THE KNIVES

The State also relies on evidence that the knives were found in a bedroom Defendant allegedly occupied. The fact that Defendant had occupied the premises where stolen goods were found, by itself, would not prove she exercised dominion and control over the objects. *Browder,* 83 N.M. at 239, 490 P.2d at 681. When persons other than Defendant had equal or greater access to the place where the illicit goods were discovered, possession may not be inferred solely from Defendant's access. *Id.; Commonwealth v. Davis,* 444 Pa. 11, 280 A.2d 119, 121 (1971). Something more is necessary to establish a link between the items and Defendant before the jury can properly infer that Defendant could control the items. *Brietag,* 108 N.M. at 371, 772 P.2d at 901; *see State v. Becerra,* 112 N.M. 604, 607, 817 P.2d 1246, 1249 (Ct.App.) (defendant's conduct and actions, as well as circumstantial evidence, may sufficiently prove constructive possession), *cert. denied,* 112 N.M. 440, 816 P.2d 509 (1991); *see also Owens v. State,* 192 Ga.App. 335, 384 S.E.2d 920, 925, *cert. denied* (1989).

THE BINOCULARS

The binoculars admittedly present the closest question of possession. Again, however, we think that there is insufficient evidence of intent to exercise dominion and control. "In a broad sense, the term 'possession' denotes facts pertaining to the relationship between a person and an item of property, as well as the consequences that attach to those facts." *McCoy,* 561 A.2d at 585.

In order to sustain a conviction, there must be proof that Defendant knew the binoculars were stolen. The evidence only shows that Defendant facilitated an apparently reasonable transaction for another person, which proof is insufficient to allow an inference that Defendant had reason to believe the property was stolen. *See State v. Carter,* 138 Vt. 264, 415 A.2d 185, 188 (1980). In the absence of proof that Defendant knew the binoculars were stolen, we do not think an inference of intent to exercise dominion and control is justified.

CONCLUSION

Although we must view the evidence, whether it be circumstantial or direct, in the light most favorable to the verdict, *State v. Duran,* 107 N.M. 603, 605, 762 P.2d 890, 892 (1988), the appellate inquiry is whether the "facts are legally sufficient to support a finding of possession for purposes of criminal liability." *Becerra,* 112 N.M. at 608, 817 P.2d at 1250. After evaluating the evidence, the ultimate question in a criminal case is whether the evidence supports a verdict of guilt beyond a reasonable doubt with respect to every element of the crime. *See Garcia,* 114 N.M. at 273, 837 P.2d at 866. In the second stage, it is important that the appellate court scrutinize the relevant evidence and supervise "the jury's fact-finding function to ensure that, indeed, a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* at 274, 837 P.2d at 867. Unless the facts make the analysis clear, the reviewing court must be able to articulate an analysis the jury might have used to determine guilt, and that analysis must be reasonable. We think it is important to be able to explain how the jury might have reasoned that Defendant had both knowledge and possession of either the guns, the knives, or the binoculars. We cannot.

We therefore hold that there was insufficient evidence of knowledge and possession to support Defendant's conviction of receiving stolen property over $2,500. In view of our disposition, we do not address the remaining issues. Defendant's conviction is reversed, and the case is remanded with instructions to dismiss the charges against her.

IT IS SO ORDERED.

CHAVEZ and BLACK, JJ., concur.

858 P.2d 426

In the Matter of the ESTATE OF Manuel PINO, III, Deceased.

Janet ABALOS and Maria Cecilia Abalos, by her mother and next friend, Janet Abalos, Petitioners–Appellees,

v.

Manuel PINO, Jr., Personal Representative of the Estate of Manuel Pino, III, a.k.a. Chon Pino, Deceased, Respondent–Appellant.

No. 13587.

Court of Appeals of New Mexico.

July 22, 1993.

John W. Reynolds, Silver City, for petitioners-appellees.

Celia Foy Castillo, Foy, Foy & Castillo, P.C., Silver City, for respondent-appellant.

OPINION

PICKARD, Judge.

This case requires us to consider whether an order from which appeal is taken in a probate matter is a final judgment, allowing this Court jurisdiction over the appeal. More specifically, we address the issue of whether an order by the district court, requiring putative grandparents to undergo blood testing to determine if their deceased son was the father of the petitioner against his estate, is final. For the reasons we discuss below, we conclude that the order was not final and does not fit into the collateral order doctrine. Therefore, we dismiss the appeal.

This action arose from a party that was allegedly attended by Janet Abalos, Manuel "Chon" Pino, III, his brother Andrew Pino, and others on the night of July 26, 1986. Ms. Abalos apparently imbibed a sufficient quantity of alcohol at the party to render her unconscious. It is alleged that one or more males then engaged in sexual intercourse with her. She subsequently gave birth to a daughter, Maria Cecilia Abalos, on April 30, 1987.

Ms. Abalos filed a petition for paternity, which named six individuals as potential fathers. Five of these six individuals were excluded from being the father through blood testing. The sixth died before testing could commence. Ms. Abalos did not originally name Andrew and Chon Pino in her paternity petition, and her motion to join Andrew, who was later excluded as a possible father, and his parents, Manuel Pino, Jr., and Ylaria Pino, was denied. Ms. Abalos attempted to join Manuel and Ylaria Pino because the results of a test of Chon Pino's blood, performed after his death, were inconclusive, and medical personnel asserted that testing Chon Pino's parents would achieve a conclusive result.

The issues in the action that began as a petition for paternity are now being litigated in a probate matter, due to the death of Chon Pino in an automobile accident. Manuel Pino, Jr., was appointed as the personal representative of his son's estate. Janet Abalos and her daughter made a claim against Chon Pino's estate, based on their assertion that Maria Cecilia is Chon Pino's daughter and sole heir. This claim was denied by Manuel Pino, Jr., as personal representative for the estate, through his attorney. The Abaloses also filed a motion asking the district court to order the Pinos to show cause why they should not undergo blood testing to aid in the determination of whether Chon Pino was the father of Maria Cecilia Abalos. The district court heard evidence and arguments and ordered the Pinos to undergo the blood tests. It is from this order that the Pinos appeal.

Our jurisdiction is limited to appeals from final judgments, interlocutory orders that practically dispose of the merits, and final orders after entry of judgment that affect substantial rights. *Thornton v. Gamble,* 101 N.M. 764, 766, 688 P.2d 1268, 1270 (Ct.App.1984). The definition of a final order does not include matters of discovery:

> Orders granting or denying a motion for protective order, like orders requiring or denying discovery, or orders requiring a party to submit to a physical or mental examination, generally do not constitute a final disposition of the proceedings. Therefore, they are not normally appealable, except upon the granting of an interlocutory appeal.

In re Deposition of Bartow, 101 N.M. 532, 534, 685 P.2d 387, 389 (Ct.App.1984); *see also* 4 James W. Moore et al., *Moore's Federal Practice* § 26.83 (2d ed. 1989); 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2006 (1970).

However, NMSA 1978, Section 45–3–107 (Repl.Pamp.1989) states that each proceeding in a probate matter is independent. *See In re Estate of Newalla,* 114 N.M. 290, 837 P.2d 1373 (Ct.App.1992). The Abaloses initiated a proceeding to determine whether Maria Cecilia is an heir. The motion to compel the blood tests did not institute a new proceeding. The dispute concerning the blood test is part and parcel of the proceeding to determine heirship. As stated in *Newalla:* "Further pleadings relating to the same subject matter, whether labelled motions or petitions, are part of the same proceeding. When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same proceeding." *Id.* at 294, 837 P.2d at 1377. In particular, discovery disputes are not separate proceedings, and orders on discovery issues therefore are not final orders. *See id.*

Other jurisdictions are split as to whether an order for the taking of blood for paternity tests is a final and appealable order. Although some jurisdictions allow an appeal from discovery orders requiring blood tests, *see Voss v. Duerscherl,* 408 N.W.2d 161, 164 (Minn.Ct.App.1987), *rev'd on other grounds,* 425 N.W.2d 828 (Minn. 1988) (applying Minnesota statute regarding appealability); *Christianson v. Ely,* 390 Pa.Super. 398, 568 A.2d 961, 962 (1990), we are more persuaded by the rule in federal court, *see* Moore et al., *supra,* § 26.83; Wright & Miller, *supra,* § 2006, and New Mexico, *see Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 239–40, 824 P.2d 1033, 1041–42 (1992); *Thornton,* 101 N.M. at 767, 688 P.2d at 1271, which seeks to

avoid piecemeal appeals and promote judicial efficiency. *See Helton v. Arkansas Dep't of Human Servs.*, 309 Ark. 268, 828 S.W.2d 842 (1992) (no jurisdiction to appeal order requiring blood test in paternity dispute).

The Pinos do not assert any religious, moral, or other compelling reason to distinguish the blood test order here from general discovery orders. *See R.J.A. v. K.A.V.*, 34 Mass.App.Ct. 369, 611 N.E.2d 729, 731–32 (1983) (fact that people may have to undergo intrusions of blood testing does not make interlocutory order appealable). *But see Commonwealth ex rel. Weston v. Weston*, 201 Pa.Super. 554, 193 A.2d 782, 783 (1963) (order for blood test is appealable; simple act of requiring child to submit to test could cause injury by leading child to question paternity). The blood test is a part of the probate proceeding initiated by the Abaloses to determine whether Maria Cecilia is an heir of Chon Pino. A final order has not been entered as to this petition against the estate. Therefore, the order for the blood testing of the Pinos is not final.

Another question to be answered is whether this case falls under the collateral order doctrine as announced in *Carrillo v. Rostro*, 114 N.M. 607, 613, 845 P.2d 130, 136 (1992). Our Supreme Court adopted the federal rule articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and its progeny. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985). The *Carrillo* Court followed the *Cohen* test that allows appeal of orders that meet, at a minimum, three conditions: they must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Carrillo*, 114 N.M. at 613, 845 P.2d at 136. Part one of the *Cohen/Carrillo* test is met because the order ended the specific dispute of whether there should be a blood test. Conditions two and three of the doctrine are more difficult matters.

Part two involves two questions to be answered. Is the issue important? Is the issue separate from the merits? We need not decide whether the Pinos meet these tests because we are confident that they fail the third part of the *Carrillo* test on the record before this Court. We note that, absent special circumstances not present here, being free from the normal incidents and costs of litigation is not a valid reason to avoid the final order rule or invoke the collateral order doctrine. *R.J.A.*, 611 N.E.2d at 732; *see Carrillo*, 114 N.M. at 615, 845 P.2d at 138 (qualified immunity confers an entitlement not to stand trial or face other burdens of litigation). We also note that the Pinos did not assert in their briefs any claim or cite to any evidence presented or claim made below that being free of a blood test was an important issue to them for any particular reason. No religious, moral, or other grounds were presented. Because the Pinos made no claim regarding specific reasons for not wanting to have their blood tested, it appears that their opposition is not to the taking of the test but rather to the admission into evidence of the test results. Indeed, their supplemental brief virtually admits that their opposition is primarily to the admission of the test results. If this is the case, their issue would not be effectively unreviewable later as required by the third condition of the collateral order doctrine.

Moreover, while our opinion should not be read as encouraging disobedience of court orders, it should be noted that an avenue for appeal does exist for the Pinos even as to the taking of the blood. Criminal or civil contempt proceedings are appealable in New Mexico. NMSA 1978, § 39–3–15(A) (Repl.Pamp.1991). If it is the very taking of their blood to which the Pinos object, they could force the issue by refusing to comply with the order and appealing any sanction order. While it could be argued that it is unduly harsh to force people into contempt before hearing their appeal, contempt will act as a useful deterrent, insuring that this Court not be required to hear piecemeal appeals on unim-

portant issues. The availability of review after criminal contempt is one reason why discovery orders in general are not appealable in federal court. *See* Moore et al., *supra,* § 26.83, at [6]; Wright & Miller, *supra,* § 2006, at 30.

The appeal is dismissed, and the case is remanded for further proceedings.

IT IS SO ORDERED.

BIVINS and HARTZ, JJ., concur.

858 P.2d 429

Jason MARTINEZ, Personal Representative of James H. Block, Deceased, Petitioner–Appellee,

v.

Beverley S. BLOCK, Respondent–Appellant.

No. 13402.

Court of Appeals of New Mexico.

July 29, 1993.

Judith C. Herrera, Herrera, Baird & Long, P.A., Santa Fe, for petitioner-appellee.

David L. Walther, David Henderson, Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Schoenburg, Santa Fe, for respondent-appellant.

OPINION

BIVINS, Judge.

Beverley S. Block (Wife) appeals from the final decree of the trial court resolving the property issues in an action for dissolution of marriage. On appeal, she argues: (1) that the trial court erred in determining that $5000 of the proceeds of the sale of the Ojo Caliente residence was community

property to be split between the parties; and (2) that the trial court erred in subjecting her separate property in Cerrillos to an equitable community lien in the amount of $39,225. We discuss the facts relevant to each issue in our discussion of the issue. We affirm the order of the trial court determining that $5000 of the proceeds of the sale of the Ojo Caliente residence was community property. We reverse the order of the trial court subjecting Wife's separate property residence in Cerrillos to an equitable community lien.

James H. Block (Husband) died during the pendency of this appeal and his personal representative was substituted. Notwithstanding this substitution, we will refer to the parties as they appeared below.

I. *The Ojo Caliente Residence*

The Ojo Caliente residence was purchased by the parties during the marriage. It was sold during the pendency of dissolution proceedings, and the proceeds were deposited in a bank account pending determination of an appropriate distribution by the trial court. At the outset of the hearing on the merits, the parties informed the court that they had agreed that the Ojo Caliente residence was community property, and had agreed to divide equally all but $5000 of the proceeds. Thus, the only issue presented to the trial court concerned distribution of the $5000.

It was undisputed below that the $5000 represented an amount equal to a loan from Wife's father. The loan was used for the down payment on the Ojo Caliente residence. The trial court found that the loan created a community debt, and this finding is not challenged on appeal. Some time after the acquisition of the Ojo Caliente residence and before the parties separated in September 1989, Wife's parents died. At the hearing, Wife testified that the operative will was her mother's will because her father predeceased her mother. A copy of her mother's will was admitted at the hearing without objection. The will provides in pertinent part: "I forgive any debts owed to my husband and me by any of our children." At the hearing, both parties testified that they believed that the will provision forgave the entire amount of the debt.

At the hearing below and on appeal, Wife argues that the forgiveness of the $5000 loan in her mother's will amounts to a separate bequest to her of the entire amount of the loan. *See* NMSA 1978, § 40–3–8(A)(4) (Repl.Pamp.1989) ("property acquired by either spouse by gift, bequest, devise or descent" is separate property). Husband challenges this contention.

On the facts of this case, we do not believe that the trial court was required to treat the forgiveness of the debt as a separate bequest to Wife. When a parent has loaned money to a child and the child's spouse for the purchase of real property, and then the parent dies, leaving a will forgiving debts owed by the child to the parent, courts have interpreted the will provision in question to forgive the entire amount of the debt, even though the debt was a joint debt and the spouse was not mentioned in the will. *See Trott's Estate v. Hanson,* 294 N.W. 777, 778, 780 (Iowa 1940); *In re Zielinski's Will,* 193 Misc. 826, 84 N.Y.S.2d 89, 91–92 (Sur.Ct.1948). Under these circumstances, we agree with Husband that the will provision forgiving the community debt merely created a community asset of $5000. Thus, we hold that the trial court did not err in dividing the $5000 equally between the parties.

