474 P.2d 487

Ray DURRETT, Plaintiff-Appellee,

v.

Kyriakos PETRITSIS, Defendant-Third-Party Plaintiff-Appellant,

v.

Loretta SIMPIER, now Loretta Brady, Leroy S. Tipton, Janie Tipton, Third-Party Defendants-Appellees.

No. 8982.

Supreme Court of New Mexico.

Sept. 14, 1970.

See also, 82 N.M. 4, 474 P.2d 490.

Wright & Kastler, Raton, for appellant.

Robert S. Skinner, Raton, for Durrett.

William H. Darden, Raton, for Loretta Brady.

OPINION

McKENNA, Justice.

Durrett, the appellee, sued appellant Petritsis for the balance due on a promissory note in the original amount of $8,500. The complaint alleged that the note was executed by Loretta Simpier (now Mrs. Brady), Janie Tipton and Leroy Tipton, and endorsed by Petritsis. A third-party complaint was then filed by Petritsis against Mrs. Brady and the Tiptons stating that the third-party defendants were primarily liable under the note and demanding judgment against them for any sums recovered by Durrett in the main action. Petritsis denied liability in his answer to the complaint and counterclaimed against Durrett for fraudulent representations in the sale of certain trade fixtures and merchandise, asking for compensatory and punitive damages. Durrett denied any fraudulent representations; Mrs. Brady denied liability in her answer to the third-party complaint. The Tiptons answered separately, admitting their liability under the note. They also alleged that Mrs. Brady had agreed to hold them harmless under the note, and prayed for judgment over against Mrs. Brady for any judgment against them.

All of this arose out of the sale of Duds for Dolls, a retail clothing business. The business was operated by Mrs. Brady and Mrs. Tipton after it was purchased. Intermixed in this was a personal relationship between Petritsis and Mrs. Brady. They were keeping company, but the relationship cooled and terminated as the business faltered.

The issues were tried before a jury. The verdicts were for Durrett on the complaint; for the third-party defendants; against Petritsis on his counterclaim, and against the Tiptons on their complaint that Mrs. Brady had agreed to hold them harmless. In answer to a special interrogatory the jury found that Petritsis was the maker and primarily liable on the note. A judgment was entered for Durrett on the note. Judgment was also entered against Petritsis on his third-party complaint. A motion to set aside the verdict on the third-party complaint and enter judgment for Petritsis or, in the alternative, to grant a new trial, was denied.

This appeal attacks the verdicts on the counterclaim and the third-party complaint as unsupported by substantial evidence, contrary to the evidence, and argues also that the motion was erroneously denied for the same reasons.

Durrett and Petritsis entered into a written contract for the sale of Duds for Dolls. The price for the name, trade fixtures and merchandise was $14,500. The sum of $6,000 was paid to Durrett and the balance was evidenced by the mentioned promissory note for $8,500. Petritsis testified that although he originally purchased the business, the third-party defendants took over the sale, signed the $8,500 note to Durrett and that he endorsed the note purely as a surety or for their accommodation. He stated further that he took back their note for $6,400, which sum represented the down payment of $6,000 and a loan of $400 for the business. This second note, however, is the subject matter of a separate dispute. The Tiptons generally agreed with Petritsis' explanation of the transaction, adding that when the business failed to prosper, Mrs. Brady agreed verbally to take it over and hold them harmless.

Mrs. Brady testified that she never authorized Petritsis to buy the business for her and that he bought it himself to provide an income for both of them after their marriage, which never came to pass. Dur-

rett, the seller, testified that at no time did Petritsis ever say that Mrs. Brady and the Tiptons were the owners. There was also evidence that after the business ran into financial troubles, Petritsis tried to resell it back to Durrett and also to another party. There was testimony that Petritsis had the "girls" (Mrs. Brady and Mrs. Tipton) sign the $8,500 note to have them "be responsible." What this meant was a matter of conflicting evidence. Suffice it to say that there was conflicting evidence on other material aspects of the transaction.

As to the counterclaim, the contract of sale referred to an itemized list of trade fixtures to be attached as an exhibit to the contract, but it was never attached. The evidence showed that some of the trade fixtures in the store belonged to the landlord, not Durrett. Petritsis claimed he paid for all of the trade fixtures in the store. Mrs. Brady testified that she was present at the taking of the inventory on behalf of Petritsis and that an itemized list was prepared. This list was introduced. The landlord's testimony was that none of the fixtures he owned appeared on the list.

The remaining portion of the counterclaim also claims fraudulent representations in the transfer of certain items of the merchandise inventory. Prior to the sale, these items had been marked down by Durrett for quick sale or as loss leaders. The markdown had been accomplished by running a line through the original retail price and adding the lower sales price. Before the inventory was taken, the seller's wife erased the lower sales price on each of these items, thereby restoring its original retail price. The contract of sale called for the purchase of all the merchandise at a percentage of the retail price. The seller's wife testified that she erased the lower sales price in order to have these items reflect the true retail price for the taking of the inventory. Petritsis paid the higher price for these few items.

We have often said that the presumptions are in favor of verdicts and the facts are to be viewed in the aspect most favorable to the prevailing party. We will indulge all reasonable inferences in support of the verdicts, disregarding all inferences or evidence to the contrary. It is for the jury, not us, "[to] weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and say where the truth lies." Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 89, 428 P.2d 625, 628 (1967); Sauter v. St. Michael's College, 70 N.M. 380, 386, 387, 374 P.2d 134 (1962). As to fraudulent conduct, it is never presumed and each of its necessary elements must be shown by clear and convincing evidence. Sauter v. St. Michael's College, supra, at 385, 374 P.2d 134. The jury was so instructed by the court.

Viewing the evidence from the above rules and standards, we believe there is substantial evidence to support the verdicts. Substantial evidence is relevant legal evidence which a reasonable person would accept as adequate to support a conclusion and it is that which establishes facts from which reasonable inferences may be drawn. Wilson v. Employment Security Commission, 74 N.M. 3, 8, 389 P.2d 855 (1963); Brown v. Cobb, 53 N.M. 169, 172, 204 P.2d 264 (1949); Tapia v. Panhandle Steel Erectors Co., supra.

Rather than one strictly mercantile, a close personal relationship between Petritsis and Mrs. Brady was clearly established. She did not participate in the negotiations with Durrett, and Petritsis later attempted to resell the business. No instrument was ever introduced showing any conveyance of the business to Mrs. Brady and the Tiptons. All of this manifested his ownership. From these facts and others which we have narrated, together with their permissible inferences, the jury believed that the business was purchased and retained by Petritsis as his

own and that he was primarily liable on the note. It was for the jury to determine credibility and reconcile any contradictions of testimony.

As to the claim of fraudulent representation in the sale of the trade fixtures, it seems quite clear from the introduced list of trade fixtures and the testimony of the landlord, that Durrett never intended to sell all the fixtures in the store, but only his own. Admittedly, the question is much closer as to the items of merchandise, for the change in the prices was done prior to the taking of the inventory and apparently without the knowledge of Petritsis. But bearing in mind the rules and standards above set forth governing our review, we must conclude that the jury had sufficient basis for deciding that such action was taken in accordance with Durrett's view of the contract, as was testified, rather than with an intent to deceive. We are not called upon to decide whether Durrett's interpretation of the contract was correct but only if fraudulent representations victimized Petritsis.

In connection with the third-party complaint, there is one additional aspect which deserves notice. Mrs. Brady denied liability under the $8,500 note, but the Tiptons admitted liability. After hearing all the testimony, the jury obviously believed Mrs. Brady, for it decided for *all three* third-party defendants against Petritsis, and in its answer to the special interrogatory found that Petritsis was the maker of the note and primarily liable. Petritsis' motion to set aside the judgment on the third-party complaint referred to the admission of liability by the Tiptons. But this was not binding on Mrs. Brady.

The court instructed the jury that Petritsis had the burden of proving that Mrs. Brady and the Tiptons were the principal debtors and the true owners of Duds for Dolls, or, "if you find that in fact Petritsis was the principal debtor and the true owner * * *," then a verdict is to be returned in favor of Mrs. Brady *and* the Tiptons on the third-party complaint. Petritsis did not object to this instruction nor tender an instruction of his own. If the court's instruction was erroneous, Petritsis did not preserve the error for our review. Rule 51(1) (i) (§ 21-1-1(51) (1) (i), N.M.S.A.1953); Hudson v. Otero, 80 N.M. 668, 671, 459 P.2d 830 (1969). Furthermore, whether Petritsis was primarily liable or not was the subject of conflicting evidence. It was for the jury to decide where the truth was.

The petition by appellees Durrett and Mrs. Brady for damages for taking an appeal which they allege was solely for the purpose of delay and to cause further expense, is denied. "Although we have found the appeal to lack merit, it does not follow that it was not in good faith." Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969); Holman v. Oriental Refinery, 75 N.M. 52, 59, 400 P.2d 471, 476 (1965).

The judgments are affirmed. It is so ordered.

COMPTON, C. J., and WATSON, J., concur.

474 P.2d 490

Kyriakos PETRITSIS, Plaintiff-Appellant,

v.

Loretta SIMPIER, now Loretta Brady, Leroy S. Tipton and Janie Tipton, Defendants-Appellees,

Hilb and Company, a corporation, et al., Intervenors-Appellees.

No. 9005.

Supreme Court of New Mexico.

Sept. 14, 1970.

Wright & Kastler, Raton, for appellant.
William H. Darden, Raton, for Simpier.
John E. Hobbes, Raton, for intervenors.

OPINION

McKENNA, Justice.

This appeal is also an outgrowth of the sale of a clothing retail business known as Duds for Dolls. See our opinion in Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 filed today. It gives some of the background of this dispute.

Here, Petritsis, the appellant, sued Mrs. Loretta Brady and the Tiptons on a $6,400 note signed by them. The amount of the note equaled the down payment of $6,000 for the business purchased from appellee Durrett, plus $400 advanced by Petritsis for working capital. We referred to this note in Durrett v. Petritsis, No. 8982, supra. Petritsis attached the assets of Duds for Dolls which were then sold in a liquidation

sale. The funds realized were deposited with the court.

Mrs. Brady denied liability under the note, affirmatively alleging that she was induced to sign the note without receiving any consideration for it. The Tiptons filed their own answer generally admitting the complaint and further alleging that Mrs. Brady, in exchange for their interest in Duds for Dolls, agreed to assume all obligations of the business and hold them harmless, specifically including this note sued on. They asked that they have judgment over against Mrs. Brady for any judgment against them. A number of suppliers, creditors of the business, intervened to establish prior rights to funds in the registry of the court. The case was tried to the court without a jury.

The district court entered judgment for the defendants on the note; against the Tiptons on their cross-claim against Mrs. Brady, and determined that the creditors of the business had prior right to the funds deposited in court.