II. *Cerrillos Separate Property*

After her parents died, Wife used part of her inheritance to purchase a house in Cerrillos. Wife and Husband moved into the Cerrillos home under a lease purchase agreement in May 1988. The purchase was consummated on August 1, 1988. The documents connected with the transaction show that the purchase price was $85,000, and that Wife took title as "Beverley Block, a married woman dealing in her sole and separate property." The parties stipulated that the purchase price was paid from her sole and separate funds.

After the house was purchased, Wife undertook extensive renovations and im-

provements to the property. These included installation of a wood stove, skylights, ceiling fans, windows, doors, a patio, exterior stairs and walls, a hot tub, a gazebo, a cabana, a swimming pool, a septic tank, and the remodelling of the garage. Much of the work involved was done by persons hired and paid by Wife from her separate funds. It is undisputed that Husband worked on the renovations and improvements, although the extent of his work on the property was contested at trial.

The parties stipulated that Wife spent $93,486.43 of her sole and separate funds on improvements to the Cerrillos property. Ultimately, the parties agreed that the value of the Cerrillos property was equal to the amount of money spent purchasing and remodelling it, $178,486.43. Both parties recognized the difficulty of obtaining an appraisal of the value of Husband's work on the renovations. Thus, Husband argued that the trial court should consider the value of his services instead of the value added to the property by his labor.

The trial court found and concluded that the Cerrillos home was Wife's sole and separate property, and was subject to a community equitable lien of $39,225. The trial court indicated that "[t]his lien is based upon the value of the community labor of the parties, and substantial justice is accomplished in establishing the lien in said amount."

On appeal, Wife contends that the community is entitled to a lien against the Cerrillos home only if the community can demonstrate that community funds or labor enhanced the value of the property or increased the equity interest in the property. Husband contends that he is not required to show an enhanced value of the property due to his labor, and that the trial court is entitled to use any method of apportionment that achieves substantial justice on the facts of each case. As discussed below, we agree with Wife that under New Mexico law the community is entitled to an equitable lien against her separate property only to the extent that the community can show that its funds or labor enhanced the value of the property or increased the equity interest in the property. Because Husband failed to show that his labor enhanced the value of the property or increased the equity interest in the property, we reverse the trial court on this issue.

[redacted] We recognize that the labor of the parties belongs to the community rather than the individuals. *See Laughlin v. Laughlin,* 49 N.M. 20, 33, 155 P.2d 1010, 1018 (1944). However, the simple fact that the community has expended funds or labor on a separate asset does not, by itself, give rise to either a community interest in the asset or a right to reimbursement for money spent on the asset. For example, it is well settled that the community has no right to be reimbursed for funds spent paying mortgage interest, taxes, or insurance premiums on the asset. *Chance v. Kitchell,* 99 N.M. 443, 445, 659 P.2d 895, 897 (1983); *Dorbin v. Dorbin,* 105 N.M. 263, 268, 731 P.2d 959, 964 (Ct.App.1986). Our Supreme Court has explained the policy behind this as follows:

> The value of real property is generally represented by the owner's equity in it. The equity value does not include finance charges or other expenses incurred to maintain the investment. Therefore, taxes, insurance, interest and garbage and sewer expenditures are not to be credited to Defendant.

Chance, 99 N.M. at 445, 659 P.2d at 897 (citation omitted).

In addition, we think Husband's argument demonstrates a misunderstanding of the concept of apportionment under New Mexico law. This Court has previously had occasion to distinguish between claims for apportionment and claims for reimbursement. *See Dorbin,* 105 N.M. at 265–68, 731 P.2d at 961–64. Apportionment is appropriate only when an asset has been acquired or its equity value increased through the use of both separate and community funds. *See Chance,* 99 N.M. at 445, 659 P.2d at 897; *Dorbin,* 105 N.M. at 268, 731 P.2d at 964. What is apportioned between separate and community interests is the increase in the value of the asset. *See Portillo v. Shappie,* 97 N.M. 59, 62–64, 636 P.2d 878, 881–83 (1981) (the amount of

an equitable community lien on property is equal to the increase in value attributable to community funds and labor); *Bayer v. Bayer,* 110 N.M. 782, 786, 800 P.2d 216, 220 (Ct.App.) (discussing apportionment of the "increase in the value of separate property that is attributable to both community and separate property"), *cert. denied,* 110 N.M. 749, 799 P.2d 1121 (1990); *Dorbin,* 105 N.M. at 265–68, 731 P.2d at 961–64 (apportioning appreciation of the asset between separate and community interests).

In this case, the parties agreed that the value of the property was equal to the amount of separate funds spent in purchasing and renovating the property. Thus, by agreement of the parties, there was no increase in the value of the property that could be attributed to the community. Under these circumstances, the community has only a claim for reimbursement. Moreover, as to that claim for reimbursement, we think that the community labor devoted to the residence is analogous to the use of community funds to pay interest, taxes, and other expenses associated with maintaining an asset. The question is not whether significant funds or labor were expended on the separate property. Indeed, as the facts of *Dorbin* make clear, the amount paid for interest often greatly exceeds the amount of principal paydown. *Dorbin,* 105 N.M. at 267, 731 P.2d at 963. The question is whether the labor contributed to an increase in value.

Husband argues that this rule is unfair as a matter of policy. In support of his argument, he points out that:

> [I]n many circumstances spouses may do things to the marital home that do not necessarily increase the value, but which make the home nicer or more liveable. For example, if community monies are used to build a closet into a separate asset, fundamental fairness to the community would seem to require reimbursement for that project even absent "enhanced value"; otherwise, there would be a windfall to the owner of the separate property.

However, as we have previously observed in *Dorbin:*

> [H]usbands and wives have a mutual duty to support one another, including the use of separate funds where necessary or appropriate. It is sound policy to allow apportionment of an existing asset acquired with mixed monies (community and separate monies) and to deny reimbursement of monies spent, but not to acquire an asset. To do otherwise would be to invite litigation for accountings between spouses to determine who paid for the least significant thing.

Dorbin, 105 N.M. at 268, 731 P.2d at 964 (citing *See v. See,* 64 Cal.2d 778, 51 Cal. Rptr. 888, 415 P.2d 776 (1966)). We think that Husband's policy argument and his claim in this case illustrate precisely the problem that *Chance* and *Dorbin* sought to avoid.

For the reasons above given, we affirm the final decree insofar as it orders that the $5000 representing the loaned down payment on the Ojo Caliente house be divided equally between the parties. We reverse the final decree insofar as it imposes an equitable community lien on Wife's separate property residence in Cerrillos. Each party shall bear his or her own costs and attorney fees.

IT IS SO ORDERED.

MINZNER, C.J., and APODACA, J., concur.

858 P.2d 854

Robert W. MOSER, Plaintiff–Appellant,

v.

Mary BERTRAM, Defendant–Appellee.

No. 20692.

Supreme Court of New Mexico.

Aug. 10, 1993.

Norman Osborne, Hobbs, for plaintiff-appellant.

Brian Fitzgerald, Santa Fe, for defendant-appellee.

OPINION

FROST, Justice.

This appeal from a summary judgment requires us to determine whether a real estate seller's agent owes a fiduciary duty to a prospective purchaser when the seller's agent and the purchaser's real estate agent work for the same real estate broker. The district court held that there is no such fiduciary duty, and we agree.

The material facts are undisputed. Plaintiff-appellant Robert Moser, an individual from California interested in purchasing investment realty in New Mexico, sued defendant-appellee Mary Bertram, a real estate sales agent employed by the Santa Fe brokerage firm of Vidal Garcia doing business as Century 21 Blue Chip Realty ("Blue Chip"), for breach of fiducia-

ry duty. Bertram was listing agent for property that Moser wanted to purchase, a residence located in Santa Fe, New Mexico. Moser hired Dolores Lee as his buyer's agent to secure his acquisition of the property. Lee, like Bertram, was employed by Blue Chip.[1]

With Lee's assistance, Moser contracted to purchase the property contingent upon his acquisition of financing by July 20, 1988. Moser was unable to secure financing by this date and the seller granted him an extension to August 12, 1988 to obtain financing. Moser failed to secure the necessary financing by the new deadline, and the agreement terminated. Approximately one week later, Lee told Moser that the property was still available at the same price. Acting upon this information, Moser arranged financing and contacted Lee, expecting to consummate the sale. Lee then informed Moser that Bertram had sold the property to another party since she had last talked to Moser.

Moser contends that Bertram is liable for his lost investment opportunity because Bertram owed him a fiduciary duty that was breached by Bertram's sale of the property to another purchaser. According to Moser, Bertram's fiduciary duty derives from Moser's agency relationship with Lee: Lee owes Moser a fiduciary duty because she is Moser's agent, Blue Chip owes Moser a fiduciary duty because the fiduciary duties of Lee are attributable to Lee's broker, and Bertram owes Moser a fiduciary duty because the fiduciary duties of Blue Chip are attributable to Bertram as a Blue Chip employee. In sum, Moser claims that "all salespeople employed by a given broker must be bound by all of the fiduciary relationships of that broker."

Bertram responds that she did not owe a fiduciary duty to Moser by virtue of the fact that she and Lee were coagents and coemployees; liability simply does not flow between coagents or coemployees. Bertram adds that she did not have an agency relationship directly with Moser, and that her only fiduciary duty as the listing agent was to the seller of the property.[2] Bertram concedes that she knew Lee was working with Moser, but contends that such knowledge did not affect her fiduciary obligations.

A real estate agent stands in a fiduciary relationship with his or her principal, a position of great trust and confidence commanding the utmost good faith. *Swallows v. Laney,* 102 N.M. 81, 83, 691 P.2d 874, 876 (1984). As a fiduciary, the real estate agent must reveal all facts within his or her knowledge to the principal that might affect the principal's decisions, rights, and interests. *Id.* A real estate broker or salesperson who breaches his or her agency fiduciary duty to a purchaser can be liable for damages. *See Robison v. Katz,* 94 N.M. 314, 321, 610 P.2d 201, 208 (Ct.App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).

A real estate salesperson in New Mexico who is not licensed as a real estate broker must perform statutorily regulated real estate work under the direction of a qualifying real estate broker. Qualifying Broker/Associate Broker/Salesperson—Affiliation and Responsibilities, N.M. Regulation & Licensing Dep't, Real Estate Comm'n Rule 5(B)(1) (Dec.18,1987); *see also* NMSA 1978, § 61–29–2(B) (Repl.Pamp.1988) (describing real estate salesperson as "associated with or engaged under contract either directly or indirectly by or on behalf of a licensed broker"). The real estate salesperson is his or her qualifying broker's agent, an affiliation and responsibility distinct from and in addition to

1. Based upon the same events precipitating this action, Moser sued Garcia, Blue Chip, and Lee. Moser obtained a default judgment against Garcia. Blue Chip, now defunct, was never successfully served with process. Moser settled his claims against Lee.

2. Bertram also argues that Moser has not submitted sufficient evidence to demonstrate that Lee was his agent. Because we hold that Bertram did not owe Moser a fiduciary duty even if Lee were Moser's agent, the factual issue of whether Moser and Lee entered a true agency relationship is not material and does not affect our disposition. We assume throughout that Lee was acting as a purchaser's agent for Moser.

the salesperson's various agency relationships with real estate buyers and sellers. Because a real estate salesperson must work under a broker, when a principal buyer or seller engages a real estate salesperson as an agent, the principal also engages the salesperson's qualifying broker as an agent, thus extending the fiduciary duty owed to the principal buyer or seller up the salesperson's chain of command to the broker.

Although agency fiduciary obligations and liabilities may extend from a salesperson to the qualifying broker, the fiduciary duties of one real estate salesperson are not attributable to another salesperson operating under the same qualifying broker unless one salesperson is at fault in appointing, supervising, or cooperating with the other. *See* Restatement (Second) of Agency § 358(1) (1958). This rule is based upon application of well-established agency law. The Restatement (Second) of Agency, Section 358(1), states: "The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he is at fault in appointing, supervising, or cooperating with them." The reporter's notes add:

> The cases are unanimous in holding that a servant or other agent is not liable for the derelictions of fellow workers or other agents of the same principal. In the absence of wrongful directions or wrongful control or some other element involving wrongful conduct, the doctrine of respondeat superior does not apply to agents who are not masters.

Restatement (Second) of Agency § 358 app. at 602 (1984).

Here, Moser unsuccessfully attempts to attribute Lee's fiduciary obligations vicariously to Bertram. This cannot be done because Bertram and Lee, fellow employees of Garcia and Blue Chip, are not liable for each other's conduct. There is no evidence that Bertram was at fault in appointing, supervising, or cooperating with Lee, and absent such circumstances, Bertram cannot be charged with Lee's fiduciary duties or liability resulting from their breach. Moser's contention that "all salespeople employed by a given broker must be bound by all of the fiduciary relationships of that broker" is incorrect.

Our conclusion is supported by recent caselaw from other jurisdictions observed in our research. *See, e.g., Norwest Capital Management & Trust Co. v. United States,* 828 F.2d 1330, 1344 (8th Cir.1987) (stating that "the negligence of an employee will not be imputed to a co-employee in the absence of tortious conduct of his own"); *Northrop v. Lopatka,* 610 N.E.2d 806, 810 (1993) (finding no vicarious liability between two agents of the same principal); *Galvan v. McCollister,* 224 Kan. 415, 580 P.2d 1324, 1325 (1978) (stating that "[t]he universal legal rule is that a servant or other agent is not liable for the dereliction of a fellow worker or agent under agency principles"); *Morgan v. Eaton's Dude Ranch,* 307 Minn. 280, 239 N.W.2d 761, 763 (1976) (finding one employee not liable for another employee's tort absent showing of fault in appointing, supervising, or cooperating with him); *Connell v. Hayden,* 443 N.Y.S.2d 383, 396–402 (1981) (refusing to find vicarious liability between coemployees absent partnership or joint enterprise).

It is worth noting that this case does not involve an issue of dual agency. In a dual agency situation, one agent has fiduciary obligations to two principals with divergent interests, evoking conflict of interest concerns and consequent disclosure requirements. *See, e.g.,* Agency: Relationship, Disclosure and Compensation, N.M. Regulation & Licensing Dep't, Real Estate Comm'n Rule 18, 2 N.M. Reg. No. 24, 56 (Dec. 31, 1991) (explaining disclosure requirements of dual agency). Because Bertram was not Moser's agent and did not owe him a fiduciary duty, either directly or vicariously, Bertram was not an agent for both the seller and the prospective purchaser of the property.[3]

3. Because Garcia is not a party and his fiduciary duties are not attributable in this case to Ber-

Our decision today does not affect New Mexico precedents characterizing the legal obligations of a real estate listing agent to a prospective purchaser, nor diminish the listing agent's legal responsibilities regarding the exercise of reasonable care, the exercise of competence in obtaining or communicating information, and the proper disclosure of defects. *See, e.g., Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc.*, 101 N.M. 572, 575–77, 686 P.2d 262, 265–67 (Ct.App.1984) (discussing listing broker's legal obligations to prospective purchasers).

Summary judgment is proper when the case presents no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. SCRA 1986, 1-056(C) (Repl.Pamp.1992). This appeal presents no issue of material fact and Bertram is entitled to judgment as a matter of law. The decision of the district court is **AFFIRMED.**

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

858 P.2d 857

In the Matter of Larry N. SMITH, An attorney admitted to practice before the courts of the state of New Mexico.

No. 21155.

Supreme Court of New Mexico.

Aug. 11, 1993.

tram, we do not determine whether Garcia was a dual agent for Moser and the seller of the property.

Sally E. Scott, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Larry N. Smith, pro se.

OPINION

PER CURIAM.

This matter comes before the Court in a disciplinary proceeding conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17–101 through 17–316 (Repl.Pamp.1991), wherein attorney Larry N. Smith has been found to have committed multiple violations of the Rules of Professional Conduct, SCRA 1986, 16–101 through 16–805 (Repl.Pamp.1991 & Cum. Supp.1992). Pursuant to Rule 17–316(D), we adopt the Disciplinary Board's findings of fact, conclusions of law, and recommendations and suspend Smith from the practice of law for an indefinite period of time, pursuant to Rule 17–206(A)(3). In addition, pursuant to Rule 17–214(B)(2), certain conditions are imposed that must be satisfied before consideration of any petition for reinstatement.

In the fall of 1989, Debra Hood retained Smith to represent her in a collection suit against three individuals to whom she had loaned money. Smith did not file suit until December of 1990 and then did not attempt to have the defendants served. The suit was dismissed in October of 1991 for lack of activity. Smith took no action to have the case reinstated. Throughout the time he represented Hood, Smith failed to communicate adequately with her about the status of her case.

In November of 1990, Smith was retained by Julie Riley to represent her in obtaining a divorce. Smith filed the petition and had summons issued, but did not attempt to have Riley's husband served with process. Nothing further happened in the case until July 16, 1991, when the court dismissed the case on its own motion for lack of activity. On August 14, 1991, Smith succeeded in having the case reinstated. Thereafter, Smith did nothing in the case. Throughout the time he represented her, Smith failed to communicate adequately with Riley. Riley repeatedly left messages for Smith, but was able to speak with him only a few times. On those occasions, Smith assured Riley he would take action in her case, but he did not.

In August of 1991, Jeannie Rodriguez retained Smith to represent her in obtaining a divorce. Smith filed the petition and obtained service on Rodriguez' husband. Thereafter, Smith did nothing. Specifically, Smith failed to take the steps necessary to obtain interim child support or a division of income. He did nothing to conclude the divorce. Rodriguez tried repeatedly to reach Smith by leaving messages on his answering machine, but her calls were not returned.

On June 18, 1991, Smith was suspended from the practice of law in New Mexico for non-payment of bar dues. He did not take steps to have his license reinstated at any time thereafter. While suspended, Smith filed the divorce petition on behalf of Rodriguez and also filed the motion to have Riley's divorce case reinstated.

Smith filed a response to the complaints of Riley, Rodriguez, and Hood in which he admitted neglecting each matter and advised that he was being treated for depression and desired to discontinue his law practice altogether. Smith then failed to respond to supplemental requests for information from disciplinary counsel. Disciplinary charges were filed against Smith on September 9, 1992. The charges were amended on November 19, 1992 to include the charge that Smith had practiced law while suspended.

Smith did not file an answer to the specification of charges, thus the charges were deemed admitted pursuant to SCRA 1986, 17–310(C). Pursuant to that same rule, a hearing was convened on January 15, 1993 to receive evidence in mitigation and aggravation and determine the hearing committee's recommendation to the Disciplinary Board. Smith appeared at the hearing and told the committee that, because of ongoing problems with depression, he did not believe he would ever seek to practice law again. He advised the committee that he

had closed his law practice, in part by making arrangements for his remaining divorce cases to be handled by another Santa Fe attorney. Smith did not contest the recommendation of disciplinary counsel that he be indefinitely suspended from the practice of law, with conditions for reinstatement.

The findings and recommendations of the hearing committee were adopted by the Disciplinary Board with modification to two of the recommended conditions for reinstatement. The decision of the Board panel was then reported to this Court. The recommended discipline of indefinite suspension can only be imposed by this Court. SCRA 1986, 17–206(A)(3).

We agree with the findings of the hearing committee and Disciplinary Board that Smith violated SCRA 1986, 16–103 by failing to represent Riley, Rodriguez, and Hood with reasonable diligence and promptness; that he violated Rule 16–104 by failing to keep Riley, Rodriguez, and Hood reasonably informed of the status of their legal matters; that he violated Rule 16–803(D) by failing to cooperate with disciplinary counsel in the discharge of her duties; that he violated Rule 16–804(D) by engaging in conduct prejudicial to the administration of justice; and that he violated Rule 16–804(H) by engaging in conduct that reflects adversely on his fitness to practice law.

The more serious of these violations are Smith's failure to act diligently on behalf of his clients and his failure to communicate with them and keep them advised about their legal matters. These are among the most common complaints the public makes against members of the legal profession. The ABA Comment to Rule 16–103 notes that "no professional shortcoming is more widely resented than procrastination." It further notes that even if the client's interests are not adversely affected by a lawyer's lack of diligence, "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." The same is no less true of the lawyer's failure to keep his clients informed about their legal matters. Moreover, when the public's confidence in one lawyer is undermined, its confidence in the entire legal profession is similarly affected.

A pattern of such conduct will not be tolerated by this Court, even if the violations occurred because the lawyer was "emotionally incapable of dealing with the pressures and demands of the practice of law...." *In re Roth,* 105 N.M. 255, 256, 731 P.2d 951, 952 (1987). Standard 9.3 of the *ABA Standards for Imposing Sanctions,* Mitigation, provides that a mental disability can be considered in mitigation only if the respondent-attorney's recovery from the condition can be demonstrated by "a meaningful and sustained period of successful rehabilitation." This Court agrees.

This should not be read as indicating a lack of understanding on the part of this Court for the stresses inherent in the practice of law and the toll those stresses can take upon a practitioner. This Court previously has noted, however, that its compassion for troubled lawyers "must be tempered with the understanding that protection of the public must be predominant in our determination of these matters." *In re Sparks,* 108 N.M. 249, 251, 771 P.2d 182, 184 (1989). In this case, Smith admits he still suffers from his mental disability, chronic depression. Smith testified that his counselor concluded that practicing law aggravates his depression. The condition cannot, therefore, be considered as a mitigating factor in imposing the appropriate discipline. A mental disability, such as depression, can only mitigate the discipline to be imposed if it can be demonstrated that the condition is no longer likely to result in harm to the public.

IT IS THEREFORE ORDERED that the findings of fact, conclusions of law, and recommendations of the hearing committee, along with the modifications requested by the Disciplinary Board, hereby are adopted and that Larry N. Smith is indefinitely suspended from the practice of law in New Mexico as of the 12th day of May, 1993.

IT IS FURTHER ORDERED that the following conditions shall be satisfied be-

fore any consideration of a petition for reinstatement:

1. Larry N. Smith shall demonstrate by competent expert testimony of a psychologist or psychiatrist that he is mentally fit and capable of engaging in the practice of law. Such psychologist or psychiatrist expert should be selected or approved by the Disciplinary Board to conduct the examination of Mr. Smith, and Mr. Smith shall pay for all costs in connection with such examination;

2. If Mr. Smith is granted reinstatement, he shall be placed under the supervision of an attorney licensed to practice in the State of New Mexico, who shall be approved and appointed by the Disciplinary Board to engage in supervisory activities over the work of Mr. Smith for a defined period of time as may be determined by the Disciplinary Board. Such practice of law shall be conducted under circumstances in which there is an adequate support staff and adequate calendaring system to monitor Mr. Smith;

3. Upon an application for reinstatement Mr. Smith shall take and successfully complete the multi-state ethics examination; and

4. Mr. Smith shall pay all costs incurred by the Disciplinary Board in this proceeding on or before December 31, 1993, with interest accruing at the rate of fifteen percent (15%) per annum on any balance unpaid as of that date.

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

IT IS SO ORDERED.

858 P.2d 860

STATE of New Mexico, Plaintiff–Appellee,

v.

Steve MENDOZA, and Alonzo Jaramillo, Defendants–Appellants.

Nos. 13762, 13732.

Court of Appeals of New Mexico.

Feb. 24, 1993.

Certiorari Denied April 5, 1993.

Tom Udall, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Christopher Bulman, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

OPINION

BIVINS, Judge.

The court's opinion filed January 21, 1993, is hereby withdrawn and the following substituted therefor.

Defendants appeal sentences imposing imprisonment for violation of certain sections of the Motor Vehicle Code. They contend the sentences are unauthorized and are, therefore, void. We hold that the sentences are authorized and affirm.

Defendant Mendoza pled guilty in metropolitan court to driving without insurance and was sentenced to thirty days imprisonment on that charge. Defendant Jaramillo pled guilty in metropolitan court to driving without a driver's license and was sentenced to ninety days imprisonment. Both Defendants appealed their sentences to district court. The sentences were upheld in district court and Defendants appealed to this court. The sole issue on appeal is whether NMSA 1978, Section 66–8–7(B) (Cum.Supp.1992), prescribed a minimum term of imprisonment which should have been imposed as the proper sentence pursuant to the requirements of NMSA 1978, Section 31–18–13(B) (Repl.Pamp.1990).

Section 66–8–7(B) reads as follows:

> Unless another penalty is specified in the Motor Vehicle Code, every person convicted of a misdemeanor for violation of any provision of the Motor Vehicle Code shall be punished by a fine of not more than three hundred dollars ($300) or by imprisonment for not more than ninety days or both.

Defendants contend that this Section, on its face, sets out minimum and maximum terms of imprisonment, a minimum of zero days and a maximum of ninety days. Defendants then argue that, because this Section sets out minimum and maximum terms of imprisonment, the mandate of Section 31–18–13(B) must be followed. Section 31–18–13(B) requires that whenever a defendant is convicted of a crime under a statute not contained in the Criminal Code, which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by such statute. *See State v. Greyeyes,* 105 N.M. 549, 552–53, 734 P.2d 789, 792–93 (Ct.App.), *cert. denied,* 105 N.M. 521, 734 P.2d 761 (1987). Defendants argue that pursuant to this statute, they should have been sentenced to no imprisonment since the minimum term prescribed by Section 66–8–7(B) is zero days.

This argument, of course, is based on the premise that the statute setting the penalty at "not more than ninety days" states a minimum. This Court has previously stated that where no minimum sentence has been specifically stated, we will not construe a statute to include one. *See State v. Shafer,* 102 N.M. 629, 636–37, 698 P.2d 902, 909–10 (Ct.App.) (Section 31–18–13(B) did not require a determinate sentence of one day where charging statute imposed no minimum), *cert. denied,* 102 N.M. 613, 698 P.2d 886 (1985). This Court does not read words into a statute unless they are necessary to make the statute conform to the obvious intent of the legislature. *See State v. Pendley,* 92 N.M. 658, 662–63, 593 P.2d 755, 759–60 (Ct.App.1979). Here, we cannot say that the obvious intent of the legislature was to impose a minimum sentence of zero days of imprisonment. As was the case in *Shafer,* the statute simply does not contain a minimum term. We do not believe the statute is ambiguous or uncertain. Therefore, no construction is required. *See State v. Mobbley,* 98 N.M. 557, 558, 650 P.2d 841, 842 (Ct.App.), *cert. denied,* 98 N.M. 590, 651 P.2d 636 (1982). The plain meaning of the statute indicates no minimum term of imprisonment, only a maximum term. Because no minimum is stated, Section 31–18–13(B) is not the appropriate section for determining the propriety of the sentence.

The State argues that Section 31–18–13(D) is the applicable statute in this case. We believe that *Shafer* supports this argument. In *Shafer,* the defendant was convicted of unlawful sales of securities, a crime not contained in the Criminal Code. The statute setting out the offense declared it a felony and provided a penalty of imprisonment for not more than three years. This Court determined that Section 31–18–13(C) applied because the offense had been declared a felony and was without a specification of the sentence to be imposed on conviction. *Shafer,* 102 N.M. at 637, 698 P.2d at 910.

Using the same analysis, we construe Section 66–8–7(B) to be governed by the provisions of Section 31–18–13(D). The crimes of driving without insurance and driving without a driver's license are not contained in the Criminal Code, but are violations of the Motor Vehicle Code. The penalty for these violations under the Motor Vehicle Code is found in Section 66–8–7(B), which provides for imprisonment for not more than ninety days. The violations are not declared to be felonies. Since they are not declared felonies and are not punishable by a specified sentence, Section 31–18–13(D) applies. For the purpose of sentencing under Subsection D, the violations constitute petty misdemeanors.

Defendants point to the fact that Section 31–18–13(D) refers to "petty misdemeanors" whereas the motor vehicle statutes expressly make the provisions which they were convicted of violating "misdemeanors." Defendants contend this difference in terminology establishes that Section 31–18–13(D) cannot be the applicable statute. We disagree. We are to read legislation as a harmonious whole. *See Grudzina v. New Mexico Youth Diagnostic & Dev. Ctr.*, 104 N.M. 576, 583, 725 P.2d 255, 262 (Ct.App.), *cert. quashed,* 104 N.M. 460, 722 P.2d 1182 (1986). Section 31–18–13(D) states that the crimes to which it applies are petty misdemeanors "for the purpose of the sentence." Thus, the fact that Section 66–8–7(B) refers to the violations of the Motor Vehicle Code at issue here as misdemeanors does not make Section 31–18–13(D) inapplicable.

The sentencing authority for petty misdemeanors is set out in NMSA 1978, Section 31–19–1(B) (Repl.Pamp.1990). It provides for imprisonment in the county jail for a definite term not to exceed six months. The sentences imposed on Defendants here fall within this mandate as well as within the specific mandate of Section 66–8–7(B). We express no opinion on cases arising in the future that might fall outside these mandates.

Defendant Mendoza's claim that the district court relied on erroneous conclusions of law in upholding the sentence need not be addressed. Even if we were to agree with Defendant, it would avail him nothing since the sentence imposed was proper. *See State v. Beachum,* 83 N.M. 526, 527, 494 P.2d 188, 189 (Ct.App.1972) (a decision of the trial court will be upheld on appeal if it is right for any reason).

Defendant Jaramillo's sentence of ninety days imprisonment and Defendant Mendoza's sentence of thirty days imprisonment are authorized by statute. The sentences are affirmed.

IT IS SO ORDERED.

CHAVEZ and PICKARD, JJ., concur.

858 P.2d 863

James R. JORDAN and Sheryl Herley, Plaintiffs–Appellees,

v.

Ronald C. HALL, Defendant–Appellant.

No. 14317.

Court of Appeals of New Mexico.

May 7, 1993.