Under his argument and authorities of his brief-in-chief, the appellant lists six points. Point I is an attack on twenty-three findings as not supported by substantial evidence and contrary to the evidence. Point II is an attack on ten conclusions. Point III complains of the court's failure to adopt some 26 requested findings. Point IV states that the court erred in refusing to adopt two requested conclusions. Point V relates to the intervenors and alleges that if the appellee Mrs. Brady was the owner of the business, then the plaintiff's attachment proceedings are prior to the intervenors' rights; if the appellant is determined to be the owner, then the intervenors have no lien on the funds until they prove their claims against the appellant. Point VI is a general attack on the judgment as not supported by substantial evidence and contrary to law.

In the argument portion of his brief, the appellant has lumped together all of these six points. No authorities are cited. Testimony is quoted, with comments thereon, in one continuous flow without reference to any particular point, finding or conclusion made or refused. The appellant complains of the court's failure to make certain findings, but the statement of proceedings does not contain a concise summary of the facts which the appellant says should have been found, nor is there any reference to the transcript showing the requests for such findings. This is not a compliance with our Rules. See Rules 15(14) (d) and 15(16) (c) (§ 21–2–1, N.M.S.A.1953 [1969 Supp.]). Despite these failures, we will consider the basic questions presented.

With the exception of a particular point raised as to the intervenors, the appellant's argument is that the judgment is not supported by substantial evidence and is contrary to law, and that the court erred in denying his requested findings and conclusions and adopting its own generally to the effect that there was no consideration received by Mrs. Brady and the Tiptons for executing the $6,400 note.

We first take up the suit on the note. At the outset, we reiterate the rules and standards governing our review to determine if there is substantial evidence, which we enumerated in our opinion in the companion case, Durrett v. Petritsis, supra. The presumptions are in favor of the findings of the court and the facts are to be viewed in the aspect most favorable to the prevailing parties. If, when so viewed, together with all reasonable inferences, the evidence supports what the court found, all contrary evidence is to be disregarded. It is the trial court's province as the trier of facts to weigh the testimony and to say which is to be given credence and what is to be disbelieved. Martinez v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970); Rein v. Dvoracek, 79 N.M. 410, 444 P.2d 595 (Ct. App.1968). The trial court found that Petritsis was at all material times the owner of the business and the defendants were not indebted under the note and concluded that the note signed by the defendants was a sham and wholly without consideration.

Mrs. Brady testified that she and Petritsis were dating; that she did not request

him to purchase the business for her; that he purchased it to provide an income for them after their marriage; that he put her and Mrs. Tipton in the store to run it for him; that he wanted her to hold herself out as the owner, which she did in a number of ways. There was also testimony that Petritsis later tried to resell the business, negotiating with prospective buyers as the owner. No bill of sale or any conveyance of the business was ever made to Mrs. Brady and the Tiptons. She further testified that Petritsis requested her to sign the note although she did not know why since he was to be responsible.

The Tiptons and Petritsis did not agree with Mrs. Brady's testimony. The Tiptons thought they were purchasing the business or a proportionate part of it, and considered themselves liable under the note. The court specifically found that the Tiptons' answer admitting liability was prepared for them by Petritsis' attorney and filed at Petritsis' request. This fact of course went to the weight of their testimony and their credibility as to the issues raised concerning liability under the note and the ownership of the business.

The appellant did not contend in the trial court that the defendants Tipton should be held liable to him because of their answer and admissions, regardless of a judgment in favor of the other defendant and the intervenors. He did request finding No. VI which reads:

> "That the Defendants, Leroy Tipton and Janie Tipton, admit, both in their verified answer on file herein and in their testimony in this cause, all the allegations contained in the second cause of action of Plaintiff's complaint."

But he did not request a conclusion for a judgment against defendants Tipton only, as required by Rule 52(B) (a) (6) (§ 21–1–1(52) (B) (a) (6), N.M.S.A.1953). His brief objects to the trial court's refusal to adopt 26 requested findings, which includes the requested finding No. VI, but he makes no particular point of the failure to find No. VI with argument and authorities. To present a point for our consideration, an appellant must submit argument and authorities thereon as required by Rule 15(14) (d), supra. An error claimed must be specifically stated and argued. Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964).

As to the note, it is true that upon proof of the execution of a note consideration is presumed, but this may be rebutted by evidence which shows or tends to show lack of consideration. Hutchison Lumber Co. v. Boney, 72 N.M. 194, 382 P.2d 525 (1963). There we observed, at 199, citing Lane v. Mayer, 33 N.M. 28, 262 P. 182 (1927), that a defense of no consideration by a joint maker is not a defense unless there is proof that no consideration was received by his joint makers or other third parties. Petritsis' case was that the defendants purchased the business, were the owners and that they executed the note as payment for the balance of the purchase price and a business loan of $400. The court found that there was no agreement for Petritsis to act as the agent for the defendants in purchasing Duds for Dolls, nor did the parties ever contract for the sale of the business by Petritsis to the defendants after its acquisition from Durrett. From all the evidence, the court found that at all material times Petritsis was the owner of the business and concluded that the note was wholly without consideration and procured as a "sham," and consequently Petritsis could not recover under it. We have made the foregoing comments despite the failure of the appellant to cite Hutchison Lumber Co. v. Boney, supra, or Lane v. Mayer, supra, or argue their impact.

There was substantial evidence for the findings made and the conclusions objected to flowed naturally and as a matter of law from the facts as found by the court. It follows then that the findings and conclusions requested and denied, in support of the validity of the note, were properly rejected.

The appellant in his reply brief says he would feel safe in resting his case for re-

versal on the following testimony of Mrs. Brady:

"Q And, why did you refuse to pay Mr. Durrett the payment on the note that was due in February?

"A When Mr. Petritsis demanded his money in full, I couldn't pay it. He knew that, and there was no way that I could get it at the time, and he wasn't willing to let me go ahead and try, to where I could pay him eventually, and I was losing money the other way, so I stopped payment with Mr. Durrett, so that he would take some kind of action."

It was quite permissible to infer and believe that Mrs. Brady could not pay the installment from the store's revenue rather than that such answer constituted an admission of personal liability on the note or that she was the owner of Duds for Dolls.

There is one remaining point which concerns the intervenor creditors. The appellant argues that the intervenors have no claim or lien on the funds until each proved a valid claim against him since there is no lien given a general creditor against merchandise sold on open accounts. The court found that Petritsis was indebted to the intervenors on their claims, that at all material times he was the owner of the business and that the intervenors had a claim upon the proceeds of the attachment sale superior to the attachment rights of Petritsis.

What Petritsis did was attach his own merchandise, not being a creditor of the business, at the expense of the true creditors. A liquidating sale followed without any notice to the creditors. Presumably, for all practical purposes, the merchandise sold could not be recovered but the funds received from the sale were intact. We do not deem it necessary to examine our Bulk Sales law and the rights of creditors under such circumstances, for it is apparently inequitable and contrary to good conscience to allow Petritsis to enrich himself at the expense of his creditors through and under the guise of a spurious attachment proceeding. Certainly, the creditors had a right not to be denied the opportunity to recover the money owed them by execution on the merchandise. The merchandise was appropriated wrongfully by Petritsis but the funds received were intact under the court's control. We think that the creditors in the very least had an equitable claim or lien prior to Petritsis. In fact, the situation is quite classic for the imposition of an equitable lien. See 51 Am.Jur.2d, Liens, § 24. The court did not err in recognizing the intervenors' claims as superior to any claim of Petritsis.

We will not award damages for the taking of the appeal. See our opinion in the companion case, Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487.

The judgment is affirmed. It is so ordered.

COMPTON, C. J., and WATSON, J., concur.

474 P.2d 494

James H. WAXLER and First National Bank in Albuquerque, New Mexico, Trustee under the Last Will and Testament of Helen W. Waxler, Deceased, Plaintiffs-Appellees,

v.

HUMBLE OIL & REFINING COMPANY, Defendant-Appellant.

No. 8966.

Supreme Court of New Mexico.

Sept. 14, 1970.

Hinkle, Bondurant & Christy, C. D. Martin, Paul Kelly, Jr., Roswell, for defendant-appellant.

Nordhaus & Moses, Albuquerque, for plaintiffs-appellees.

OPINION

SISK, Justice.

Defendant, Humble Oil & Refining Co., hereafter referred to as Humble, appeals from a judgment awarding damages to plaintiffs, James H. and Helen W. Waxler, hereafter referred to as Waxler, for breach by Humble of a service station lease agreement.

In February, 1962, Humble leased from Waxler, for use as a service station, certain land and improvements, together with all rights and appurtenances thereto, which had previously been operated by Waxler as a service station. Prior to execution of the lease, both parties knew that there existed a New Mexico State Highway Department right of way in front of the leased premises and that a highway widening and improvement project was contemplated, although they did not know the extent of the widening or its effect on the use of the leased premises.

Paragraph 7 of the lease specifically provided for rental adjustment during any period of access impairment by reason of governmental construction, as follows:

> "During any period that access by the motoring public to the premises is impaired by reason of any street opening, widening, repair, or other work undertaken by or with the consent of any municipal, state, or other governmental authority, Lessee may, at its option, pay a rental of One Cent (1¢) for each gallon of gasoline and other motor fuels sold during such period, and such payment shall be in lieu of the rental provided in the Rental article above apportionable to such period."

However, because after completion of the highway construction the beneficial use of the leased premises as a service station facility had been permanently impaired and restricted, Humble sought to terminate the lease agreement by exercise of the rights granted to it under paragraph 2, which provided in its material part:

> "If at any time during the term of this lease, however, Lessee shall in any manner be restricted or prevented from using the leased premises for such purpose by reason of inability to obtain said necessary licenses or permits, or by any use restriction, law, ordinance, injunction, regulation, or order of any properly constituted governmental authority,

or by proceedings to enforce same, or by bona fide inability to obtain labor or materials, or by other causes beyond the control of Lessee, this lease may thereupon be terminated by Lessee by giving Lessor thirty (30) days' notice of its intention so to terminate. From and after the date of such termination, Lessee shall be relieved of all liability hereunder."

When leased by Humble the service station had a single pump island which served cars on either side. Access to the inner lane between the gas pumps and the station building, and to the garage and lubrication bay, was most readily gained by turning off the highway on to an oil mat laid on an adjacent lot and thus angling into the inner station area. The outside lane of the pump island served cars which parked on the then unused right of way.

Prior to execution of the lease by Humble, Waxler had obtained, at Humble's request, a survey which certified that none of the improvements on the leased premises encroached on any adjoining property. On June 7, 1963, Mr. Gilbert, Project Supervisor for the State Highway Department, orally requested Humble to remove the gas pumps from the pump island because his survey showed that the pump island, and possibly the pumps, encroached on the right of way which was being utilized in a widening project. On June 11, 1963, Mr. Gilbert sent a letter to Humble reiterating his oral request. Humble removed the gas pumps and sent notice to Waxler of its actions and of the current situation. Waxler subsequently came on to the premises and the alleged encroachment was pointed out to him by Mr. Gilbert. In a letter dated June 17, 1963, Humble notified Waxler that because of the removal of the pumps and other restriction of use, "* * * we have elected pursuant to the terms and conditions of our lease with you to terminate and cancel same."