Michael P. Clemens, Butt, Thornton & Baehr, P.C., Albuquerque, for plaintiffs-appellees.

Michael Allison, Albuquerque, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals an order denying his motion to set aside a foreign default judgment. The trial court determined that the state of Washington was the proper forum for a motion to set aside a default judgment from that state and denied the motion. Our second calendar notice proposed summary affirmance. Both parties have responded to that proposal. Not persuaded by Defendant's arguments, we affirm.

Because the relevant facts are undisputed and the application of legal principles to the facts of this case is clear, we conclude disposition on the summary calendar is appropriate. *Cf. Garrison v. Safeway Stores,* 102 N.M. 179, 180, 692 P.2d 1328, 1329 (Ct.App.1984), *cert. denied,* 102 N.M. 225, 693 P.2d 591 (1985). This appeal raises an issue of first impression. However, we believe the law in other jurisdictions is sufficiently settled and the facts of this case are such that it is appropriate to decide this appeal at this time.

A default judgment was entered against Defendant, a New Mexico citizen, in Washington for money due on an employment contract. Plaintiffs filed an action in New Mexico seeking enforcement of the Washington judgment. Defendant moved to set aside the default judgment on the basis that he was never a party to the employment contract and had acted only as agent and attorney for one of the individual defendants. The trial court refused to set aside the default judgment, holding that Washington was the proper forum for such an action.

The Foreign Judgments Act, NMSA 1978, Sections 39–4A–1 through –6 (Repl.Pamp.1991), states that a foreign judgment filed with the district court clerk "shall have the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying, enforcing or satisfying as a judgment of the district court of this state." Section 39–4A–3. Defendant contends that this language allows New Mexico courts to apply SCRA 1986, 1–060 (Repl.1992) to foreign judgments in the same manner as the rule is applied to judgments of the courts of this state. Defendant contends that each time enforcement of a foreign judgment is sought, our courts may reexamine the merits of the case for the purpose of determining whether or not to give full faith and credit. Defendant states that the clear statutory language supports his argument. We disagree.

Article IV, section 1, of the United States Constitution overrides the local regulation of access to procedures of state courts for the purpose of enforcing foreign adjudications. *See Mountain States Fixture Co. v. Daskalos,* 61 N.M. 491, 493, 303 P.2d 698, 699 (1956). The final determinations by the courts of one state are entitled to full faith and credit in the courts of its sister states. U.S. Const. art. IV, § 1; *see also Full Faith and Credit as to State Statutes Governing Time Limitations on Action on Foreign Judgment—Federal Cases,* 17 L.Ed.2d 952 (1967). New Mexico courts have long given full faith and credit to judgments of sister states, unless the judgment is void. *See Watson v. Blakely,* 106 N.M. 687, 689, 748 P.2d 984, 986 (Ct. App.1987), *overruled on other grounds by Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992). Defendant argues that there are other exceptions to the rule of recognition of sister state court judgments. He has provided us with neither authority for that argument nor a statement of what those exceptions are. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (argument unsupported by cited authority need not be addressed on appeal).

Other jurisdictions that have considered this issue have held that the full faith and credit clause limits the power of a court to reopen or vacate a foreign judgment and that foreign judgments cannot be collaterally attacked on the merits. *Morris v. Jones,* 329 U.S. 545, 551–52, 67 S.Ct. 451, 456, 91 L.Ed. 488 (1947). The Foreign Judgments Act does not diminish the finali-

ty of a foreign adjudication or the full faith and credit obligations under the United States Constitution. *Phares v. Nutter,* 125 Ariz. 291, 293, 609 P.2d 561, 563 (1980) (en banc); *Matson v. Matson,* 333 N.W.2d 862, 867–68 (Minn.1983); *Rosenstein v. Steele,* 103 Nev. 571, 747 P.2d 230, 231–32 (1987); *Data Management Sys., Inc. v. EDP Corp.,* 709 P.2d 377, 380–81 (Utah 1985). After the foreign judgment has been duly filed, the grounds for reopening or vacating are limited to lack of jurisdiction, fraud in the procurement, lack of due process, or other grounds making a judgment invalid or unenforceable. *Matson,* 333 N.W.2d at 867.

We agree with these authorities and hold that the New Mexico Foreign Judgments Act does not change the universal rule that foreign judgments are entitled to full faith and credit. Only the defenses of fraud or lack of jurisdiction may be raised to destroy the full faith and credit owed a foreign judgment. *See Data Management Sys., Inc.,* 709 P.2d at 381. To interpret the language of our statute otherwise would not afford any finality to foreign judgments and would be contrary to the constitutional mandate. Since Defendant did not raise any of these defenses, there was no basis for collateral attack on the Washington judgment.

Defendant claims that the Uniform Foreign Money–Judgments Recognition Act, NMSA 1978, §§ 39–4B–1 through –9 (Repl.Pamp.1991), allows him to make his attack on the Washington default judgment. That act does not apply for two reasons. First, the act was effective on July 1, 1991. Plaintiffs filed their notice of filing foreign judgment on May 16, 1991. Thus, the act was inapplicable to this claim. *See Garcia v. Mt. Taylor Millwork, Inc.,* 111 N.M. 17, 19, 801 P.2d 87, 89 (Ct.App. 1989) (statutes are presumed to operate prospectively), *cert. quashed,* 110 N.M. 282, 795 P.2d 87 (1990). Second, by its language, this act applies to judgments of other countries, not to judgments of other states of the United States. Section 39–4B–2(B); *Van Kooten Holding B.V. v. Dumarco Corp.,* 670 F.Supp. 227, 228 (N.D.Ill. 1987).

The fundamental premise for which Defendant relies on the Uniform Foreign Money–Judgments Recognition Act is also misguided. Defendant argues that, because the Washington judgment was entered by default, the district court could reopen it. New Mexico courts have frequently enforced valid judgments entered by default in other jurisdictions. *Benham v. Forest Prods. Co.,* 101 N.M. 119, 679 P.2d 261 (1984); *Houston Fire & Casualty Ins. Co. v. Falls,* 67 N.M. 189, 354 P.2d 127 (1960). Other courts that have interpreted the Uniform Enforcement of Foreign Judgments Act have also held that valid judgments from other states, even those entered by default, are entitled to enforcement. *Matson,* 333 N.W.2d at 867; *Sparks ex rel. Schimmer v. Wall,* 774 S.W.2d 864, 872 (Mo.Ct.App.1989); *Noetzel v. Glasgow, Inc.,* 338 Pa.Super. 458, 487 A.2d 1372, 1376 (1985), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1517, 89 L.Ed.2d 915 (1986); *Minuteman Press Int'l, Inc. v. Sparks,* 782 S.W.2d 339, 342 (Tex.Ct.App.1989); *see also* Sara L. Johnson, Annotation, *Validity, Construction and Application of Uniform Enforcement of Foreign Judgments Act,* 31 A.L.R.4th 706 (1984); *cf. Colorado Nat. Bank of Denver v. Merlino,* 35 Wash. App. 610, 668 P.2d 1304, 1310–11 (Colorado default judgment against husband only enforceable against community property to the extent allowed by Washington law), *rev. denied,* 100 Wash.2d 1032 (1983).

The trial court's order denying the motion to set aside the Washington default judgment and determining that the motion may be addressed only in the state of Washington is affirmed.

IT IS SO ORDERED.

BLACK and FLORES, JJ., concur.

858 P.2d 867

Palmyra GALLEGOS, personally and as Mother and Next Friend of Martha Gallegos, a Minor, and Delfido Gallegos, Plaintiffs–Appellants,

v.

SCHOOL DISTRICT OF WEST LAS VEGAS, NEW MEXICO, Edmundo Martinez, and Ignacio Lovato, Defendants–Appellees,

and

State of New Mexico Board of Education, School Transportation Division of the State of New Mexico Board of Education, New Mexico State Highway Department, Board of Commissioners of the County of San Miguel, New Mexico State Police, and San Miguel County Sheriff's Department, Defendants.

No. 13382.

Court of Appeals of New Mexico.

July 12, 1993.

Certiorari Denied Aug. 19, 1993.

Elliot L. Weinreb, James E. Thomson, Santa Fe, for plaintiffs-appellants.

Gregory L. Biehler, M. Anne Wood, Beall & Biehler, P.A., Albuquerque, for defendants-appellees.

OPINION

PICKARD, Judge.

Plaintiffs appeal the district court's order granting Defendants School District of West Las Vegas, Edmundo Martinez, and Ignacio Lovato summary judgment in this Torts Claims Act (the Act) case. Plaintiffs filed suit under the Act, NMSA 1978, §§ 41–4–1 to –27 (Repl.Pamp.1989), for damages resulting from an accident on January 10, 1989, in which Plaintiffs' daughter, Martha, was hit by a vehicle while she was crossing State Road 3 to be picked up by a school bus. Defendant Lovato was the driver of the school bus that Martha was attempting to meet. Lovato (Driver), the School District (School), and Martinez, the School's transportation director, (collectively, Defendants) moved for summary judgment, maintaining that they were entitled to immunity under the provisions of the Act. Plaintiffs responded by arguing that immunity had been waived because these Defendants negligently operated the school bus and negligently maintained State Road 3. *See* §§ 41–4–5 and –11. The district court granted the motion for summary judgment, and Plaintiffs appeal. The motion for summary judgment was not joined in by the other defendants in this case, and they are not part of this appeal.

FACTS

In reviewing the summary judgment granted to Defendants, we look at the whole record and view the matter presented in the light most favorable to Plaintiffs. *See Cunningham v. Gross,* 102 N.M. 723, 725, 699 P.2d 1075, 1077 (1985). Affidavits submitted in this case alleged the following facts: (1) Prior to the accident, Driver made a practice of traveling up State Road 3 without picking up any children; (2) Driver would turn around at Sena and pick up all the children on his way back down the road; (3) Driver wanted the children to be waiting for him when he arrived at the bus stop, and he never instructed them to wait until the school bus was at the stop to cross the road; (4) Defendant Martinez provided route instructions, locations of stops, and information concerning procedures to Driver; and (5) while Martha was crossing State Road 3 to catch the school bus, before the bus actually arrived at the stop, she was hit by a vehicle and injured.

DISCUSSION

Negligent Maintenance of Highway

Plaintiffs contend that Defendants negligently maintained State Road 3 by locating the school bus stop in such a way that Martha was required to cross the road to reach the stop. Defendants argued below, and the trial court held, that the act of locating a school bus stop is part of the design or plan of a road, for which immunity is not waived under the Act. *See* § 41–4–11(B)(1). However, Defendants presented no evidence that concerned the design of State Road 3 or tended to show that the location of this particular school bus stop was indeed part of the design or plan of the road. Absent such evidence, the trial court could not determine whether the location of this particular school bus stop was indeed part of the design of the road. *See Romero v. State,* 112 N.M. 332, 333–34, 815 P.2d 628, 629–30 (1991) (state has burden of producing evidence of plan or design of highway in order to show entitlement to "design" exception to statutory waiver of immunity).

To the extent that Defendants would have us hold as a matter of law that the location of a school bus stop on a road is an act of design, rather than maintenance, we decline to do so. Our Supreme Court has indicated that the question of whether an action is one of design or not is fact-based. *See id.*

The placement of a school bus stop involves elements of traffic control, both pedestrian and vehicular, that are quite similar to the placement of traffic lights or other controls on a road. New Mexico courts have held that the placement of such controls, or the lack thereof, constitutes maintenance of the road under the Act. *See Grano v. Roadrunner Trucking, Inc.*, 99 N.M. 227, 228, 656 P.2d 890, 891 (Ct.App.1982), *cert. quashed*, 99 N.M. 358, 658 P.2d 433 (1983); *see also Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987) (citing *Grano* with approval). A school bus stop determines where oncoming and following traffic will be required to slow down or stop to wait for loading or unloading of the bus. The stop also establishes locations where pedestrian traffic will be present, requiring greater care on the part of motorists. This traffic control aspect of the decision to locate a bus stop at a particular place puts the decision in the category of maintenance of a road, unless there are specific facts showing that the bus stop location was part of the plan or design of the road. *Cf. Miller*, 106 N.M. at 255, 741 P.2d at 1376 (decision to issue oversize vehicle permits is act of maintenance because it could create unsafe condition on highway); *Grano*, 99 N.M. at 228, 656 P.2d at 891 (absence of traffic control device at intersection was issue of maintenance); *Romero*, 112 N.M. at 334, 815 P.2d at 630 (question of whether condition of road was matter of design or maintenance required evidence of design or plan of road). The fact that the location of the bus stop has more to do with the safety of pedestrians using the roadway than the safety of drivers is not, in our view, material under our precedents.

Based on the foregoing, we hold that Defendants failed to establish entitlement to summary judgment on the negligent maintenance issue because they did not produce undisputed evidence that would show that the location of this particular bus stop was part of the design or plan of State Road 3.

Negligent Operation of the School Bus

Plaintiffs claim that Driver negligently operated the school bus in two ways. First, they maintain that his day-to-day practice of refusing to pick up Martha on her side of the road, thus forcing her to cross the road to wait for his return trip, was negligent operation of the vehicle. Second, they claim that Driver's failure to instruct Martha to wait until the school bus arrived at the stop and had its lights flashing to cross the road was negligent operation of the bus. Defendants, on the other hand, argue that Driver was nowhere near the scene of the accident when it occurred, so he could not have been operating the bus in a manner that caused the accident. In addition, Defendants contend that Driver's alleged failure to instruct Martha properly concerning safe procedures is not "operation" of a vehicle as defined in the Act.

Operation of a school bus, under the Act, has been construed to include making decisions, while driving the bus, about whether to stop the vehicle on the pavement, with lights flashing, or off the road. *Chee Owens v. Leavitts Freight Serv.*, 106 N.M. 512, 515, 745 P.2d 1165, 1168 (Ct.App.1987). Similarly, Driver in this case allegedly decided, while driving the bus each day, not to pick up Martha on her side of State Road 3 but to pick her up on the opposite side on his return trip. That decision constituted operation of the bus—it occurred while Driver was in control of the bus, and it affected the manner in which Driver performed his driving duties. *See id.*

Although we read *Chee Owens* as holding that "the designation of bus stops did not constitute 'operating a motor vehicle[,]' " *id.* at 514, 745 P.2d at 1167, Plaintiffs do not seek recovery from the School or Martinez on that ground; their claim against those two Defendants is based on derivative liability arising from the alleged negligent operation of the bus by Lovato. Although Driver ordinarily would not be negligent for stopping only at bus stops prescribed by superiors, *see id.* at 516, 745 P.2d at 1169, the facts in this regard are not undisputed.

The fact that the decision about where to pick up Martha did not produce immediate results, so that the bus was not in the area when the accident occurred, does not affect the question of whether the decision constituted operation of the bus. If the bus was negligently operated, and that negligence created a dangerous condition that produced harm at a later time, Driver is not shielded from liability by the fact that his bus was not at the scene at the time of the accident. *See Calkins v. Cox Estates,* 110 N.M. 59, 61, 66, 792 P.2d 36, 38, 43 (1990) (landlord's liability was jury question when child exited fence allegedly negligently maintained by landlord, traveled 900 feet, and was struck by vehicle); *Lopez v. Maez,* 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982) (person who negligently creates dangerous condition cannot escape liability for natural and probable consequences thereof, even if act of third person contributes to final result).