Humble relies on three points for reversal. Because we hold that the facts pertaining to restriction of use, when applied to the express provisions of the lease, are determinative and require reversal, it is not necessary to rule on the issue of the extent and effect of alleged encroachments or on the issue of constructive eviction. We have also considered the three points raised by Waxler pursuant to Supreme Court Rule 17(2) (§ 21-2-1(17) (2), N.M.S.A.1953), each of which concerns the issue of alleged encroachments, and have determined that because of the basis of our decision it is not necessary to rule on the allegations of error raised by such points.

As a result of the completion of the highway construction project, the means of entry to the service station, as well as its service areas, were severely curtailed. After the widening and installation of curbing, the outside lane of the single pump island was too narrow to be used at all. Further, cars backing out of the lubrication bay would have to back out over the now utilized right of way at the risk of being hit by passing vehicles. Also because of the installation of curbing, cars could no longer angle off merely by driving along the shoulder and across the oil mat on the adjacent property to get into the inside pump island. Yet, Waxler alleges that such severe use restriction should not be included within the provisions of paragraph 2 of the lease agreement, quoted above, because such changes and occurrences were known by or should have been foreseeable by Humble, and because the right of way was being intruded upon prior to the highway project.

Certain unchallenged findings of the trial court dispute such allegations. The court made numerous findings concerning knowledge of Humble including the fact that the lease was prepared in contemplation, among other things, of the highway construction, but it is significant to note in applying the essential facts to the construction of paragraph 2 of the lease, that the court found that when the lease was executed neither Waxler nor Humble

knew the "extent" of the widening project or the "effect" of such widening on the leased premises. The court also found that the lease was prepared by Waxler's attorneys, and it is undisputed that paragraph 2 was purposely inserted in the lease to protect Humble.

That use of the premises as a service station was substantially and detrimentally affected by the end results of the completed construction project is unequivocally shown by the trial court's finding as to the resulting change in the value of the premises. The lease negotiated by the parties placed rental value at $200.00, and the trial court found: "That during the remainder of the term of said lease, that is, until March 1, 1977, the highest rental that the Plaintiffs can expect to receive from said premises is Fifty Dollars ($50.-00) per month." Also, Waxler and his appraiser fixed the maximum rental value of the altered premises at only $75.00 per month. Yet, despite the unchallenged findings of fact referred to, and the evidence of material restriction of, and substantial interference with, the use of the premises, the court in its conclusion of law No. 8 construed paragraph 2 of the lease in a manner which denied Humble its contractual right to terminate the lease.

In Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944), this court recognized that parties to a real estate transaction could contract to relieve themselves from the happening of some event which restricts the use of the leased premises. The court stated: "First, it is the rule that in the absence of an eviction, actual or constructive, or a complete destruction of the leasehold, a tenant is bound to discharge his covenant to pay rent, unless he is relieved therefrom by the happening of some event which by the covenants of the lease terminates it." In our case, the parties negotiated and agreed to all of the terms and conditions expressed in the written lease.

Waxler argues that the parties considered the consequences of highway construction when they inserted paragraph 7 of the lease agreement, providing for an alternative rental payment during temporary impairment of business service. Yet, he would deny effect to a similar recognition of the parties by agreeing to paragraph 2, the terms of which would include a restriction of use resulting from the same construction project. Such reasoning is erroneous, because both provisions were considered, negotiated for, and included within the same instrument. They provide for different rights and they are not contradictory.

The language of paragraph 2 is clear and unambiguous. Its stated purpose is to permit termination if use as a service station is restricted or prevented by any cause beyond the control of the lessee. Humble had no control over the construction project, and did not know what the extent or the effect of the widening would be. We can reach no conclusion other than that there was such significant restriction of the use of the service station as to permit termination of the lease agreement under the terms of paragraph 2. Because of the full use of the right of way, only half of the gas facilities of the service station, the inside lane of the pump island, were usable. Further, because of the installation of curbing, any car backing out of the service bay would, of necessity, have to back into the curb lane of a busy highway. Even mere entry into the service station's usable area was made a difficult maneuver. Surely, if the parties knew enough of the possibilities which confronted them to provide in paragraph 7 for reduction of rental during periods of temporary business interruption and restriction of use resulting from the highway project, they could as easily have chosen to specifically omit any resultant permanent restriction or prevention of use from the scope of paragraph 2, the termination clause, but they did not.

Real estate leases, like any other written contracts, must be interpreted as a whole to effectuate the intention of the parties, with meaning and significance given to each part in context of the entire agree-

ment. Thigpen v. Rothwell, 81 N.M. 166, 464 P.2d 896 (1970); Hondo Oil & Gas Co. v. Pan American Petroleum Corp., 73 N.M. 241, 387 P.2d 342, 15 A.L.R.3d 437 (1963). Applying these rules of construction to the written lease, voluntarily negotiated and executed by the parties, we are required to hold as a matter of law that paragraph 2 gives to Humble the contractual right to terminate the lease.

In a case quite similar to ours, Stalvey v. Pure Oil Co., 234 F.Supp. 185 (E.D.S.C. 1964), aff'd 346 F.2d 1009 (4th Cir. 1965), the trial court held that the lessee of a service station was entitled to cancel the lease because the use of the premises was impaired by the widening of the adjacent highway, and stated:

> "And if the use of the premises for the sale of petroleum products to motor trucks, and the servicing of the same is limited, suspended, affected or impaired, then its use as a 'service station' is obviously limited, suspended, affected or impaired.
>
> "It is readily apparent that the purpose of the Lease was the operation and maintenance by the Defendant-Lessee of a service station or filling station on the premises. 'Use of the leased premises' was nothing more than the transacting by defendant of such business; the selling of products and furnishing of services to motor vehicles."

After discussing the terms of the lease, the termination clause of which was narrower in scope than the termination clause in our case, the court said:

> "The defendant's use of the premises, therefore, was not confined to the described lot; but included all 'appurtenances' or 'adjuncts' (such as the pump island which was necessary to its enjoyment), and such easements, rights, privileges or licenses as the Lessor had in the adjoining streets, and the use thereof (such as the privilege of exit and entrance, and parking).
>
> "'Appurtenances' or 'adjuncts' include everything essential or reasonably necessary to the full beneficial use and enjoyment of the demised premises. Whatever easements or privileges appertain to the demised premises, and are used and enjoyed in connection therewith ordinarily pass with the demise.
>
> "* * *. The Lease Agreement clearly indicates that the acts or actions or changes affecting the use of the premises need not be confined to the described lot, nor directly operate thereon. The pump island and parking area were obviously used in connection with the described lot (as was the Highway itself for customer entrance and exit) and necessary to the business transacted thereon. Removal of the island and disruption and discontinuance of parking would certainly affect or impair, or limit the use of the lot or premises. It is apparent from the record that the location of the pump island and its use in connection with the leased premises, and the condition of the Highway, were all known to the parties, and within their contemplation at the time the Lease Agreement was entered into. * * *"

In affirming the district court's judgment, the Fourth Circuit Court of Appeals also took note of the fact that difficulty of maneuvering into the service station area was an additional restriction of use to be considered, as was the elimination of the use of adjacent lots as previously utilized before the highway improvement. In final dismissal of allegations that the lessee's knowledge and use of right of way previous to the altered conditions made invalid its claim of termination under the lease agreement, which are similar to the allegations made here by Waxler, the court stated:

> "Furthermore, we see no merit in the lessor's contention that no right of cancellation arose upon the occurrence of the highway improvements because those improvements merely made it impossible for the lessee to continue operating its business within a highway right-of-way of which it had actual notice at the time the lease was executed. * * *

There is uncontradicted testimony that at the time the lease was executed, the lessor was using and for some time theretofore had been using the area in front and to the side of her lot in operating the service station because the full rights-of-way shown on recorded real estate plats were not being utilized for street and highway purposes. As a matter of fact, at the time the lot was leased, the lessor's gasoline pump island was located entirely within the acknowledged highway right-of-way. Under these circumstances, it was altogether reasonable for the lessee to insist that it have the right to cancel if these conditions were changed to its detriment, and we think the language in the lease agreement effectively gave the lessee the protection it desired."

See also, Orme v. Atlas Gas & Oil Co., 217 Minn. 27, 13 N.W.2d 757 (Minn.1944); Buell v. Indian Refining Co., 62 Ohio App. 108, 23 N.E.2d 329 (1939).

In our case, both the oil mat which extended on to adjacent property, and the outer service lane of the single pump island, were used in the service station operation prior to the time of the lease and the construction project, and thereafter were completely impaired and no longer available. There can be no question but that a severe and permanent restriction of use resulted. In the absence of language in the lease to the contrary, the events and subsequent impairments which have occurred are well within the termination option given to Humble under paragraph 2.

Disregarding disputed facts, and based only on the unchallenged findings of the trial court and uncontroverted evidence of permanent restriction of use, the court's conclusion of law No. 8 that paragraph 2 of the lease agreement did not give Humble the right to terminate the lease constitutes reversible error. Humble's requested conclusion of law No. 5 to the effect that the restriction of use resulting from the highway project entitled it to cancel the lease pursuant to the terms of paragraph 2 should have been granted. The judgment must, therefore, be reversed and Waxler's complaint dismissed with prejudice.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

474 P.2d 499

BUREAU OF REVENUE of the State of New Mexico, Plaintiff-Appellant,

v.

DALE J. BELLAMAH CORPORATION and Dale Bellamah Equipment Corporation, Defendants-Appellees.

No. 9028.

Supreme Court of New Mexico.
Aug. 3, 1970.
Rehearing Denied Sept. 29, 1970.

James A. Maloney, Atty. Gen., Gary O. O'Dowd, Deputy Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

J. Victor Pongetti, Albuquerque, for defendants-appellees.

OPINION

WATSON, Justice.

The Bureau of Revenue of the State of New Mexico brought suit against Dale J. Bellamah Corporation and Dale Bellamah Equipment Corporation to recover tax assessments due under the Emergency School Tax Act (§§ 72-16-1 through 72-16-47, N.M.S.A., 1953 Comp. [since repealed]) for the period from November 1, 1959 to December 15, 1964, on gross receipts from management and engineering services and from equipment rental. The trial court granted defendants' motion for summary judgment on the ground that the action was barred by the applicable statute of limitations (§ 72-21-25, N.M.S.A., 1953 Comp.). This statute was introduced as § 25 of House Bill No. 119 during the 1959 session of the legislature, and after adoption appeared as ch. 54, § 25, N.M.S.L.1959. It reads as follows:

> "Section 25. LIMITATION OF ACTIONS.—No action or proceeding may be brought to collect any tax due under this Oil and Gas Emergency School Tax Act *or under Sections 72-16-1 through 72-16-47, inclusive, New Mexico Statutes Annotated, 1953 Compilation, as amended, or House Bill No. 10, 24th Legislature, (being Laws 1959),* after five years from the time that such tax became due." (Emphasis added.)

It is appellant Bureau of Revenue's contention that the emphasized portion of the above-quoted section is unconstitutional, being in conflict with N.M.Const. art. IV, § 16. The relevant part of this section reads as follows:

> "The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. * * *"

The title to House Bill 119 (ch. 54, N.M.S.L. 1959), which is in question, reads as follows:

> "AN ACT RELATING TO TAXATION; IMPOSING A PRIVILEGE TAX ON PERSONS IN THE BUSINESS OF SEVERING OIL, NATURAL GAS AND LIQUID HYDROCARBON FROM THE SOIL; PROVIDING FOR THE COLLECTION AND ADMINISTRATION THEREOF; CREATING A FUND; PROVIDING FOR REFUND, PAYMENT

UNDER PROTEST AND PENALTIES; AMENDING SECTION 2, HOUSE BILL NO. 10, 24th LEGISLATURE (BEING LAWS 1959) AND SECTION 72-16-15 NEW MEXICO STATUTES ANNOTATED 1953 COMPILATION (BEING HOUSE BILL NO. 10, 24TH LEGISLATURE (LAWS 1959))."

The question we must answer is whether the subject of the emphasized portion of § 25, supra (§ 72-21-25, supra), is sufficiently expressed in the title to House Bill 119 to meet constitutional requirements. As early as 1913, in State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913), this court set forth the test to be applied in adjudging an alleged violation of N.M. Const. art. IV, § 16, supra. There, the court said:

> "In our opinion, the true test of the validity of a statute under this constitutional provision is: Does the title fairly give such reasonable notice of the subject-matter of the statute itself as to prevent the mischief intended to be guarded against?" 18 N.M. at 219, 135 P. at 1178.

The mischief to be prevented was hodgepodge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969); State v. Ingalls, supra. In applying this test, every presumption is indulged in favor of the validity of the act. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969), Silver City Consol. Sch. Dist. No. 1 v. Board of Regents, 75 N.M. 106, 401 P.2d 95 (1965). Since each case wherein the sufficiency of the title to a legislative act is questioned must be decided on its own set of facts and circumstances, Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127 (1949); State v. Gomez, 34 N.M. 250, 280 P. 251 (1929), we must carefully examine the history of the statutes in question and closely examine the titles and bodies thereof.

On February 13, 1959, the 24th Legislature of the State of New Mexico passed House Bill 10, which appeared in our session laws as ch. 5, N.M.S.L.1959. This bill rewrote the existing Emergency School Tax Act, which had appeared as §§ 72-16-1 to 72-16-5, 72-16-7 to 72-16-46, N.M.S.A., 1953 Comp., as published in the original, but now superseded, Volume 10 of the 1953 Compilation. Section 2 of this act placed the assessment on gross receipts of extractors of natural products (except coal) including producers of oil and gas, and § 18 (which rewrote § 72-16-15, N.M.S.A., 1953 Comp.) specifically exempted the receipts from certain other sources, but did not exempt receipts from producers of oil and gas.

On March 12, 1959, the 24th Legislature passed House Bill 119 (ch. 54, N.M.S.L. 1959, supra). The Act declared it was to be cited as the "Oil and Gas Emergency School Tax Act," and its declared purpose and intent was to provide for the separate collection and administration of the privilege tax from persons engaged in the business of severing oil, natural gas, and liquid hydrocarbon and to make inapplicable to such persons the emergency school tax legislation then in existence. To do this it was necessary for the legislature to amend those sections of House Bill 10, passed less than 30 days before, as they affected persons engaged in oil and gas production. This required the amendment of § 2 of House Bill 10, which levied the tax on all natural resources, by the elimination therefrom of the oil and gas producers. It also necessitated the addition to the specific exemptions section (18) of the Emergency School Tax Act which, as we said above, was a rewrite of § 72-16-15, supra, of the gross receipts of the oil and gas producers.

It would appear that the title to House Bill 119 included all of these things, although it is somewhat inconsistent in indicating an amendment to § 2 of House

Bill 10 and then referring to § 72-16-15, supra, instead of § 18 of House Bill 10 which had repealed and rewritten this section. However, the Act itself went further, and by § 25, above quoted, attempted to place a five-year limitation on the collection of taxes under both the new Oil and Gas Emergency School Tax Act (House Bill 119) and the Emergency School Tax Act (House Bill 10), which covered the gross receipts from other sources.

Does the title to House Bill 119 so tend to mislead as to create the mischief to be guarded against? In State ex rel. Salazar v. Humble Oil & Refining Co., 55 N.M. 395, 234 P.2d 339 (1951), we approved and quoted from Taylor v. Frohmiller, 52 Ariz. 211, 79 P.2d 961 (1938). There the title to the act read: "An Act Relating to Unemployment Compensation, and Amending Sections 3, 4, 5, 6, 7, 12, 18, 19, and 22, Chapter 13, Session Laws of 1936, First Special Session." Section 10 of Chapter 13 was also amended, by adding to it a sentence including a salary for the Unemployment Compensation Commissioners. The Arizona Court said:

> "* * * Had the title of the act stopped at the first comma, it would have been broad in its scope, and one who read the title would have been advised thereby that any matter relating to unemployment compensation might be found in the body of the act. But the title further states that it is amendatory of certain named sections of a certain specified act. *We think the natural reaction of one who read the title would be that the only portions of chapter 13 which were to be amended were the particular sections set forth in the title of the act, and that he would be led to believe that any amendments to be made to chapter 13 contained nothing which was not germane to the matters dealt with in the sections named.* * * *" (Emphasis added.) 79 P.2d at 964.

See also I Cooley, Constitutional Limitations, 308, 310 (8th ed. 1927), and State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948).

We simply cannot say that the natural reaction to a reading of the entire title to House Bill 119 would be that a limitation on the collection of the privilege tax on businesses other than oil and gas producers would be included in the body of the act. Here, as in Frohmiller, if the title had stated only "An Act Relating to Taxation," it would have been broad in scope, and perhaps alerted its readers to anticipate anything in that field, but we cannot say that the subject embraced in the act is expressed in the title if the reader is misled. The natural reaction of the reader is to conclude that the specific references in the title limits the broad subject. Even if the entire title of House Bill 10, which is referred to, is also read, one is not alerted to the questioned limitation since neither the title nor the body of House Bill 10 provided for any such limitation on the collection of the privilege taxes there enumerated. Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122 (1952); State v. Sifford, 51 N.M. 430, 187 P.2d 540 (1947).

A time limitation on the collection of the tax may be an incident to its collection and administration and thus need not be expressed in the title. Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951); Albuquerque Bus Co. v. Everly, supra. But the collection and administration provided for in House Bill 119 was limited to the business of severing oil and gas only, in both the title and the body of the act. Thus the inclusion of a time limitation on the collection of a privilege tax on professional services or other matters cannot be deemed incidental to its subject. See State ex rel. Board of Education of Village of Roy v. Saint, 28 N.M. 165, 210 P. 573 (1922). Just as in State v. Humble Oil & Refining Co., supra, the title was not left in general terms, but the legislature pin-pointed its changes to §§ 2 and 18 of House Bill 10 (the latter section being referred to by its compilation section number).

We have held that where an intention to amend a specific section of a prior act is announced in the title of an amendatory act, that amendatory act must be germane

to the subject matter of the section sought to be amended. State v. Candelaria, 28 N.M. 573, 215 P. 816 (1923). In Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964), we held that the inclusion of non-owner drivers in the provisions of the guest act was not germane to the subject which was expressly limited to owners by the title. Although the limitation on the time to bring an action to collect the oil and gas emergency school tax may be germane to "the collection and administration" of the "privilege tax on persons in the business of severing oil and natural gas * * *" the limitation on the collection of all the taxes covered under the Emergency School Tax Act (§§ 72-16-1 through 72-16-47, supra), is not germane to either § 2 or § 18 of House Bill 10, supra, nor to the collection of the oil and gas emergency school tax. See also Silver City Consol. Sch. Dist. No. 1 v. Board of Regents, supra, and State v. Miller, 33 N.M. 200, 263 P. 510 (1927).

There can be no doubt that the general subject of House Bill 119, supra, was provision for the separate administration of the privilege tax on the producers of oil and gas. This subject did not go beyond the object or purpose of the act as set forth under "Purpose of Act—Declaration of Intention" in § 3 thereof which so stated. Other than the elimination of such producers from the Emergency School Tax Act (House Bill 10), neither the title nor § 3 indicates that any other change in House Bill 10 was contemplated. We can only conclude that an attempt to include within the limitation section of House Bill 119 a provision applying to House Bill 10 was improper since such a provision was not germane to either the general subject of House Bill 119 or the express wording of its title.

Thus, pursuant to the provisions of N.M. Const. art. IV, § 16, supra, we must eliminate from the limitation provisions of House Bill 119 (ch. 54, § 25, N.M.S.L. 1959) the void provisions emphasized above, so that the section will read:

"No action or proceeding may be brought to collect any tax due under this Oil and Gas Emergency School Tax Act after five [5] years from the time that such tax became due."

The statute of limitations relied upon for granting the summary judgment being void, the cause is remanded to the trial court to reinstate the cause on its docket for further proceedings on the other issues raised by the pleadings.

It is so ordered.

COMPTON, C. J., and SISK, J., concur.

474 P.2d 503

STATE of New Mexico, Plaintiff-Appellee,
v.
Larry Thomas SERO, Defendant-Appellant.
No. 485.

Court of Appeals of New Mexico.
Sept. 4, 1970.

Mack Easley, Easley & Reynolds, Hobbs, for defendant-appellant.

James A. Maloney, Atty. Gen., Mark B. Thompson, III, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of receiving stolen property, § 40A–16–11, N.M.S.A.1953 (Repl.Vol. 6), defendant appeals. The first issue concerns the severance of multiple counts. There are three issues concerning search and seizure. The fifth issue concerns evidence of prior convictions. We discuss each issue and affirm.

Severance.

The criminal information charged defendant with three counts of receiving stolen property. Each count charged a separate offense—the stolen property allegedly received in violation of the statute was charged to have been stolen on different dates from different persons or organizations.

By motion in advance of trial, defendant asked the court to order the District Attorney to elect a count upon which to proceed to trial or to order the counts severed for trial purposes. Since defendant was charged with separate, distinct and unrelated offenses, he asserts he was prejudiced in his defense against the three charges. He claims he was entitled to go to trial on only one count and the trial court erred in denying his motion.

A similar contention was presented in State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct.App.1970). There, this court pointed out that severance was a procedural question addressed to the trial court's discretion, that the trial court's actions would be upheld "* * * unless an abuse of discretion is shown which results in prejudice to the defendant." See § 41–6–38, N.M.S.A. 1953 (Repl.Vol. 6). The opinion quotes State v. Brewer, 56 N.M. 226, 242 P.2d 996 (1952), for the view that proof of legal prejudice is not shown by the fact that evidence of two separate crimes was before the jury.

Defendant, however relies on State v. Paschall, 74 N.M. 750, 398 P.2d 439 (1965), where defendant was charged in four separate informations with six separate crimes. There, the charges alleged offenses regarding the property of different owners, the offenses occurred at different places and times and the offenses were not provable by the same evidence. Further, the charges involved different types of offenses. It was held "* * * that in the very nature of things it cannot be said that the defendant in this case was not prejudiced in his defense by consolidation for trial of these separate charges. * * *" The various convictions were reversed.