Driver in this case allegedly created a dangerous condition by making it a regular practice to require Martha to cross the road to meet his bus and to be at the stop when he arrived. That regular practice, as we have stated, constituted operation of the bus, whether or not the consequences of the practice occurred while the bus was present. It is up to the fact-finder, of course, to determine whether the accident suffered by Martha was a reasonably foreseeable consequence of Driver's operation of the bus. *See Calkins,* 110 N.M. at 65 & n. 6, 792 P.2d at 42 & n. 6.

Due to our disposition of the foregoing issue, we need not determine whether Plaintiffs have, at this time, made a sufficient evidentiary showing that Defendants' failure to properly instruct Martha concerning safety was part of the process of operating the school bus.

CONCLUSION

In accordance with the above discussion, we reverse the summary judgment granted to Defendants with respect to both the negligent maintenance claim and the negligent operation claim. This case is remanded to the district court for further proceedings.

IT IS SO ORDERED.

APODACA and HARTZ, JJ., concur.

HARTZ, Judge.

I join fully in Judge Pickard's opinion. I write only to emphasize the date on which the cause of action accrued in this case and to comment on the statement in Defendants' Answer Brief that "[o]ne must stretch the term 'maintenance' beyond recognition to find that a bus stop placement on a road falls under the definition."

In an opinion interpreting NMSA 1978, Section 41–4–11(A), Judge Sutin wrote, "Maintenance of a highway means the upkeep of the surface of the highway." *Grano v. Roadrunner Trucking,* 99 N.M. 227, 229, 656 P.2d 890, 892 (Ct.App.1982) (Sutin, J., specially concurring), *cert. quashed,* 99 N.M. 358, 658 P.2d 433 (1983). New Mexico case law has strayed some distance from that construction of the statutory language. Yet, whatever our view of that case law, we should be particularly mindful of the doctrine of stare decisis in matters of statutory interpretation. The opinion in this case is a necessary consequence of our precedents.

When the legislature demonstrates discontent with judicial construction of its enactments, however, it is time for the courts to reconsider their precedents. In 1991 the New Mexico legislature added a provision to the Tort Claims Act stating that the term "maintenance" does not include "conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner[.]" NMSA 1978, § 41–4–3(E) (Cum.Supp.1992). This amendment repudiated *Miller v. New Mexico Department of Transportation,* 106 N.M. 253, 741 P.2d 1374 (1987), which was our Supreme Court's most expansive interpretation of the term "maintenance" in the Tort Claims Act. Regardless of what the legislature originally intended when it enacted Section 41–4–11, the intent of the 1991 legislature was certainly that "main-

tenance" not be interpreted as broadly as it had been in the state's appellate decisions. *See Smith v. United States,* — U.S. ——, ——, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (June 1, 1993) (amendment to statute, which did not redefine the word "use," made clear that the amending Congress intended a broad meaning for the word, even if the Congress that originally passed the provision had intended a more limited scope).

Thus, I am not confident that the meaning of "maintenance" in the present statute would encompass placement of a bus stop. Nevertheless, because the cause of action in this case arose in 1989, before the effective date of the 1991 amendment to the Tort Claims Act, it is unnecessary to decide that issue.

858 P.2d 1263

In the Matter of Staff's Motion for an Order to Show Cause to be Issued to Cerrillos Water and Irrigation Company, Inc., and El Vadito de los Cerrillos Water Association.

EL VADITO DE LOS CERRILLOS WATER ASSOCIATION, Petitioner,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Respondent.

Nos. 19596, 19835.

Supreme Court of New Mexico.

Aug. 10, 1993.

Montgomery & Andrews, John B. Draper, Galen M. Buller, Rod D. Baker, Santa Fe, for petitioner.

Lee Huffman, Com'n Counsel, Santa Fe, for respondent.

OPINION

BACA, Justice.

Appellant, El Vadito de los Cerrillos Water Association ("El Vadito"), appeals two final orders issued by the New Mexico Public Service Commission ("Commission"). Both Commission orders pertained to an application for abandonment and transfer that was filed with the Commission by the Cerrillos Water and Irrigation Company ("CWIC"), a public utility which sought to abandon water service to its customers and transfer its water supply facilities to El Vadito. We address the following issues on consolidated appeal: (1) Whether the Commission exceeded the scope of its authority by requiring El Vadito to offer memberships to all former water hauler customers of CWIC as a condition to approving CWIC's application for abandonment and transfer; (2) whether El Vadito was transformed into a public utility when it sold water to water haulers who were not members of its association; and (3) whether the New Mexico Sanitary Projects Act, NMSA 1978, Sections 3–29–1 to –19 (Repl.Pamp.1991) ("SPA"), requires El Vadito to offer membership in its association to non-member water haulers who reside in the rural areas surrounding Cerrillos. We note jurisdiction under NMSA 1978, Section 62–11–1 (Repl.Pamp.1984), and vacate both Commission orders.

I

For nearly a century, CWIC, a public utility regulated by the Commission, sup-

plied water to the rural New Mexican village of Cerrillos and was the sole source of water for residents living in Cerrillos and surrounding rural areas. By 1990, CWIC served seventy-seven customers via a water pipeline and provided service to approximately sixty customers without access to CWIC's pipeline ("water haulers"), who physically hauled water from CWIC's valve house to their residences.

Due to a perennial shortage of maintenance funds, CWIC's water supply system gradually fell into a state of disrepair and eventually ceased to supply water in an effective manner. El Vadito, a non-profit corporation organized pursuant to the SPA, entered into an agreement with CWIC to purchase CWIC's existing water supply facilities. El Vadito planned to utilize SPA funds and loan money obtained under the Rural Infrastructure Act, NMSA 1978, sections 75–1–1 to –6 (Repl.Pamp.1988), to upgrade and replace CWIC's existing water supply system. El Vadito then intended to assume CWIC's responsibility for supplying water to the community of Cerrillos.

On February 1, 1990, CWIC filed an application with the Commission, requesting permission to abandon water service to its customers and transfer its water supply facilities to El Vadito. A hearing on CWIC's application, docketed as Case No. 2313, was held before the Commission in June of 1990, with El Vadito and seventeen water haulers intervening. Evidence adduced during the hearing established that El Vadito's newly constructed pipeline would serve CWIC's existing pipeline customers and fifteen of CWIC's former water hauler customers. These customers had previously been granted membership in El Vadito. Several of the remaining 45 water hauler customers not served by El Vadito's pipeline applied for and were denied membership in El Vadito.

Toward the conclusion of the three-day hearing, counsel for CWIC suggested to the Commission's Hearing Examiner that the Commission promulgate an interim order permitting CWIC to immediately transfer its water supply facilities to El Vadito, subject to reversal in the event that the Commission denied CWIC's application. In response, the Commission's Hearing Examiner questioned the practicality and necessity of obtaining an interim order and instead suggested that CWIC simply transfer its facilities to El Vadito, subject to later Commission approval.

Following the hearing and prior to issuance of the Commission's final order in Case No. 2313, CWIC abandoned service to its customers and transferred its water system to El Vadito. El Vadito began operating and upgrading CWIC's water supply system and began selling water to its members and to non-member water haulers pending the Commission's final decision on CWIC's application.

The Commission issued its final order in Case No. 2313 on October 1, 1990. The Commission, concerned that denial of membership in El Vadito would leave non-member water haulers without legally enforceable rights to an adequate water supply, conditioned approval of CWIC's application on whether El Vadito agreed to offer membership in its association to all water haulers currently excluded under El Vadito's plan. The Commission's order also required CWIC to assist El Vadito by notifying former water hauler customers of their opportunity to obtain membership in El Vadito.

Neither El Vadito nor CWIC complied with the requirements of the Commission order in Case No. 2313. CWIC declined to notify its former water hauler customers of their opportunity to join El Vadito. El Vadito continued selling water to non-member water haulers, but refused to allow them membership in its organization.

On November 27, 1990, Commission staff members filed a motion for an Order to Show Cause why CWIC and El Vadito were not in violation of the Final Order issued in Case No. 2313 for executing the abandonment and transfer agreement without first

complying with the conditions mandated by the Commission's order. In response to the staff's motion, the Commission instituted Case No. 2365 and issued a final order finding CWIC and El Vadito in violation of the final order issued in Case No. 2313. The Commission found that El Vadito had been transformed into a public utility by selling water to persons outside its membership. The Commission required El Vadito to file for a Certificate of Public Convenience and Necessity in order to continue operating the CWIC water supply system. El Vadito appeals both final orders. The two cases were consolidated for appeal to this Court.

II

The first issue that we address is whether the Commission exceeded the scope of its authority by requiring El Vadito to offer approximately forty-five water haulers membership in its association as a condition to granting CWIC's application. The answer to this question depends upon whether El Vadito, an SPA association, was subject to the Commission's jurisdiction. The issue of whether the Commission has jurisdiction over SPA associations has not previously been addressed by this Court.

When reviewing Commission orders, this Court must ensure that the order is supported by substantial evidence, is neither arbitrary nor capricious, and is within the Commission's scope of authority. *See Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm'n,* 106 N.M. 622, 626, 747 P.2d 917, 921 (1987). Commission decisions requiring expertise in highly technical areas, such as utility rate determinations, are accorded considerable deference. *See Attorney Gen. v. New Mexico Pub. Serv. Comm'n,* 111 N.M. 636, 642, 808 P.2d 606, 612 (1991). Less deference, however, is warranted when reviewing determinations outside the realm of the Commission's expertise. *See Mitzelfelt v. Department of Air Force,* 903 F.2d 1293, 1296 (10th Cir. 1990). The question of whether the Commission has jurisdiction over the parties or subject matter in a given case is a question of law outside the scope of the Commission's expertise and reviewable by the courts with little deference accorded to the Commission's own jurisdictional determination.[1] *Homer Elec. Ass'n v. City of Kenai,* 816 P.2d 182, 184–85 (Alaska 1991).

The Commission is an administrative body created by statute and obtains authority and jurisdiction expressly or by necessary implication from the statute creating it. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n,* 81 N.M. 683, 684, 472 P.2d 648, 649 (1970). The Commission was created by and derives its jurisdiction from the New Mexico Public Utility Act, NMSA 1978, Sections 62–1–1 to –14–8 (Repl.Pamp.1984 & Cum.Supp.1989) ("PUA"). The PUA gives the Commission regulatory jurisdiction over public utilities, *see* § 62–6–4(A) (Repl.Pamp.1984) ("[t]he commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility...."), and grants the Commission control over various operational activities of public utilities, such as those pertaining to CWIC in the instant case. *See* § 62–9–5 (Repl.Pamp. 1984) (requiring Commission approval before a utility can abandon all or part of its facilities); § 62–6–12(A)(4) (requiring the Commission's express authorization before a public utility can "sell, lease, rent, purchase or acquire any public utility plant or property...."). No provision of the PUA,

1. The Commission always has the first opportunity to define its jurisdiction. Through its action or inaction, the Commission ascertains whether the subject matter and parties are or are not within the purview of its statutory power. *See People ex rel. Thompson v. Property Tax Appeal Bd.,* 22 Ill.App.3d 316, 317 N.E.2d 121, 125 (Ill.App.Ct.1974), *cert. denied,* 422 U.S. 1002, 95 S.Ct. 2623, 45 L.Ed.2d 666 (1975), *and reh'g denied,* 423 U.S. 885, 96 S.Ct. 161, 46 L.Ed.2d 117 (1975). The Commission, however, is not the final arbiter of its statutorily conferred jurisdiction, and the propriety of the Commission's initial determination is always a question appropriate for judicial review. *See id.*

however, expressly grants the Commission jurisdiction over SPA associations.

Because the PUA does not explicitly grant the Commission jurisdiction over SPA associations, we must determine whether such jurisdiction arises by necessary implication. We note that the Commission's jurisdiction under the PUA extends no further than regulating those entities that function and operate as public utilities. *See* § 62–6–4(A). The PUA neither affirmatively brings all SPA associations within the scope of the Commission's jurisdiction by including such associations in the definition of "public utility," as was done with rural electric cooperatives, *see* § 62–3–3(E) & (G) (Cum.Supp.1989) (including rural electric cooperatives in the definition of "public utility"); § 62–3–2(A)(1) (Cum.Supp.1989) (stating that the Commission must regulate electric service furnished by rural electric cooperatives "in order to effectuate the purposes of both the Rural Electric Cooperative Act, [NMSA 1978, Sections 62–15–1 to –33 (Repl.Pamp. 1984 & Cum.Supp.1992)] ... and the [PUA]...."), nor deliberately exempts SPA associations, as a class, from Commission jurisdiction, as in the case of utilities solely owned and operated by municipalities. *See* § 62–3–3(E) (stating that absent voluntary election to come within the provisions of the PUA under NMSA 1978 Section 62–6–5 (Repl.Pamp.1984), municipalities are excluded from the operation of the PUA); NMSA 1978, § 62–6–4(A) (pronouncing that while the Commission has regulatory and supervisory jurisdiction over public utilities, it lacks the power and jurisdiction to regulate or supervise utilities owned and operated by municipal corporations).

■ The PUA's silence as to whether the Commission has jurisdiction over SPA associations, by itself, proves to be inconclusive on the issue of whether the Commission has jurisdiction by necessary implication over SPA associations. *See Leyba v. Renger,* 114 N.M. 686, 688, 845 P.2d 780, 782 (1992) (declaring that legislative silence, by itself, does not express legislative intent); *Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't,* 113 N.M. 593, 598, 830 P.2d 145, 150 (1992) (holding that a statute's silence on whether punitive damages are recoverable from a governmental entity indicates no intent one way or the other on whether the legislature intended to waive sovereign immunity for punitive damages in contract actions against a governmental entity). The legislature, however, was not silent as to administrative oversight of SPA associations. The SPA grants control of SPA associations to the New Mexico Environmental Improvement Division of the Health and Environment Department ("NMEID") and provides a comprehensive legislative scheme under which NMEID supervises local SPA associations as these associations develop water facilities and sewage works in rural communities otherwise lacking adequate domestic water supplies. *See* §§ 3–29–1 to –19. The absence of any provision in the PUA bringing SPA associations within the Commission's jurisdiction by including these associations in the definition of "public utility," combined with NMEID's extensive oversight and control of SPA associations under the SPA, leads us to conclude that the legislature intended SPA associations to be free from the Commission's extensive regulatory oversight when carrying out the purpose of the SPA by providing basic water service to rural unincorporated communities.

■ Furthermore, the fact that the SPA grants NMEID extensive oversight and control of SPA associations alone warrants the conclusion that the Commission does not have general jurisdiction over SPA associations. Under Section 62–6–4(A) of the PUA, the Commission has *exclusive* power and jurisdiction to regulate and supervise public utilities. Consequently, any determination that SPA associations are under the general jurisdiction of the Commission—i.e., that SPA associations generally operate as public utilities, *see* § 62–6–4(A) (granting, and by implication, confining the Commission's jurisdiction to the supervi-

sion and regulation of public utilities)—would lead to an irreconcilable conflict between those provisions of the SPA granting extensive control over SPA associations to NMEID and the Commission's exclusive jurisdiction to regulate and supervise public utilities found in Section 62–6–4(A) of the PUA. We assume that the legislature was aware of the Commission's exclusive jurisdiction over public utilities, conferred by 1941 N.M. Laws, ch. 84, § 17, and had no intention of creating a conflict with this provision of the PUA when it later granted NMEID extensive control over SPA associations by enacting the SPA in 1965 N.M. Laws, ch. 300. *See Clothier v. Lopez,* 103 N.M. 593, 595, 711 P.2d 870, 872 (1985) (recognizing the presumption that the legislature is aware of existing law when it passes subsequent legislation and concluding that two acts which appear to be contradictory should be interpreted, when possible, to give effect to both). Based upon these foregoing reasons, we hold that Commission jurisdiction over SPA associations does not arise by necessary implication.[2]

SPA associations, however, are not exempt from the Commission's regulatory jurisdiction in every case. An SPA association operating as a public utility would be subject to the Commission's exclusive regulatory jurisdiction, as any other public utility would be. *See* § 62–6–4(A). In the instant case, examination of the Commission's final order in Case No. 2313 reveals that it made no determination that El Vadito was operating as a public utility. Instead, the Commission agreed with the Hearing Examiner's conclusion that El Vadito would not be transformed into a public utility and would remain outside Commission regulatory jurisdiction when operating CWIC's former water facilities, but qualified this conclusion by stating that El Vadito would remain free of Commission oversight only if it restricted water service to its members. The Commission expressed concern in its final order that the already-completed transfer of CWIC's water supply facilities to El Vadito—a conditional transfer suggested by CWIC's counsel and consented to by the Hearing Examiner—was not in the best interests of the Cerrillos community if El Vadito failed to extend membership in its association to all non-member water haulers. It is within this factual context that the Commission promulgated its order requiring El Vadito to extend membership in its association to the remaining non-member water haulers as a condition to approving CWIC's application for abandonment and transfer.

While the Commission clearly had the power to grant or deny CWIC's abandonment and transfer application, it did not have the power to dictate El Vadito's membership as a condition to approving CWIC's application. El Vadito was an SPA association not found to be operating as a public utility and thus, was not within the realm of the Commission's statutorily-conferred jurisdiction. Once the Commission determined that CWIC's application for abandonment and transfer was not in the public interest and that the only cure for the application's defects rested with El Vadito, a party outside the scope of Commission jurisdiction, all that the Commission lawfully could have done was to deny CWIC's application.[3] The Commission, lacking the

2. A system of concurrent jurisdiction over SPA associations by NMEID and the Commission is impractical for the same reason. Concurrent jurisdiction would create the same irreconcilable conflict between NMEID's statutorily-conferred oversight of SPA associations and the Commission's exclusive control over the entities under its jurisdiction.

3. The final order in case No. 2313 stated that CWIC's application should be denied if certain conditions for approval were not met and if the Commission finds "that there has not been a sufficient showing made that the continuation of service is assured or that the present and future public convenience and necessity do not otherwise require the continuation of service." However, examination of the Commission's final orders in Case No. 2313 and Case No. 2365 discloses that the Commission never denied CWIC's application for abandonment and transfer. Instead, the final order in Case No. 2365 declared El Vadito to be a public utility and ordered that El Vadito apply for a certificate of

statutory mandate to assert jurisdiction over El Vadito, acted beyond the scope of its authority by attempting to dictate El Vadito's membership. We hold that the Commission was without jurisdiction to require that El Vadito offer memberships in its association to non-member water haulers as a condition to granting CWIC's application and vacate the Commission's final order in Case No. 2313.

III

We next review the Commission's determination that El Vadito was transformed into a public utility by selling water to certain non-member water haulers. The Commission instituted Case No. 2365 after El Vadito and CWIC refused to comply with the order promulgated in Case No. 2313. In its final order in Case No. 2365, the Commission found El Vadito to be operating as a public utility, decided that El Vadito was subject to the Commission's regulatory jurisdiction, and held that El Vadito would be required to obtain a certification of public convenience and necessity to operate the water system purchased from CWIC. *See* NMSA 1978, § 62–9–1 (Repl.Pamp.1984). El Vadito bears the burden on appeal of demonstrating that the order appealed from is unreasonable or unlawful. NMSA 1978, § 62–11–4 (Repl.Pamp.1984).

Whether El Vadito became a public utility by selling water to non-member water haulers depends upon whether providing water to the water haulers constituted furnishing water service *to the public,* within the meaning of the Public Utility Act. Section 62–3–3(G) (defines "public utility" as every person operating, owning, leasing or controlling plants, properties or facilities furnishing water "to or for the public"); § 62–3–1(A) (Repl.Pamp.1984) (public utilities are affected with the public interest in that, among other things, they render "essential public services to a large number of the general public").

Several of our previous opinions have considered whether certain entities operated as public utilities within the meaning of the PUA when providing utility service to individuals or groups of individuals within the general population. *See Griffith v. New Mexico Pub. Serv. Comm'n,* 86 N.M. 113, 520 P.2d 269 (1974) (holding that a subdivision developer who ran water pipes from his privately-owned spring to each lot in the subdivision and charged lot owners for water service was a public utility within the meaning of the PUA); *Llano, Inc. v. Southern Union Gas Co.,* 75 N.M. 7, 399 P.2d 646 (1964) (upholding trial court decision to vacate a Commission order finding that a corporation buying and reselling gas to a single industrial customer was a public utility subject to Commission jurisdiction); *Socorro Elec. Coop. v. New Mexico Pub. Serv. Co.,* 66 N.M. 343, 348 P.2d 88 (1959) (holding that a rural electric cooperative that distributed electricity to member consumers and "certain others" in several New Mexico counties was not a public utility as contemplated by the PUA).

These cases define a public utility as an individual or entity that holds itself out " 'expressly or impliedly, as engaged in the business of supplying [its] product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding [itself] out as serving or ready to serve only particular individuals.' " *Llano, Inc.,* 75 N.M. at 17, 399 P.2d at 653 (quoting 73 C.J.S. *Public Utilities* § 2 p. 992 (1951)). In *Llano,* we noted that the principle determinative feature of a public utility " 'is that of service to or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its servic-

public convenience and necessity after El Vadito and CWIC failed to fulfill the conditions necessary to obtain Commission approval of CWIC's application in Case No. 2313. Had the Commission simply denied CWIC's application, CWIC would have been required to resume operation of the water facilities until CWIC and El Vadito could have developed terms for abandonment and transfer that were acceptable to the Commission.

es or commodities.' " *Id.* at 18, 399 P.2d at 653 (quoting 43 Am.Jur. *Public Utilities and Services* § 2 p. 571, (1942)). Thus, public utilities are clearly characterized by an interest in serving the public at large, *see West Valley Land Co. v. Nob Hill Water Ass'n,* 107 Wash.2d 359, 729 P.2d 42, 46 (1986), or a willingness to extend service to an indefinite public, without restricting service to privileged individuals. *Socorro Elec. Coop.,* 66 N.M. at 348, 348 P.2d at 91 (quoting *Thayer v. California Dev. Bd.,* 164 Cal. 117, 128 P. 21, 25 (1912)).

In the instant case, El Vadito sold water to approximately forty-five non-member water haulers in addition to providing water service to its 108 members. El Vadito's sale of water to its pipeline membership and to a small group of non-member water haulers fails to manifest a readiness to serve an indefinite public. Consequently, we hold that El Vadito was not transformed into a public utility by selling water to a limited number of non-member water haulers and is not subject to the Commission's regulatory jurisdiction. At the present time, El Vadito may continue to operate its water system without obtaining a certificate of public convenience and necessity from the Commission. We find the Commission's determination that El Vadito was operating as a public utility to be unreasonable under the facts of this case and vacate the Commission's order in Case No. 2365.[4]

IV

Finally, we note that El Vadito evoked the jurisdiction of this Court to determine whether it, as an SPA association, was outside the scope of the Commission's regulatory jurisdiction. Having held that El Vadito is free from Commission jurisdiction, we consider it necessary to address the issue of whether non-member water haulers have a right to membership in El Vadito under the SPA. El Vadito is under no obligation to serve non-members because of its status as a non-profit association organized pursuant to the SPA. Thus, non-member water haulers who are hauling water from El Vadito's valve house currently have no legally enforceable right to access the community's sole source of water if El Vadito decides to discontinue service to these water haulers in the future.

The purpose of the SPA is to improve the public health of the people of New Mexico by establishing sanitary domestic water facilities to supply water to rural unincorporated communities, which otherwise would likely have no means to procure usable water. *See* § 3–29–3. The SPA, in apparent recognition of an SPA association's obligation to provide for its community, requires that all persons within a given community be granted equal opportunity to become members of any new or existing association. *See* § 3–29–11; N.M. Att'y Gen. Op. 61–44 (1961). Because this provision limits the right to membership in a given SPA association to "persons within the community" served by the association, the question presented in the instant case is whether water haulers living in the rural areas surrounding Cerrillos are persons within the community of Cerrillos, such that they have a right to membership in El Vadito under the SPA.

The SPA in relevant part defines "community" as "any rural unincorporated community." Section 3–29–2(A). This definition provides little help in answering the question presented and instead requires a determination of what constitutes the rural unincorporated community of Cerrillos. The words used in a statute should be given their common, everyday meaning. *State ex rel. Reynolds v. Aamodt,* 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990). The term "community" has traditionally meant a group of people residing "in a locality in more or less proximity," bound together by

4. We hold only that El Vadito is not operating as a public utility at this point in time. Should El Vadito begin to sell water to a proportionately larger number of non-members or to substantial numbers of water users outside the Cerrillos community, it might well be transformed into a public utility in the future. *See Llano, Inc.,* 75 N.M. at 18, 399 P.2d at 654.

"common rights, privileges, or interests." *Black's Law Dictionary* 254 (5th ed. 1979). The word "rural" connotes country as opposed to urban living. *See id.* at 1197. Thus, the rural unincorporated community of Cerrillos is comprised of those people who share common rights, privileges, or interests, and live in reasonable proximity to one another within Cerrillos and the agrarian areas surrounding Cerrillos.

While a rural community is by its very nature not amenable to easily defined boundaries, the circumstances of this case mandate that proximity and dependency shape and define the community of Cerrillos water users. Water haulers living in the Cerrillos area are as much a part of the community as residents served by El Vadito's pipeline because both groups live in reasonable proximity to one another and are bound together by the common important interest in maintaining access to the area's sole source of water. Thus, water haulers who reside in the rural areas surrounding Cerrillos and depend exclusively upon the El Vadito water system for water have a right under the SPA to become members of El Vadito.[5] As members of the Cerrillos community, these water haulers must be afforded the opportunity to become members of El Vadito under the same membership criteria as that applied to members served by El Vadito's pipeline. Membership in El Vadito will ensure that these water haulers will have legally enforceable rights to access the community's sole source of water in the future.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

RANSOM, C.J., dissents.

RANSOM, Chief Justice (dissenting).

I respectfully dissent. In Case 2313, approval of a public utility's transfer of facilities was conditioned upon the transferee's offer of membership in its association to all water haulers who may require service. The propriety of the Commission's conditional approval is not in question. In Case 2365, the Commission found that El Vadito is a public utility which is required to have a certificate of public convenience and necessity in order to continue operating a former public utility's water supply system.

Whether El Vadito is operating as a public utility is a question of fact, not one of law. The majority opinion acknowledges the obvious: "An SPA association operating as a public utility would be subject to the Commission's exclusive regulatory jurisdiction, as any other public utility would be." As to whether the facts demonstrate that El Vadito is operating as a public utility, I would accord the decision of the Commission considerable deference because of its expertise. I deem the majority's exercise in statutory interpretation to be largely irrelevant in deciding whether the Commission acted arbitrarily or capriciously in finding El Vadito to be a public utility.

To digress, if I were to address the statutory questions discussed in the majority opinion, I believe I would find installation of sanitary domestic water facilities to be compatible with regulation by the Environmental Improvement Division concurrently with regulation of public convenience and necessity (and rates) by the Commission. I see no "irreconcilable conflicts." The purpose of the SPA is to improve the public health of New Mexicans through a program that provides for installation of sanitary domestic water facilities. NMSA 1978, § 3-29-3 (Repl.Pamp.1991). The SPA does not address service, rates, or the transfer of facilities by an existing public entity. That is the responsibility of the Commission. By its current specific ex-

5. It necessarily follows from our definition of the Cerrillos community that water haulers who have access to alternative sources of water or live considerable distances from the vicinity of Cerrillos are not members of the Cerrillos community and thus do not have a mandatory right to membership in El Vadito.

emptions regarding municipalities and tenants or employees of a system owner, the legislature has shown that it knows how specifically to exempt certain types of associations from regulation by the Commission. Prior to 1967, rural electric cooperatives were expressly excepted by statute from regulation by the Commission, but those statutes were repealed by the enactment of Section 62-3-2. The repeal of that exemption further indicates the legislature's intent to make essential utility services (other than those specifically exempted) subject to Commission regulation.

The majority correctly states that: "Whether El Vadito became a public utility by selling water to non-member water haulers depends upon whether providing water to the water haulers constituted furnishing water service *to the public,* within the meaning of the Public Utility Act." The majority defines a public utility as a business engaged in service to the public as distinguished from service to particular individuals; it holds that El Vadito is not a public utility because its "sale of water to its pipeline membership and to a small group of non-member water haulers fails to manifest a readiness to serve an indefinite public." However, the opinion notes that "El Vadito ... intended to assume CWIC's responsibility for supplying water *to the community.*" (Emphasis added.) The opinion concludes with the acknowledgement that water haulers who are members of the Cerrillos community "must be afforded the opportunity to become members of El Vadito under the same membership criteria as that applied to members served by El Vadito's pipeline." Apparently, no member of the public requiring service is to be excluded. A duty to serve water haulers who reside in the rural areas surrounding Cerrillos and who depend exclusively upon the El Vadito water system evinces that El Vadito is a corporation which supplies service to the public as distinguished from particular individuals.

I am inclined to believe that the definition of a public utility as adopted in the circulating opinion is not sufficiently precise. I would prefer the language from *Griffith*: "[I]n order to preserve the public welfare, any person not engaged solely in interstate business, who operates a facility which supplies water to the public for domestic use, is a public utility unless he supplies water only to himself, his tenants, or his employees." *Griffith v. New Mexico Public Serv. Comm'n,* 86 N.M. 113, 115, 520 P.2d 269, 271 (1974). *Griffith* also quotes helpful language from *Socorro Electric Cooperative, Inc. v. Public Service Co.,* 66 N.M. 343, 347, 348 P.2d 88, 90 (1959). Public or private character depends on "whether or not [the enterprise] is open to the use and service of all members of the public who may require it, to the extent of its capacity." *Griffith,* 86 N.M. at 115, 520 P.2d at 271. A water system is for the public use whenever service is "to sufficient of the public to clothe the operation with a public interest." *Id.* at 116, 520 P.2d at 272. I would echo the proposition that: "the true criterion by which to determine whether a ... system is a public utility is whether or not the public may enjoy it of right or by permission only." 73B C.J.S. *Public Utilities* § 3, at 132 (1983); *Junction Water Co. v. Riddle,* 108 N.J.Eq. 523, 155 A. 887, 889 (Ch.1931) (same).