Here, the "very nature of things" does not establish that defendant was prejudiced in defending against three counts of receiving stolen property at the same trial. Possession of the stolen property is a circumstance to be considered in determining whether the offense has been committed. State v. Follis, 67 N.M. 222, 354 P.2d 521 (1960). In this case proof as to defendant's possession under each count was, largely, provable by the same evidence. In addition to proof of possession, there must be proof that defendant knew the property was stolen. State v. Follis, supra. Such knowledge is usually established circumstantially and may be established by proof of defendant's possession of other stolen property. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct.App.1969), cert. denied 398 U.S. 904, 90 S.Ct. 1692, 26 L.Ed.2d 62 (1970). Thus, evidence of possession under each count would be admissible on the issue of defendant's knowledge under all counts.

Further, the results show the jury was able to follow the evidence and apply it to each count; it acquitted defendant of two of the three charges. Compare State v. Turney, 41 N.M. 150, 65 P.2d 869 (1937); State v. Jones, 39 N.M. 395, 48 P.2d 403 (1935). State v. Paschall, supra, does not

require us to hold that defendant, as a matter of law, was prejudiced in his defense.

Accordingly, we follow State v. Gunthorpe, supra, and require a showing of prejudice. None has been shown. Thus, we have no basis for holding that the trial court abused its discretion in denying the motion to elect or sever.

Search and seizure.

There are three separate issues under this point.

(a) The first issue—was there a search and was there consent to search?

Defendant owned and operated a Phillips Service Station at the corner of Marland and Turner Streets in Hobbs, New Mexico. One of his employees was Jim Poppinhouse.

Poppinhouse had previously worked for C & C Motors and had also worked for another company that had been burglarized. Learning of the burglary at C & C Motors, Poppinhouse telephoned the police and asked them to check his tools. His purpose was to avoid any suspicion that he was involved in the burglaries.

Responding to Poppinhouse's call, police officers came to defendant's service station directly from their investigation of the break-in at C & C Motors. Poppinhouse took the officers to the garage portion of the building where he identified his tools and where the officers examined them.

Two rooms had been partitioned off inside the garage. The examination of Poppinhouse's tools took place near a window in the wall of one of the partitioned rooms. The officers saw some unidentified property through the window. Subsequently, Poppinhouse opened the door to the second partitioned room. The officers entered and saw items which appeared to have been taken in the C & C Motors break-in. One officer was kneeling beside one of the items, looking at it, when defendant arrived and asked what was going on. At this point none of the items viewed by the officers had been seized. At this point everyone left the garage, and one of the officers went for a search warrant.

This first search and seizure issue is concerned with what the officers had viewed in the partitioned rooms prior to defendant's arrival and the validity of their view. Defendant claims the officers had searched without a search warrant and without the consent of anyone authorized by defendant to consent. Postulating an illegal search, defendant claims that all items subsequently seized under the search warrant should have been suppressed as evidence.

Defendant raised this issue by motion prior to trial. The trial court held an evidentiary hearing and denied the motion. Attacking the trial court's ruling on the evidence presented, defendant asserts: "No reasonable interpretation of the evidence would sustain any other view than that the officers deliberately searched these two rooms to see if they contained stolen articles. * * *" We disagree.

There were two factual issues resolved by the findings of the trial court. The first is whether there had been a search by the officers. If there had been a search, the second factual question is whether anyone in authority consented to the search.

The trial court found that the officers went to the garage only upon the invitation and insistence of Poppinhouse; that what the officers saw through the window of the first partitioned room (from the garage proper, where they were inspecting Poppinhouse's tools), was in plain view. It found that Poppinhouse opened the door to the second room and the officers followed him into the room. "* * * It was only natural that the officers would follow him since they were there to see everything he had asked them to come to see. * * *" It found that Poppinhouse was the manager and had full authority over and access to the garage in defendant's absence. Substantial evidence supports these findings and the determination by the trial court that there was no search and that a person in authority

consented to the officers being at the places where they viewed the stolen articles.

The trial court's findings being supported by substantial evidence, there is no factual basis for this first search and seizure claim. See State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970); State v. Miller, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969).

(b) The second issue—validity of the search warrant.

The officer obtained the search warrant, returned to the service station and served it on defendant. Various items, identified as property of C & C Motors taken in the break-in, were seized. Shortly before the trial began, defendant attacked the validity of the search warrant. No evidence was offered in support of this attack. However, the attack on the validity of the warrant was renewed during the trial and evidence going to the question of its validity was introduced at the trial. The trial court denied defendant's motion that the search warrant was invalid.

In this appeal, defendant asserts the search warrant is invalid for two reasons. Both go to constitutional and statutory provisions requiring a search warrant to particularly describe the place to be searched. U.S.Const. Amend. IV, N.M.Const. art. II, § 10, § 41–18–2, N.M. S.A.1953 (Repl.Vol. 6, Supp.1969). Under these provisions, a description is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched. Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925). The description, however, must be such that the officer is enabled to locate the place to be searched with certainty. State v. Lemon, 212 So.2d 322 (Fla.Ct.App. 1968). The description "* * * should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched. * * *" People v. Smith, 20 Ill.2d 345, 169 N.E.2d 777 (1960).

Defendant asserts the search warrant fails to particularly describe the place to be searched. One of his arguments is directed to the failure of the search warrant to identify the city where the search was to be held; the description in the warrant says only "Phillips Service Station at 510 S. Turner." The following authorities are pertinent: Ward v. State, 293 P.2d 618 (Okl.Cr.1956); Doyle v. State, 49 Okl.Cr. 422, 295 P. 237 (1931); Commonwealth v. McCleary, 76 York 105 (Pa.Quarter Sessions 1962); Commonwealth v. Battipaglia, 19 Cambria 30 (Pa. Quarter Sessions 1952); Bragg v. State, 155 Tenn. 20, 290 S.W. 1 (1927); Armstrong v. State, 150 Tenn. 416, 265 S.W. 672 (1924); Helton v. State, 164 Tex. Cr.R. 488, 300 S.W.2d 87 (1957); Anderson v. State, 192 Wis. 352, 212 N.W. 628 (1927). We do not decide whether the warrant was void for failure to name a city in its description. This issue was never presented to nor ruled on by the trial court. No ruling of the trial court having been invoked on this issue, it presents no issue for review in this appeal. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), decided May 28, 1970, and cases therein cited.

Defendant's second ground for the asserted invalidity of the search warrant is that it identifies only the Phillips Service Station and does not particularly describe the garage. "* * * [I]t was directed to Phillips Service Station, when actually the garage at the back of the Phillips Service Station was a portion of the search. * *" "* * * [T]he search warrant does not cover the garage building, * * *"

Two factual questions are implicit in defendant's contention—whether there was more than one building on the premises and whether there was multiple occupancy of the premises.

Evidence favorable to defendant is: there was a wall between the garage and service station portions of the building; there was no door between the garage and service station portions and the only open-

ing in the wall was for an air hose of less than one inch diameter. There is an inference that the officers knew of this "solid" wall before application was made for the search warrant and knew that, formerly, the garage portion had been separately occupied. In addition, there is evidence that the garage had a separate address and had a separate occupancy a few months prior to the events under consideration.

Evidence favorable to the State is: defendant was a tenant of the entire building (both service station and garage portions), and defendant stored items in the garage that were used in the service station. From outward appearances, the garage appeared to be a portion of the service station—the defendant and photographs in evidence confirm this. Neither of the officers involved up to the time the search warrant was obtained knew that the garage portion had a separate address.

The cases cited by defendant concerning multiple buildings on the premises do not require discussion because of the facts. Here, there is no question that we have only one building. The evidence does raise a question of multiple units in that building—the "solid" wall and former separate occupancy are undisputed and there is evidence of separate addresses for the service station and garage portions. On the question of multiple occupancy, we rely on the following from Annot., 11 A.L.R.3d 1330 (1967):

> § 6, at 1341: "The general rule that a search warrant directed against a multiple-occupancy structure must particularize respecting the subunit to be searched is usually held inapplicable where the premises in question are occupied by several families or persons in common rather than individually, or where it is shown that notwithstanding the joint occupancy, defendant was in control of the whole of the premises.
>
> "* * *
>
> § 7, at 1343: "In a number of cases, search warrants directed against multiple-occupancy structures have been held valid despite the fact that no particular subunit was specified where it appeared that the entire premises, rather than a particular subunit, was under suspicion of illegal activity.
>
> "* * *
>
> § 8, at 1344: "An exception to the rule that a search warrant directed against a multiple-occupancy structure must specify the subunit to be searched has been recognized in some cases where the multiunit character of the premises was not externally apparent and was not known to the officers applying for and executing the warrant."

Here, while the building was capable of multiple occupancy the undisputed fact is that defendant occupied both the service station and garage portions of the building. He controlled the entire building. It is also undisputed that the entire building was under suspicion. The officer's affidavit for the search warrant asked for a warrant to search "* * * all of the building/s [sic] at this location." It is undisputed that the multiunit character of the building was not externally apparent. The only contrary inference is that the officers knew the building had two units. This inference does not require a holding that the search warrant was invalid.

We hold that the description, "Phillips Service Station at 510 S. Turner," did not limit the search warrant to the service station portion of the building; that the description sufficiently described the entire building as the place to be searched. The evidence of multiple units in that building did not render the warrant invalid because in fact there was no multiple occupancy, defendant controlled the entire building and the Phillips station was the only occupant.

In so holding, we note another contention advanced by the State. It is that the affidavit was expressly incorporated into the search warrant by reference, and the description in the affidavit sufficiently described the entire building. We express no opinion either as to whether the entire

affidavit was incorporated, or whether a description by reference meets constitutional and statutory requirements. See, generally, Annot., 11 A.L.R.3d, supra, § 10, at 1346.

On the contentions submitted to it, the trial court did not err in refusing to hold the search warrant invalid.

(c) The third issue—search and seizure at defendant's home.

After the items were seized from the service station building, defendant claims the officers conducted a search of defendant's home and seized various items during that search. This alleged search was not conducted under authority of a search warrant and was not incidental to defendant's arrest. Its initial validity depends upon whether defendant consented to the search.

There is no dispute as to the fact of defendant's consent. The issue is whether the consent was no more than acquiescence to a claim of lawful authority. Defendant relies on State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969), where the defendant consented to a search only after the officer stated he would get a search warrant anyway.

Here, the facts are different. There is evidence that defendant told officers of articles acquired at the same time as those found in the service station search; that these articles were at his home; that he wanted the officers to see them. There is evidence that defendant insisted that the officers go to defendant's home; that the officers advised defendant of his constitutional rights. All of this occurred before a search warrant was mentioned. When mentioned, it was in the context that defendant need not permit the officers to enter his home; that a search warrant could be obtained. There is evidence that, in spite of the officers' cautionary remarks, defendant insisted upon the officers going to defendant's home and viewing articles which were taken in the C & C Motors break-in.