In *Rural Electric Co. v. State Board of Equalization,* 57 Wyo. 451, 120 P.2d 741 (1942), the court stated that: "In order that an owner of an electric plant may be said to be a public utility, his or its property must be devoted to public use." *Id.* at 747. Such intent to devote to public use could be shown by the following factors: whether the association or corporation supplies a commodity to the public; the character of the service—whether it is a necessary commodity; whether the public enjoys the service by right or by permission; the monopoly of the service; and the corporation's exercise or right of eminent domain.[1] *Id.* at 751. The Wyoming court stated that a corporation that services such a substantial

1. In New Mexico, the taking of property through eminent domain is permitted for none

part of the public as to make its rates, charges, and methods of operation a matter of public concern, welfare, and interest subjects itself to every characteristic of a public utility. *Id.* *Griffith* echoes this principle. Since an SPA association is legislatively created; the project is financed with public monies; the association is given the power, with NMEID approval, to exercise eminent domain; and the public by statute has a right to demand service, it is clear to me that SPA associations are public utilities. Under the appropriate definition, I do not believe the Commission acted arbitrarily in deciding that El Vadito fell within the scope of its authority.

other than a public use. *Kaiser Steel Corp. v. W.S. Ranch Co.,* 81 N.M. 414, 416, 467 P.2d 986, 988 (1970). In *Bookhart v. Central Electric Power Cooperative, Inc.,* 219 S.C. 414, 65 S.E.2d 781 (1951), the court stated that if a cooperative has express powers of eminent domain, it inevitably results in the obligation to reasonably render nondiscriminatory service. The court found that just because the co-op furnished service only on the basis of membership did not preclude it from being a public utility since such members constituted the "public" of such rural areas. *Id.* 65 S.E.2d at 784.

[redacted]

858 P.2d 1276

Ernest GALLEGOS, Petitioner–Appellant,

v.

NEW MEXICO STATE CORRECTIONS DEPARTMENT and New Mexico State Personnel Board, Respondents–Appellees.

No. 11762.

Court of Appeals of New Mexico.

Jan. 30, 1992.

E. Justin Pennington, Law Offices of E. Justin Pennington, Albuquerque, for petitioner-appellant.

Sharon Walton, Sp. Asst. Atty. Gen., Corrections Dept., Santa Fe, for respondents-appellees.

OPINION

APODACA, Judge.

The original opinion filed January 8, 1992, is hereby withdrawn, on this court's own motion, and the following opinion is substituted in its place.

Petitioner Ernest Gallegos (Employee) appeals from orders of the district court and State Personnel Board (Board) affirming his dismissal from the New Mexico State Corrections Department (Department). Employee argues that (1) the Board's action was not supported by substantial evidence, was arbitrary and capricious, and contrary to law; (2) the Board failed to make findings supporting its conclusion that the Department had just cause to dismiss him; and (3) the Department's failure to follow its own regulations renders its decision null and void and violated Employee's right to procedural due process. We hold that the Board's decision was not supported by substantial evidence, was arbitrary and capricious, and contrary to law. Because of our disposition, we need not address the due process issue. We have combined issues 1 and 2 in our discussion. We reverse and remand, with instructions that the district court's and Board's orders be vacated and that Employee be reinstated to his former position with the Department.

FACTS

Employee was employed by the Department as a Correctional Officer II (Lieutenant), at the Central New Mexico Correction-

al Facility (the Facility). In September 1987, when Employee was working the evening shift, he was called to assist Officer Steve Lovato (Lovato) at what was known as the J–1 unit (the unit). Lovato was having difficulty removing Inmate Dennis Leza (Leza) from a cellblock where Leza's presence was prohibited. Lt. Arthur Lesueur (Lesueur) accompanied Employee to the unit. When Employee and Lesueur arrived there, Leza and Lovato were in the corridor below the control center. The corridor was roughly horseshoe shaped, with a stairwell separating the two ends. It was impossible to see through or around the stairwell. A control center was located above the corridor on a second level. Windows in the floor of the control center allowed officers in the control center to see into the corridor below them.

Before Employee arrived at the unit, Leza had become confrontational and refused to leave the cellblock. He was holding several items of contraband, including a picture frame, which Employee took from him and handed to Lesueur. Leza suddenly grabbed for the picture frame held by Lesueur. In the brief struggle that followed, the frame broke and pieces scattered on the floor. Lovato and Employee picked up the pieces. After the frame broke, Lesueur picked Leza up with one hand on his throat and slid him up against the wall, lifting him at least several inches off the ground and holding him there for two or three seconds. Employee looked up and saw Lesueur follow Leza out the door. Officer Cary testified that Lesueur pushed Leza out the door.

Several officers saw Lesueur's action. Lovato looked up briefly as he was picking up pieces of the picture frame and saw Leza's feet off the floor. Cary and another employee, Officer Maes, saw Lesueur use force against Leza from the cellblock window. Cary testified that, if he had been momentarily distracted, he would not have seen the incident.

Employee testified that he did not see Lesueur lift Leza by the neck. He did not learn that force had been used until a month after it occurred, when Lesueur told him. After Lesueur's admission, Employee wrote a memo to the chief of security at the Facility, describing his conversation with Lesueur. The other officers involved in the incident testified either that they could not see Employee or that they were not looking at him and thus did not know where he was looking. No one testified that Employee saw Lesueur pick Leza up by the neck.

No misconduct report, incident report or use of force report describing Lesueur's lifting Leza by the neck was prepared by any officer involved. Cary prepared a report in which he related that the inmate had been in the wrong unit and had been forcibly removed from the unit by Lesueur. He submitted this report to Lesueur. For reasons that are the subject of conflicting testimony, Cary retracted his original report and filed an amended one that omitted any mention of the use of force. The control log prepared by Cary, contemporaneously with the event, did not mention the use of force.

Leza later reported the incident. In the investigation that followed, Cary, Lesueur, Lovato and Employee all denied witnessing or using force against Leza. Cary said that he had seen Lesueur push Leza out of the unit. Only Maes told the investigator that Lesueur had lifted Leza by the neck. In a second interview, Lovato admitted seeing Lesueur lift Leza by the neck. Lesueur did not admit using force on Leza until late October.

All officers involved in the incident were eventually disciplined. Cary was suspended for two days for having witnessed an incident involving the use of force and failing to report, denying witnessing such force, and providing false and misleading statements during the investigation. Lovato was suspended for two days for having provided false and misleading statements. Maes received a letter of reprimand. Lesueur was suspended for five days for using

physical force on an inmate, for failing to report the use of such force, failing to issue a misconduct report to the inmate or submit an incident report, and for making false and misleading statements during the interviews. Employee received the most severe discipline—he was terminated for failing to report the use of force, failing to issue a misconduct report to Leza or to submit an incident or use of force report, making false and misleading statements during the interview, continuing to deny witnessing the use of force, and intimidating the other officers involved by telling them that they would lose their jobs if they did not deny the use of force.

Employee sought review of his termination by the Board, which upheld his dismissal. He appealed the Board's decision to the district court, which affirmed the Board's decision. Employee then appealed to this court.

BOARD'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Employee argues that there is not substantial evidence to support the charges of misconduct against him. We agree.

This court's scope of review in reviewing appeals under the Personnel Act, NMSA 1978, Sections 10–9–1 to –25 (Repl.Pamp.1990), is the same as that of the district court. *Padilla v. Real Estate Comm'n,* 106 N.M. 96, 739 P.2d 965 (1987); *Jimenez v. Department of Corrections,* 101 N.M. 795, 689 P.2d 1266 (1984); *Perkins v. Department of Human Servs.,* 106 N.M. 651, 654, 748 P.2d 24, 27 (Ct.App. 1987). NMSA 1978, Section 10–9–18(G) (Repl.Pamp.1990), requires the reviewing court to affirm the decision of the Personnel Board "unless the decision is found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence; or (3) otherwise not in accordance with law." *See Anaya v. New Mexico State Personnel Bd.,* 107 N.M. 622, 625, 762 P.2d 909, 912 (Ct.App.1988).

The reviewing court will not reweigh the evidence or substitute its judgment for that of the agency if the findings are supported by substantial evidence on the record as a whole. Whole record review requires the reviewing court to consider all of the evidence, both favorable and unfavorable to the administrative decision. *Perkins v. Department of Human Servs.,* 106 N.M. at 655, 748 P.2d at 28. An administrative action is arbitrary and capricious if, when viewed in the light of the whole record, it is unreasonable. An action is an abuse of discretion "if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.* Applying these guidelines to the facts in this appeal, we determine that there is not substantial evidence supporting the Board's decision to uphold Employee's termination.

The Department dismissed Employee in part because he "witnessed and failed to report" the use of force on Leza, he failed to submit a use of force report, he "made false and misleading statements regarding the use of force[,]" and he falsified his statement. The hearing officer found, and his decision was affirmed by the Board and district court, that Employee was in proximity to the incident and saw or was aware of Lesueur's use of force on Leza. He also found that Employee gave misleading information regarding the incident during the investigation. There is not substantial evidence in the record to support these findings. Although Employee acknowledged that he was in the area, neither he nor any other officer involved testified that Employee saw the incident. The only direct evidence in the record concerning what Employee saw or did not see was his own testimony—he testified that he did not see Lesueur pick Leza up by the neck. There was no evidence whatsoever that contradicted this testimony.

The lone fact that Employee was in the proximity, by itself, did not support a conclusion or inference that he saw or was

aware of the brief incident. The total confrontation with Leza lasted approximately two minutes; Lesueur's use of force against Leza lasted only two to three seconds. The evidence is undisputed that, at that time, Employee was picking up pieces of the broken picture frame off of the floor. Lovato, who was also picking up the pieces, saw the incident only because he happened to look up briefly and saw Leza's feet off of the floor. Cary, who saw the incident from the control tower, testified that, if he had been distracted, he would not have seen the incident. Employee continually maintained that he did not see nor was he aware of Lesueur's lifting Leza by the neck. Although the other officers eventually recanted their initial version and admitted they had known about the use of force, Employee never changed his story. For this reason, we are left with the inescapable conclusion that his testimony simply was not believed. Yet, the record is void of any evidence from which it could be inferred that Employee was not telling the truth. Under this posture, we cannot conclude there was substantial evidence to support a contrary finding.

Because there was not substantial evidence to support the underlying charge that Employee knew of Lesueur's use of force on the day of the incident, the other charges likewise must fail for the same reason. This would include the charges that Employee failed to report the use of force, provided false and misleading information during the investigation, and falsified his statement by continuing to deny that he saw Lesueur use force. If we assume that Employee did not see Lesueur's use of force, he obviously could not have provided false and misleading information or falsified his statement during the Department's investigation when he denied witnessing any use of force. Additionally, if Employee did not see and did not know of Lesueur's use of force, he could not know that a use of force report was necessary. Finally, if Employee did not see the incident, his steadfast claim that he did not witness the use of force was justified. Consequently, the Department's expectation that he recant was obviously unreasonable. Therefore, these particular findings by the hearing officer could not support the Department's dismissal of Employee.

That leaves one remaining charge against Employee that was not brought against the other officers—the Department also imposed discipline on the ground that Employee had intimidated Lesueur, Cary and Lovato to deny that the incident had occurred by telling them they would lose their jobs if they did not do so. Significantly, the hearing officer expressly found that the Department failed to prove its allegation that Employee had attempted to convince Lovato and Lesueur to support his story. On the other hand, the hearing officer did find that Employee ordered Cary to change his report. Nonetheless, the hearing officer did not find that Employee had intimidated Cary. Thus, the Department's allegation that Employee intimidated the other officers involved is not supported by the findings nor by substantial evidence and, additionally, was not a proper basis for disciplining Employee.

BOARD'S ACTION WAS ARBITRARY AND CAPRICIOUS, AND CONTRARY TO LAW

Employee also argues that the Board's decision was arbitrary and capricious, and contrary to law, because the discipline imposed on him was so disproportionate to the discipline imposed on the other officers involved and because the hearing officer did not make appropriate findings to support the conclusion that the Department had just cause to dismiss him. On the other hand, the Department maintains that the more severe sanction is justified by Employee's intimidation of the other officers involved and his continued denial of witnessing Lesueur's use of force. To support its argument that the hearing officer properly determined there was just cause, the Department relies on the fact that the

hearing officer made a separate determination that there was just cause for Employee's dismissal. We are not persuaded that this fact alone is significant. Instead, we determine that the Department's action was arbitrary and capricious, and contrary to law, for the reasons that follow.

In *State ex rel. New Mexico State Highway Dep't v. Silva,* 98 N.M. 549, 552, 650 P.2d 833, 836 (Ct.App.1982), this court stated:

> Section 10-9-18(F) ... refers to "action taken by the agency" without just cause. This statutory provision does not refer to employee conduct; it refers to *agency action* which is taken because of the employee's conduct. The Board, in deciding the appeal, must decide whether agency action was based on just cause.... This statute authorizes the Board to decide the propriety of the agency's action—in this case, the dismissal of Silva. (Emphasis in original.)

Thus, the Board is required to determine not only that there was employee misconduct but also that the agency's discipline was appropriate in light of that misconduct. The first prong focuses on the *employee's* action; the second prong, on the other hand, focuses on the *agency's* action.

Section 10-9-18(E) requires the Board to render both findings of fact and conclusions of law. The conclusion that Employee's dismissal was for just cause must be supported by the findings. *See id.* at 554, 650 P.2d at 838. An agency has acted arbitrarily and capriciously when its conduct, "viewed in light of the whole record, is unreasonable or does not have a rational basis." *Perkins v. Department of Human Servs.,* 106 N.M. at 655, 748 P.2d at 28. "An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.*

The only basis for the differential treatment, as argued by the Department in this appeal (suspension or reprimand versus termination), is Employee's continued denial that he witnessed any use of force and his alleged intimidation of the other officers. We have already determined that these findings are not supported by the evidence. Once those grounds are eliminated, it becomes clear that Employee was disciplined much more severely than any other officer involved for the *same* misconduct—failing to report the incident. The discipline imposed on the other officers ranged from a letter of reprimand to the five-day suspension imposed on Lesueur, who actually used force on Leza and repeatedly denied it. For this reason, the Department's reliance on the hearing officer's separate determination of just cause becomes meaningless. Without more in the record to support such differential treatment, we conclude that the imposition of more severe discipline on Employee was unreasonable and constituted arbitrary and capricious action.

Additionally, although the Board concluded that the Department had just cause to dismiss Employee, it made no findings to support its conclusion. This conclusion standing alone does not suffice to support a determination that the second prong mandated by *Silva* was considered. We thus conclude that the Department failed to proceed in the manner prescribed by law, which required the Department not only to determine that Employee committed the alleged misconduct but also to determine that the Department's discipline was appropriate. *See State ex rel. New Mexico State Highway Dep't v. Silva,* 98 N.M. at 552, 650 P.2d at 836. It follows that the Department's decision, in addition to being arbitrary and capricious, was also contrary to law.