The evidence is opposite to that in State v. Lewis, supra. The evidence is substantial and supports the trial court's finding that the search was voluntary, at the insistence of defendant, and was not acquiescence to a claim of lawful authority.

Although the initial entry into defendant's home was at defendant's insistence, defendant alleges that the officers undertook a general search after entry. He contends there was no consent to a general search. The trial court's finding as to the articles seized at defendant's home is that defendant "* * * led them to all the articles except the Underwood tool box, and it was sitting on the floor in plain view. * * *" This finding is supported by substantial evidence.

Defendant's complaint of a general search then goes to the assertion that the officers rummaged in various drawers and that this rummaging was beyond the scope of defendant's consent. Defendant does not identify anything seized as a result of the "rummaging." Thus, no issue is raised as to the exclusion of improperly seized evidence. See State v. Harrison, 81 N.M. 623, 471 P.2d 193, decided May 28, 1970, supra. There is no merit to this third search and seizure claim.

Evidence of previous convictions.

Defendant's pre-trial motion asserted that previously he had been convicted of criminal offenses; that he believed that if he testified at his trial the prosecutor would cross-examine him concerning these convictions. Section 20–2–3, N.M.S.A.1953 authorizes such questioning. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969).

Defendant's motion asserted, however, that such questioning would violate his constitutional privilege against self-incrimination and would deprive him of due process of law. State v. Lindsey, supra, held adverse to defendant on these con-

stitutional claims. Compare De Vita v. Sills, 422 F.2d 1172 (3rd Cir. 1970).

The judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

474 P.2d 510

FIELD ENTERPRISES EDUCATIONAL CORPORATION, a Delaware corporation, Appellant,

v.

COMMISSIONER OF REVENUE, State of New Mexico, Appellee.

No. 473.

Court of Appeals of New Mexico.

Sept. 4, 1970.

John A. Mitchell, Mitchell, Mitchell & Alley, Santa Fe, for appellant.

James A. Maloney, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

OMAN, Judge.

The taxpayer has appealed from the following portion of a Decision and Order of the Commissioner entered January 16, 1970:

"The protest as to the $5,102.20 portion of Assessment Number 89254 is hereby denied. This assessment is to be enforced insofar as it reflects amounts of tax due on finance service charges applied on unpaid balances due from sales to residents of the State of New Mexico. Under this assessment the compensating tax applies for period prior to July 1, 1967, and either the compensating tax or the gross receipts tax applies for the period subsequent to July 1, 1967. Such charges constitute 'time-price differential' within the meaning of the Compensating Tax Act of 1939, as amended, and the Gross Receipts and Compensating Tax Act."

The taxpayer takes the position that under the facts of this case the service charges are not taxable under either of the stated Acts. We agree and reverse the foregoing quoted portion of the Decision and Order.

We quote the following material portions of the Stipulation of Facts:

"1. Taxpayer is, and at all times material hereto has been, engaged in the business of publishing educational books and related products, orders for which are received and accepted by Taxpayer in its office at Merchandise Mart Plaza, Chicago, Illinois. The purchasers of such books and products are situated throughout the various states of the United States, including New Mexico.

"2. Taxpayer at all times material hereto did not own any property or maintain any office or other place of business in the State of New Mexico.

"3. Taxpayer at all times material hereto was not qualified to do business in the State of New Mexico.

"4. During the Reporting Period and to date, salesmen in New Mexico operating on a commission basis have solicited orders on behalf of the Taxpayer for the Educational Materials from persons in New Mexico. Every such order has been forwarded to the Taxpayer in Chicago, Illinois, where it has been reviewed and then either accepted or rejected. If the order is rejected, the Taxpayer notifies the person making the order of its rejection and no further action is taken on it. Accepted orders are shipped directly to the purchaser, F.O.B. from Taxpayer's binderies in Crawfordsville, Indiana, Chicago, Illinois, Willard, Ohio, or Kingsport, Tennessee.

"* * *

"10. The educational books and related products published by Taxpayer are typically sold to customers in installment sales transactions. The sales price in a given transaction does not include interest, or any other time price differential, and at the time property enters New Mexico no service fee is due. Taxpayer does collect a service charge of 1 per cent per month on the actual outstanding balance due from the sales to residents of New Mexico, who may, at any time, pay all or any portion of the balance due and thereby prevent application of future service charges on the amount paid.

"11. The aforementioned service charge is under no circumstance pre-computed, but rather is computed each month determined by the unpaid balance of each customer's account."

Under his first point, the taxpayer urges that the service charges are not part of the "sales price" of property within the meaning and definition thereof under the Compensating Tax Act of 1939, as amended, which was repealed effective July 1,

1967. The material portions of this Act were as follows:

"*72–17–1. Title of act—Purpose.*—This act [72–17–1 to 72–17–30] may be cited as the Compensating Tax Act of 1939. The primary purpose of this act is declared to be to protect, so far as is practicable, the merchants, dealers and manufacturers of New Mexico who operate under the excise tax laws of this state, and who meet the requirements of such laws, against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of goods, wares and merchandise."

"*72–17–3. (Supp.1963). Tax on tangible personal property stored, used or consumed in state.*—An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1939, and stored, used or consumed in this state at the rate of three per cent [3%] of the *sales price* of such property; * * *." [Emphasis added.]

"*72–17–2. Definitions.*—The following words, terms and phrases, when used in this act [72–17–1 to 72–17–30], have the following meaning, except where the context clearly indicates a different meaning:

"* * *

"(d) 'Sales price' means the total amount for which *tangible personal property* is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever, * * *." [Emphasis added.]

As shown by the written contract between the taxpayer and purchasers, and as conceded by the Commissioner, the sale of the tangible personal property here involved was consummated at the foregoing named points outside New Mexico, when and where the property was delivered, F.O.B. for shipment directly to the purchasers. See in accord §§ 50A–2–319 and 50A–2–401, N.M.S.A.1953 (Repl. 8, pt. 1). The sales price was evidenced by a written contract entered into prior thereto. This contract showed the amount, or price, to be paid for each item of tangible personal property purchased, the amount of the tax (if any) thereon, the total of these prices and taxes, the amount of any down payment, and the "balance to pay." The contract also provided: "* * * A service charge of 1% per month on the outstanding balance shall be added to my [purchaser's] account at each monthly billing date. * * *"

The sole issue is whether this service charge of 1% per month was a part of the "sales price." This charge was not precomputed, no portion thereof was due when the sale was completed, and no portion thereof ever became due, unless the purchaser elected to pay the balance owing in installments. If payments were made in installments, then the service charge was computed each month on the basis of the then unpaid balance.

The Compensating Tax Act of 1939, as amended, made no express reference to a "time-price differential," which the Commissioner decided and ordered was the nature of the service charge. If a "time-price differential" is implicit within the contemplation of the Act, and particularly within the definition of "sales price," we are still not concerned therewith in this case. It is expressly stipulated: "* * * The sales price in a given transaction does not include interest, or any other time price differential, * * *."

Regardless of this apparent inconsistency between the Commissioner's Decision and Order and the stipulated facts, we are of the opinion the service charge was not a part of the "sales price." The sales price of the property in question was not determined by the subsequently rendered services, or changed by the charges therefor. The contractual right of purchasers to make

payments in installments may have induced many of them to enter into contracts with the taxpayer, but this did not make the agreed charges for the services rendered by the taxpayer, upon the exercise by the purchasers of this right, a part of the "sales price." The service charges were not a part of the "* * * total amount for which [the] tangible personal property [was] sold, * * *." The amount for which the property was sold was the same regardless of whether the purchasers did or did not choose to make installment payments. If they elected to make payments in installments after the consummation of the sale, then, and only then, were the service charges computed and charged to the purchasers in accordance with the agreement. The purchasers received from the taxpayer for these charges the benefits of additional services and expenses necessarily connected with the additional bookkeeping and billings. These additional services and expenses were not a part of the previously accomplished sale, and the charges therefor, arrived at by the contractual method of computation, in no way changed or affected the contractually determined sales price of the tangible property sold.

At least the language of the statute, as applied to the facts of this case, is clearly susceptible of the interpretation we place thereon, and this interpretation thereof makes doubtful the inconsistent interpretation placed thereon by the Commissioner. Any doubtful meaning or intent of a tax statute must be resolved against the State and in favor of the taxpayer. We cannot extend the applicability of the statute beyond a clear import of the language used therein. United States v. Merriam, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240 (1923); Standard Oil Co. of Indiana v. State Tax Com'r, 71 N.D. 146, 299 N.W. 447 (1941). See also United States Gypsum Company v. Green, 110 So.2d 409 (Fla. 1959); Dain Mfg. Co. v. Iowa State Tax Commission, 237 Iowa 531, 22 N.W.2d 786 (1946); New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct. App.1969).

We have considered the following cases relied upon by the Commissioner: Union Oil Co. of California v. State Board of Equalization, 60 Cal.2d 441, 34 Cal.Rptr. 872, 386 P.2d 496 (1963); State v. Natco Corporation, 265 Ala. 184, 90 So.2d 385 (1956); O'Kelley-Eccles Company v. State, 160 Cal.App.2d 60, 324 P.2d 683 (1958); Schemmer v. Iowa State Tax Commission, 254 Iowa 315, 117 N.W.2d 420 (1962); Rena-Ware Distributors, Inc. v. State, 463 P.2d 622 (Wash.1970); Peterson Tractor Co. v. State Board of Equalization, 199 Cal.App.2d 662, 18 Cal.Rptr. 800 (1962). Neither the holding nor the rationale of the decision in any of these cases is inconsistent with our holding or reasoning.

Under its second point, the taxpayer urges that the "SERVICE CHARGES ARE NOT A 'TYPE OF TIME-PRICE DIFFERENTIAL' * * *" within the meaning of the Gross Receipts and Compensating Tax Act. The applicable provisions of this Act are:

"*72-16A-2. Purpose.*—The purpose of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax."

"*72-16A-7. Imposition and rate of tax —Denomination as 'compensating tax.'*— A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to four per cent [4%] of the value, at the time of acquisition or of introduction into the state, whichever is later, * * *."

"*72-16A-8. Presumption of taxability and value.*—A. To prevent evasion of the compensating tax and the duty to collect it, it is presumed that property bought or sold by any person for delivery into this state is bought or sold for a taxable use in this state.

"B. In determining the amount of compensating tax due on the use of property, it is presumed, in the absence of preponderant evidence of another value, that the value means the total amount of money, including any type of time-price differential, or the reasonable value of other consideration paid for property, including any service that is a part of the sale of the property. * * *"

It is apparent from what has been said above concerning the time and place of the consummation of the sale, that the time of computing the value of the property with which we are here concerned was when the property entered, or was introduced into, New Mexico, which was subsequent to the sale. Section 72-16A-7, supra. As shown by the stipulation above, no service charge had been computed when the property entered the State, and none was then due or owing. The value of the property as of that time was the stated sales price, or cost of the property to the purchaser as shown by the written contract.

The subsequently computed and imposed service charge for services subsequently rendered was not part of the value of the property as of the time it entered the State. At least this is a reasonable construction of the language of the statute, when considered in the light of its applicability or inapplicability to the service charge, and the statutory language does not clearly import the contrary construction placed thereon by the Commissioner. As above stated, all doubts as to the meaning and intent of a tax statute must be construed in favor of the taxpayer. United States v. Merriam, supra; Standard Oil Co. of Indiana v. State Tax Com'r, supra; New Mexico Electric Service Co. v. Jones, supra.

The Commissioner argues that since the statute provides "time-price differentials" are to be included as a part of the value of the property, the taxpayer is seeking an exemption therefrom, and has the burden of bringing itself clearly within the scope of the desired exemption. He relies upon Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946); Peisker v. Unemployment Compensation Commission, 45 N.M. 307, 115 P.2d 62 (1941) and Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970). These cases do support the rule that exemptions and deductions from a tax act must be strictly construed in favor of the taxing authority, and any one claiming to come within an exemption, or to be entitled to a deduction, must clearly establish his right thereto. However, the question here presented is not one of exemption or deduction from the statute or the tax thereby imposed, but rather the applicability of the tax to the service charge in question. The fact that "time-price differential" is mentioned in the statute does not clearly show that a service charge, such as that here involved, is included therein, or that such a service charge, even if properly considered a "time-price differential," was a part of the value of the property at the time it was introduced into New Mexico.

It follows from what has been said that the portion of the Decision and Order appealed from must be reversed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

474 P.2d 711

STATE of New Mexico, Plaintiff-Appellee,

v.

Andrew K. PATTON and Lyle V. Moody, Defendants-Appellants.

No. 487.

Court of Appeals of New Mexico.

Sept. 11, 1970.

George P. Jones, III, Albuquerque, for appellant Patton.

Douglas T. Francis, Albuquerque, for appellant Moody.

James A. Maloney, Atty. Gen., Santa Fe, Justin Reid, Asst. Atty. Gen., for appellee.

OPINION

HENDLEY, Judge.

Defendants' motions for post-conviction relief under Rule 93 [§ 21-1-1(93), N.M.S.A.1953, (Supp.1969)], were denied without hearings.

Rule 93, supra, provides in part that:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the courts shall * * * grant a prompt hearing therein, determine the issues and make findings of fact and conclusions of law with respect thereto."

The motions, files, and records do not conclusively show that defendants are not entitled to a hearing. Accordingly, we reverse.

Defendant Patton contends that after his arrest he was questioned by the police without being advised of his rights and without the presence of an attorney although he had requested an attorney. Patton further alleges that as a result of the interrogation he signed an incriminating statement which the police subsequently threatened to use against him at his trial unless he pleaded guilty. He contends that his plea was induced by these threats and thus involuntary.

Defendant Moody also contends that his guilty plea was involuntary; that he was threatened and coerced into making an incriminating statement; by taking the statement before he had an attorney or was advised of his right to remain silent; that he was deprived of the right to talk

to his counsel by being moved to the State prison; and that three of his court appointed attorneys withdrew because he would not plead guilty. He states in his motion that:

"* * * In fact the placing of Petitioner and threating [sic] him with the use of the involuntary statement at trile [sic] against him along with the fact that every attorney appointed him just wanted him to plede [sic] guilty is the only reason the petitioned [sic] did plead guilty to the charge."

Defendants' claims raise factual issues which cannot be conclusively determined from the files and records. See State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct.App.1970). These allegations of pleas coerced or induced by threats to use statements, allegedly improperly obtained, would be sufficient, if true, to collaterally attack the judgments against defendants. See State v. Robbins, 77 N.M. 644, 427 P. 2d 10 (1967), cert. denied 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967); State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct.App.1968).

The State contends that Moody's allegations are barred by the doctrine of res judicata. The State's argument proceeds on the assumption that the facts alleged in Moody's present Rule 93 motion are the same as alleged in a prior Rule 93 motion, and since the trial court ruled against the first motion and Moody failed tc appeal, he is now precluded from raising these same factual allegations in a subsequent Rule 93 motion. The res judicata aspect of Rule 93 proceedings was decided by Justice Noble in State v. Rito Canales, 78 N.M. 429, 432 P.2d 394 (1967). He stated: "A second or successive application may be refused only if the prior denial rested on an adjudication of the merits of the ground presented in a subsequent application. This means that an evidentiary hearing must have been held in the prior application if factual issues were raised and it was not denied on the basis that the files and records conclusively resolved those issues. * * *" Moody had no hearing in which the issues of the first Rule 93 motion could have been litigated and determined; hence, the doctrine of res judicata or Rule 93(d), supra, cannot be applied. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968); State v. Rito Canales, supra.

Since Patton will be granted a hearing on his motion for the above stated reasons, his contention of not understanding the consequences of his plea need not be considered here.

The orders appealed from are reversed. It is so ordered.

OMAN and WOOD, JJ., concur.

474 P.2d 712

Marie NOVAK, Plaintiff-Appellant,

v.

Red DOW and Albuquerque National Bank, Defendants-Appellees.

No. 498.

Court of Appeals of New Mexico.
Sept. 4, 1970.

John B. Speer, Albuquerque, for appellant.

Peter J. Adang, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for appellee Albuquerque National Bank.

James A. Maloney, Atty. Gen., Ray Shollenbarger, Asst. Atty. Gen., Santa Fe, for appellee Red Dow.

OPINION

WOOD, Judge.

Plaintiff's damage suit claimed Sheriff Dow wrongfully refused to conduct an execution sale and claimed the Albuquerque National Bank unlawfully obtained a delay in the scheduled sale. The Bank counterclaimed, asserting a right to possession of the car involved and asserting a security interest superior to the execution levy. The trial court granted summary judgment adverse to plaintiff on all

of the claims; plaintiff appeals. The issue is the propriety of the summary judgments. We affirm the summary judgment in favor of the Bank on plaintiff's damage claim. We reverse the other summary judgments.

The claim against Dow.

Plaintiff's unverified complaint alleges that: plaintiff had an unsatisfied Small Claims Court judgment against Bowling; execution on this judgment was delivered to Deputy Sheriff Osterman in November, 1968; on January 7, 1969, "while the execution was in force," Osterman levied on a certain car; sale under the levy was advertised; the Small Claims Court stayed the sale and subsequently dissolved the order of stay; plaintiff requested Dow to have a deputy conduct the sale on the date to which it had been postponed; Dow refused to permit this and "* * * refused to assist in any way to conduct a sale of the car, * * *."

Dow's unverified answer denies, on information and belief, most of the allegations of the complaint. The answer does admit plaintiff's request to conduct the sale on the postponed date and Dow's refusal to assist in a sale of the car. The refusal was on the basis that "* * * the levy had not been made by his office." Whether the levy had been made by Dow's office, obviously, is a material issue on the question of Dow's alleged wrongful refusal to conduct the execution sale.

Dow moved for summary judgment on the basis of the pleadings and the affidavits filed of record. The pleadings, being unverified, do not lend support for or against the motion for summary judgment in this case. See Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App.1970). Neither the affidavits filed on behalf of the Bank nor the affidavits by plaintiff's attorney go to the question of a levy by the Sheriff's office.

The only support for the motion is Sheriff Dow's affidavit. His affidavit does not assert that the levy was not made or that it was not made by Osterman. His affidavit does go to Osterman's authority to make the levy. The Sheriff states that "* * * Osterman was not a regularly full-time salaried deputy sheriff on the staff of the Sheriff's Department at the time of the alleged service of the execution * * *"; that Osterman "* * * did have a special deputy's commission, which gives the holder no authority to act in any capacity for the Sheriff's office; * * *"

Section 15–40–9, N.M.S.A.1953 (Repl.Vol. 3) gives the Sheriff authority to appoint deputies. Section 15–40–12, N.M.S.A.1953 (Repl. Vol. 3) recognizes there may be "regular" and "special" deputies. A classification of "special deputy" does not, however, establish a lack of authority to serve a writ of execution or make a levy pursuant to the writ. Section 15–40–12, supra, specifically refers to "* * * special deputies to serve any particular order, writ or process, * * *." The fact that Osterman may have been a "special deputy" does not establish an absence of authority, on his part, to levy on the car.

Section 15–40–11, N.M.S.A.1953 (Repl. Vol. 3) refers to the powers of deputy sheriffs. It states: "The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals, * * *." Thus, Deputy Sheriff Osterman had such authority as had been conferred upon him by Sheriff Dow. The extent of Osterman's authority was a question of fact.

Sheriff Dow's affidavit also states that: he took office on January 1, 1969; he had no personal knowledge of the execution; the records of the Sheriff's office do not show the execution; the execution was never sent or received by the Sheriff's office; and the execution was never served through his office. The affidavit also states that Osterman was not qualified to serve the execution.

The opposing affidavit of E. M. Stoll states that: the prior sheriff, Wilson, had

authorized Stoll and Osterman to levy executions; that they did so regularly; that executions were brought directly to Stoll and Osterman with Sheriff Wilson's knowledge and approval; immediately after midnight on January 1, 1969, Sheriff Dow issued new commissions to Stoll and Osterman; and a form of the new commission is attached. The commission form attached contains no limitation on the deputy's authority. Stoll states: "* * * Dow told me at that time that we were to continue operating as deputies as we had been doing under Joe Wilson. * * *"

Stoll's affidavit raises factual issues as to whether Sheriff Dow would have had knowledge of the execution, whether the records of his office would have shown the execution, whether the execution would have passed through his office, whether the execution was served under his authority and whether Osterman had authority to make the service. There being material fact issues, they must be resolved at trial. The summary judgment in favor of Sheriff Dow was improperly granted. Jacobson v. State Farm Mutual Automobile Insurance Company, 81 N.M. 600, 471 P.2d 170, decided June 22, 1970.

The claim against the Bank.

Plaintiff's damage claim against the Bank asserts: "The defendant bank unlawfully intervened * * * and unlawfully procured the order from the small claims court which delayed the scheduled sale of the car levied upon."

Although the summary judgment in favor of the Bank on this damage claim has been appealed, an issue raised by the briefs is whether an appeal, generally, from the summary judgment, sufficiently states a "point relied on" for purposes of review. See § 21-2-1(15) (11), N.M.S.A.1953 (Supp.1969). We assume that it does.

However, plaintiff presents neither arguments nor authorities in her brief in chief as to why the trial court erred in granting summary judgment on this damage claim. See § 21-2-1(15) (14), N.M. S.A.1953 (Supp.1969). We assume, but do not decide, [see Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953)], that arguments and authorities could be presented for the first time in the reply brief. The reply brief states: "* * * the district court's errors in giving the bank priority over the plaintiff are * * * good reasons for reversing the judgment in its entirety." This is the sum of the argument; no authorities are presented in support. As to this argument, it is not explained how the asserted error in priorities, which involves the Bank's counterclaim and the asserted levy by Osterman, affects or in any way pertains to a damage claim against the Bank for obtaining an order delaying the execution sale.