CONCLUSION

Because the Board's action was not supported by substantial evidence, was arbitrary and capricious, and contrary to law, we reverse the district court's affirmance of the Board's action. We remand with instructions that the Department reinstate

Employee to his former position and the Board consider the appropriate award of back pay due to Employee pursuant to Section 10–9–18(F).

IT IS SO ORDERED.

A. JOSEPH ALARID, C.J., and BENJAMIN ANTHONY CHAVEZ, J., concur.

858 P.2d 1282

Richard CONNELLY and Mary Jane Connelly, Plaintiffs,

v.

Gayle M. WERTZ and Jane M. Wertz, husband and wife, Involuntary Plaintiffs–Appellees,

v.

Ronald L. HIBDON and Carolyn R. Hibdon, Defendants–Appellants.

No. 13422.

Court of Appeals of New Mexico.

July 28, 1993.

Michael Allison, Albuquerque, for defendants-appellants.

Dan A. McKinnon, III, Marron, McKinnon & Ewing, Albuquerque, for involuntary plaintiffs-appellees.

OPINION

PICKARD, Judge.

This case involves a tax sale. *See* NMSA 1978, § 7–38–70 (Repl.Pamp.1990). Section 7–38–70(B) provides that the deed from the state to the buyer "conveys all of the former property owner's interest in the real property as of the date the state's lien for real property taxes arose ... subject only to perfected interests in the real property existing before the date the property tax lien arose." Section 7–38–70(C) provides that "After two years from the date of sale, neither the former real property owner shown on the property tax schedule as the delinquent taxpayer nor anyone claiming through him may bring an action challenging the conveyance." The issues we must decide in this case are (1) whether a seller under a real estate contract is a "former real property owner," (2) whether a seller under a real estate contract holds a "perfected interest," (3) whether the seller under the real estate contract is barred by the two-year statute of limitations in Section 7–38–70(C) from challenging the conveyance, and (4) whether the trial court erred in not barring the seller's cause of action under the doctrines of laches or equitable estoppel.

In affirming the trial court's decision, we hold that the trial court properly deter-

mined that (1) the seller under a real estate contract is not a former real property owner; (2) the seller holds a perfected interest in the property by virtue of recording his interest pursuant to the Recording Act, *see* NMSA 1978, §§ 14–9–1 & –3 (Repl. Pamp.1988); (3) the two-year statute of limitations does not apply; and (4) the doctrines of laches and equitable estoppel do not require a reversal.

FACTS

Appellees, the Wertzes (Sellers), sold a tract of land and a mobile home to the Connellys (Purchasers) under a real estate contract dated June 19, 1980. Purchasers duly recorded the contract shortly thereafter. The terms of the contract required Purchasers to be responsible for the real property taxes and for assessing the property in their names. In addition, the contract permitted Sellers to terminate the contract and declare a forfeiture should Purchasers fail to make their installment payments to Sellers.

Although Purchasers assessed the property in their names for 1981, they did not pay the taxes. Due to the 1981 tax delinquency, the State of New Mexico sold the property at a tax sale to Appellants, the Hibdons (Tax Sale Purchasers). The state gave notice of a public auction of the property in 1985. Tax Sale Purchasers acknowledge that they examined the chain of title prior to the tax sale and were aware of Sellers' recorded interest in the property.

The state sent notice of the impending tax sale to Purchasers and Sellers at their last known addresses; however, the notices were returned for lack of current addresses. Notice was also published in local papers. Sellers contend that they were not aware of the impending tax sale. The tax sale was concluded in 1985. Purchasers nonetheless continued to make the installment payments to Sellers until March 1987.

In May 1988, Sellers sent Purchasers and Tax Sale Purchasers demand letters notifying them of the delinquency in the installments and offering them an opportunity to cure the delinquency or face default. On July 7, 1988, an affidavit of default was recorded, and the interests of Purchasers and Tax Sale Purchasers were forfeited to Sellers. Purchasers subsequently defaulted in this case, disclaiming any interest in the subject real property, and are therefore not parties to this action. The suit below was one to quiet title, and the trial court ruled in Sellers' favor. Tax Sale Purchasers appeal.

FORMER REAL PROPERTY OWNER

Tax Sale Purchasers contend that pursuant to Section 7–38–70, Sellers are "former real property owners" rather than holders of a "perfected interest" in the subject property. Tax Sale Purchasers' argument appears to be two-fold: (1) both the seller and the purchaser under a real estate contract retain an ownership interest in the property, *see Marks v. City of Tucumcari,* 93 N.M. 4, 595 P.2d 1199 (1979); and (2) Sellers were responsible for the delinquent 1981 taxes, pursuant to the terms of the contract. We do not find Tax Sale Purchasers' arguments persuasive.

Tax Sale Purchasers' reliance on *Marks* for the proposition that a seller's interest in a real estate contract constitutes an ownership interest in the real property is misplaced. *Marks* stands for the principle, long established in New Mexico, that the seller's interest in a real estate contract is personalty, not realty:

> In New Mexico the rule is that a *vendee,* under an executory contract for the sale of realty, acquires an equitable interest in the property. By application of the doctrine of equitable conversion, the *vendee* is treated as the owner of the land and holds an interest in real estate. On the other hand, the *vendor* holds the bare legal title as a trustee for the vendee. The *vendor's* interest is considered personalty.

Id. at 5, 595 P.2d at 1200. Furthermore, the seller's personalty interest is a security

interest. *Id.* at 6, 595 P.2d at 1201 (purchaser acquires and owns the land as equitable owner; seller merely holds legal title to the land in trust as security for the purchase price) (quoting *Mesich v. Board of County Comm'rs,* 46 N.M. 412, 416–17, 129 P.2d 974, 976 (1942)); *see Bank of Santa Fe v. Garcia,* 102 N.M. 588, 590–91, 698 P.2d 458, 460–61 (vendor's interest in real estate contract is personalty rather than realty and therefore a judgment lien cannot attach to vendor's legal title) (Ct. App.), *cert. denied,* 102 N.M. 613, 698 P.2d 886 (1985); *see also Garcia v. New Mexico Real Estate Comm'n,* 108 N.M. 591, 594–95, 775 P.2d 1308, 1311–12 (Ct.App.), *cert. denied,* 108 N.M. 624, 776 P.2d 846 (1989); *Cano v. Lovato,* 105 N.M. 522, 529, 734 P.2d 762, 769 (Ct.App.), *cert. quashed,* 105 N.M. 438, 733 P.2d 1321, *and cert. denied,* 104 N.M. 246, 719 P.2d 1267 (1986).

Tax Sale Purchasers' second argument is essentially a sufficiency of the evidence argument attacking the trial court's finding that the terms of the real estate contract required Purchasers to assess the property in their own names and pay all the real property taxes on the property. Tax Sale Purchasers' argument is not persuasive because the copy of the contract submitted as evidence as Plaintiffs' Exhibit 1 specifies that "Owner undertakes and agrees to pay all taxes up to and including Second half of 1979" and that "Purchaser agrees to assess said real estate for taxation to himself for the year 1981, and, thereafter, pay all taxes and assessments." In addition, witness Larry Thorp, Bureau Chief of the Delinquent Property Tax Division of the Department of Taxation and Revenue, testified that according to the county's tax list where the subject property was located, Purchasers were the assessed property owners and Sellers' interest was one by virtue of the real estate contract. Therefore, there is sufficient evidence to support the trial court's determination that Purchasers, rather than Sellers, were responsible for paying the taxes in 1981 and that Purchasers had the property assessed in their names. *See* IV Department of Taxation & Revenue P.T.D. Regulation 35–2(F):1 (1983) (defining "owner" in NMSA 1978, Section 7–35–2(F) as including "person who has equitable ownership of property by reason of being the purchaser or buyer of the property under a conditional sale contract"). In reviewing a substantial evidence claim, the question is not whether substantial evidence would have supported an opposite result; it is whether such evidence supports the result reached. *Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986).

Accordingly, we hold that Sellers' interest in the real estate contract is personalty, not realty, and acts as security for the purchase price. Therefore, Sellers do not fall within the meaning of "former real property owners" in Section 7–38–70.

PERFECTED INTEREST

Tax Sale Purchasers contend that the trial court erred in classifying Sellers' interest as a perfected interest under Section 7–38–70(B). First, Tax Sale Purchasers argue that such an interpretation is contrary to the policy behind statutes regarding tax deeds, which is to give a measure of certainty and security to tax titles. *See First Nat'l Bank in Albuquerque v. State,* 77 N.M. 695, 699, 427 P.2d 225, 227 (1967). Tax Sale Purchasers also assert that the tax deed issued to them by the state conveys title to the land free of any encumbrances because the tax deed conveys " 'a new and paramount title in fee simple absolute, striking down all previous titles and interests in the property.' " *Worman v. Echo Ridge Homes Coop., Inc.,* 98 N.M. 237, 239, 647 P.2d 870, 872 (1982) (quoting *Bailey v. Barranca,* 83 N.M. 90, 92, 488 P.2d 725, 727 (1971)).

We agree that one policy behind the new property tax code is to " 'clothe tax titles with a measure of certainty and security.' " *Cano,* 105 N.M. at 527, 734 P.2d at

767 (quoting *Bailey,* 83 N.M. at 92, 488 P.2d at 727). However, the clear and unambiguous language of Section 7–38–70(B) also protects holders of certain perfected interests in the tax sale property and limits the rights conveyed to the tax sale purchasers in the tax deed by making them "subject ... to perfected interests in the real property existing before the date the property tax lien arose." Therefore, we do not find Tax Sale Purchasers' first argument dispositive of this issue.

In support of their second argument, Tax Sale Purchasers rely on *Worman* for the proposition that their tax deed is free of any encumbrances, including whatever ownership interest belonged to Sellers. *See Worman,* 98 N.M. at 239, 647 P.2d at 872. However, the applicable statutes in *Worman* were the former redemption and repurchase statutes, NMSA 1953, §§ 72–8–9 & –31, which were subsequently repealed. Therefore, Tax Sale Purchasers' reliance on the language in *Worman* to suggest that all prior interests in the tax sale property are extinguished by issuance of a tax deed is misplaced and is not compatible with Section 7–38–70.

Sellers contend that their security interest in the subject property is a perfected interest for the purpose of Section 7–38–70 because (1) Sellers duly recorded their interest under Sections 14–9–1 and –3, thus perfecting their interest; (2) as testified to by witness Thorp, the long-standing policy of the Taxation and Revenue Department is to treat recorded real estate contracts as perfected interests; and (3) courts should give persuasive weight to long-standing administrative construction of statutes by the agency charged with administering the statutes because the more long-standing the interpretation absent legislative amendment, the more likely the agency's interpretation reflects the legislature's intent. *See In re Application of Sleeper,* 107 N.M. 494, 498, 760 P.2d 787, 791 (Ct.App.), *cert. quashed,* 107 N.M. 413, 759 P.2d 200 (1988).

We find Sellers' arguments persuasive for the most part, although we question how much weight we should give to an asserted policy of an administrative agency that is not evidenced by regulations or formal rulings. *See State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n,* 79 N.M. 357, 360, 443 P.2d 850, 853 (1968) (longstanding dereliction of duties by administrators is not to be equated with "long-standing interpretation"). According to *Black's Law Dictionary,* a "perfect instrument" is defined as follows: "An instrument such as a deed or mortgage is said to become perfect or perfected when recorded (or registered) or filed for record, because it then becomes good as to all the world." *Black's Law Dictionary* 1137 (6th ed. 1990). A real estate contract involves a writing concerning the sale of land and thus falls under New Mexico's recording act. *See* §§ 14–9–1 & –3; *see also D'Avignon v. Graham,* 113 N.M. 129, 135, 823 P.2d 929, 935 (Ct.App.1991) (lien on father's real and personal property becomes perfected under NMSA 1978, Section 40–4–15 (Repl.Pamp.1989) when filed for record with the office of the county clerk where the property is situated). Accordingly, we hold that Sellers' interest in personalty in the real estate contract is a perfected interest under Section 7–38–70 and when Tax Sale Purchasers acquired their tax deed from the state, they took it subject to Sellers' perfected interest.

STATUTE OF LIMITATIONS

As we stated above, Sellers are not former real property owners for the purpose of Section 7–38–70. Tax Sale Purchasers contend that Sellers are people claiming through a real property owner and, thus, the two-year statute of limitation in Section 7–38–70(C) applies. However, Tax Sale Purchasers cited no authority in support of their contention that Sellers are claiming through Purchasers and therefore should be classified as former real property owners under Section 7–38–70. Issues unsupported by cited authority will not be considered on appeal. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330

(1984). Therefore, for purposes of this case, we hold that Sellers are not people claiming through owners. According to the plain language of Section 7–38–70(C), in order for the two-year statute of limitations to apply, Sellers either had to be owners or had to be claiming through an owner. Because we have held that they are neither, we hold that Sellers are not barred by the two-year statute of limitations.

LACHES AND ESTOPPEL

Tax Sale Purchasers assert that Sellers should be barred from bringing this suit by virtue of the application of the doctrines of laches and equitable estoppel. We do not find Tax Sale Purchasers' argument persuasive. The burden was on Tax Sale Purchasers to establish the facts necessary to support their claims. *In re Estates of Salas,* 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct.App.1987). In the context of this case, among the elements that Tax Sale Purchasers had to establish were that they lacked notice that Sellers would assert their rights and that they were prejudiced by the delay in Sellers' actions. *Id.; Garcia v. Garcia,* 111 N.M. 581, 588, 808 P.2d 31, 38 (1991). In addition, Tax Sale Purchasers had to show that they relied on Sellers' lack of action and that such reliance was reasonable. *See Gonzales v. Public Employees Retirement Bd.,* 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct.App.), *cert. denied,* 114 N.M. 227, 836 P.2d 1248 (1992). In light of the following facts, the trial court in this case could have found that Tax Sale Purchasers failed to meet their burden of proving the applicability of either laches or estoppel: (1) Tax Sale Purchasers were fully aware of the fact that Sellers held a recorded security interest in the property sold at the tax sale; (2) upon affirmance of the trial court's decision, a provision in the trial court's conclusions of law requires Sellers to reimburse Tax Sale Purchasers "upon presentation of appropriate receipts [for] all sums paid by [Tax Sale Purchasers] of taxes on the real property in question"; (3) Tax Sale Purchasers should have known that Sellers were unaware of the tax sale; and (4) Sellers acted reasonably promptly after they learned of the sale and learned that Purchasers were not going to make further payments on the real estate contract. Moreover, Tax Sale Purchasers have failed to argue any specific grounds for prejudice. *See In re Estates of Salas,* 105 N.M. at 475, 734 P.2d at 253; *Garcia,* 111 N.M. at 588, 808 P.2d at 38. Accordingly, we conclude that the doctrines of laches and estoppel do not require a reversal.

CONCLUSION

We affirm the judgment of the trial court.

IT IS SO ORDERED.

BIVINS and HARTZ, JJ., concur.