Plaintiff has the burden of clearly pointing out the asserted error of the trial court. Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967); Cochran v. Gordon, 77 N.M. 358, 423 P.2d 43 (1967). Plaintiff has not met that burden. Further, even though the propriety of the summary judgment in favor of the Bank is assumed to have been presented as a point relied on for reversal, the point is neither argued nor supported by authority. Therefore, it is considered as abandoned. Sproul Const. Co. v. St. Paul Fire & Marine Ins. Co., 74 N.M. 189, 392 P.2d 339 (1964); Gibbs v. Whelan, 56 N.M. 38, 239 P.2d 727 (1952). Accordingly, the summary judgment in favor of the Bank is affirmed.

Summary judgment for the Bank on its counterclaim.

In its counterclaim, the Bank alleged that: Bowling purchased the car, financing it by a loan from the Bank; the loan was secured by a security agreement covering the car; the security agreement was filed with the Motor Vehicle Department; and plaintiff had constructive notice of the Bank's lien. The Bank alleged: plaintiff obtained possession of the car pursuant to a writ of execution; the Bank's lien is a superior lien and the Bank is entitled to possession of the car; after de-

mand, plaintiff continued to wrongfully detain the vehicle.

The counterclaim asked that a writ of replevin be issued directing the Sheriff to seize the car from plaintiff and to deliver it to the Bank. The counterclaim also sought a judgment that the Bank was entitled to possession of the car "* * * exclusive of any rights of possession * * *" by plaintiff. An affidavit in replevin and a bond in replevin were filed. The writ of replevin was issued.

The summary judgment in favor of the Bank on the counterclaim states that the Bank is entitled to possession of the car and directs the Sheriff to deliver custody of the car to the Bank. Because of the contents of the summary judgment, two questions must be discussed in determining its propriety.

The first question concerns the writ of replevin. The counterclaim did not waive seizure and delivery of the property as authorized by § 22–17–7, N.M.S.A.1953. It alleged a right to immediate possession, a wrongful detention by plaintiff, and asked for recovery of the car. Section 22–17–1, N.M.S.A.1953. It proceeded on the basis that the car was not in the possession of an officer, see §§ 22–17–2 and 22–17–3, N.M.S.A.1953, but in plaintiff's possession.

Plaintiff asserts that the writ of replevin was never served. Contending to the contrary, the Bank relies on certificates of mailing signed by counsel. These certificates apply only to the counterclaim in which the writ of replevin was requested and copies of the affidavit and bond in replevin. There is nothing in the record showing that the writ was ever served or that the Bank obtained possession of the car pursuant to the writ. The only indication in the record is that the Bank did not obtain possession of the car pursuant to the writ—the summary judgment directs the Sheriff to deliver possession of the car to the Bank. Section 22–17–10, N.M.S.A.1953.

What results from the failure to serve the writ? Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944) states:

> "Replevin, under this statute, [§ 22–17–1, supra] is a possessory action. The primary object of which is plaintiff's right to the immediate possession of the property and, secondarily the recovery of damages by the plaintiff for the unjust caption, or detention thereof. The only judgment that may be rendered, under the statute, in favor of the plaintiff, is for the possession of the property and damages for its unlawful caption or detention. The jurisdiction of the court, to hear and determine actions in replevin instituted pursuant to this statute, is dependent upon the issuance and service of the writ which brings under the control of the court the property for the purpose of rendering a judgment in accordance with the object and purpose of the statute, viz.: To determine the right to the immediate possession of the property, and damages for its unlawful caption or detention. * * *"

Troy Laundry Machinery Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921); see Citizens Bank, Farmington v. Robinson Bros. Wrecking, 76 N.M. 408, 415 P.2d 538 (1966).

Since seizure of the property under the writ of replevin is a requisite to the trial court's jurisdiction to determine the right to the possession of the car, Johnson v. Terry, supra, and since the record before us shows no such seizure, the trial court did not have jurisdiction to grant a summary judgment determining that the Bank had a right to possession of the car.

The second question concerns that portion of the counterclaim which asserts the Bank's lien is superior to plaintiff's claim under a levy pursuant to a writ of execution. This question assumes a valid levy by the Sheriff's office although we have held there is a factual issue concerning this levy in discussing plaintiff's claim against Sheriff Dow. This question is

concerned with priorities—whether the Bank's lien is superior to the levy under the writ of execution.

The priority of the Bank's lien involves §§ 64–5–1 and 64–5–2, N.M.S.A.1953 (Repl. Vol. 9, pt. 2, Supp.1969). These sections provide for the filing of security interests with the Motor Vehicle Department [formerly Motor Vehicle Division, § 64–2–1, N.M.S.A.1953 (Repl.Vol. 9, pt. 2, Supp. 1969)]. Section 64–5–2, supra, provides the filing of the application (for a new title showing the lien) with the Department and the issuance of a new certificate of title constitute constructive notice of all security interests in the vehicle described in the application. It provides that if the application is received within ten days after the date the security agreement was executed, constructive notice dates from the time of execution of the security agreement. "* * * Otherwise, constructive notice shall date from the time of receipt noted on the title application."

It is undisputed that the Bank's loan, the security agreement and the application for a title showing the Bank's lien were all executed on June 12, 1968. The Bank's affidavit states: "* * * A copy of the application for a title * * *" is Exhibit C to the affidavit. Section 64–5–1, supra, requires the Department to stamp on the application, the date it was received. The copy of Exhibit C in the record shows it was stamped, but the date cannot be read. The affidavit also states the security agreement was filed with the Motor Vehicle Department on June 12, 1968. On this basis, the Bank asserts its lien was valid, was superior to the asserted levy of January 7, 1969 and that its lien was constructive notice to plaintiff from June 12, 1968. As to the issue before us, the Bank asserts that its affidavit and exhibits were a prima facie showing of a right to summary judgment and that in the face of the Bank's showing, plaintiff has not shown that a material issue of fact existed. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969).

Plaintiff presents several contentions as to why the Bank had not made a prima facie showing entitling it to summary judgment. We need consider only one of them—the date the Motor Vehicle Department received the application for a new title. Under § 64–5–2, supra, constructive notice of the Bank's lien dates from the date the security agreement was executed if the application was received within ten days of June 12, 1968. Otherwise, constructive notice dates from the time of receipt noted on the application.

The Bank's affidavit states the security agreement was filed on June 12, 1968. It makes no such statement concerning the application. Further, the affidavit is silent as to the date the application was received by the Motor Vehicle Department. Constructive notice does not date from a filing of a security agreement even if it was proper to file the security agreement. Upon the filing of the application, constructive notice is tied directly to receipt of the application. Section 64–5–2, supra. The affidavit does not state when the application was received by the Motor Vehicle Department and, therefore, fails to make a prima facie showing that plaintiff was charged with constructive notice of the Bank's lien.

Exhibit C to the Bank's affidavit is stated to be a copy of the application. We have previously pointed out that the stamped date cannot be read. In addition, Exhibit C shows two inked notations. One is: "RD 1/14/69." The second is: "Jan 14–69 22093 * * * 19⁰⁰." These notations, unexplained, prevent a prima facie showing for summary judgment since they suggest that the application was received on January 14, 1969 and, therefore, subsequent to the execution levy. There is no explanation of the notations, therefore, the Bank failed to make a prima facie showing entitling it to summary judgment.

The Bank, however, would avoid any effect for the notations. It states: "* * * It might be pointed out that, whatever that handwriting means, it cer-

tainly was not put there by anyone at the Motor Vehicle Division. The exhibit * * * is an Extra Copy of the application that was sent to the Motor Vehicle Division * * * That copy never left the file of the Bank and the affidavit * * * establishes that it is only a copy of the actual application on file with the Motor Vehicle Division. * * * Any writing on the application was placed there by employees of the Bank and not anyone at the Motor Vehicle Division. * * *"

The foregoing contention contradicts the affidavit. The affidavit states that the exhibit, which contains the notations, is a copy of the application. If this is so, we have previously pointed out that the Bank failed to make a prima facie showing as to the priority of its lien. If, as asserted in the above quotation, the exhibit is a copy of the application retained by the Bank and the notations were not on the copy submitted to the Motor Vehicle Department, then there is nothing in the record showing when the Department received the application. If this is so, there is nothing on which to base constructive notice. Either way, there is no showing entitling the Bank to a summary judgment holding the Bank's lien to be superior to the execution levy.

There is no prima facie showing that the Bank's lien was superior to the execution levy. Spears v. Canon de Carnue Land Grant, supra. The trial court erred in granting summary judgment on the counterclaim.

The summary judgments in favor of Dow and in favor of the Bank on its counterclaim are reversed. The summary judgment in favor of the Bank on plaintiff's claim against the Bank is affirmed. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

OMAN and HENDLEY, JJ., concur.

474 P.2d 718

STATE of New Mexico, Plaintiff-Appellee,

v.

Floyd Douglas MAPLES, Defendant-Appellant.

No. 496.

Court of Appeals of New Mexico.

Sept. 11, 1970.

Dwight D. Arthur, Deming, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Ray Shollenbarger, Asst. Atty. Gen., for appellee.

OPINION

OMAN, Judge.

Defendant's motion for relief under Rule 93 [§ 21-1-1(93), N.M.S.A.1953 (Supp. 1969)] was denied without a hearing, and he appeals. We affirm.

As grounds for the motion, which defendant apparently prepared, it is alleged:

"1. Petitioner was sentenced without the aid or advice of counsel at any time during the court proceedings.

"2. Petitioner was not capable of intelligently waiving rights to counsel or representing himself. In that:

The above named petitioner had not progressed beyond the eight year of school. Petitioner was 20 year of age at this time and completely uninformed as to court proceedings or rights and safeguard guaranteed by the Constitution of the United States. Petitioner had been discharged from the United States Army for Mental Incompetency."

Notice of appeal from the order denying the motion was filed on October 29, 1969. Thereafter an attorney was appointed to represent defendant on the appeal. A motion for rehearing was filed on December 10, 1969, by which defendant sought to have his Rule 93 motion reconsidered on the ground that it "* * * raises factual issues as to the defendant's capacity to stand trial and his mental competency which require a hearing upon such issues."

The court denied the motion for rehearing after considering the arguments of counsel thereon.

Defendant now claims error in the denial of his motion for rehearing. The order denying the Rule 93 motion was final and appealable. Rule 93(e), [§ 21-1-1(93)(e), N.M.S.A.1953 (Supp.1969)]. Upon the filing of the notice of appeal from the order, the trial court lost jurisdiction of the case, except for purposes of perfecting the appeal to this court. Section 21-2-2, N.M.S.A.1953 (Supp.1969); Sup.Ct. Rule 5(5), [§ 21-2-1(5) (5), N.M.S.A.1953 (Supp.1969)]; Hardin v. State Tax Commission, 78 N.M. 477, 432 P.2d 833 (1967); Mirabal v. Robert E. McKee, General Contractors, Inc., 74 N.M. 455, 394 P.2d 851 (1964); National American Life Insurance Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963); State v. White, 71 N.M. 342, 378 P.2d 379 (1962). Thus, the court could not have erred by denying the motion for rehearing.

However, the court's order denying the Rule 93 motion without a hearing necessarily included a ruling that the files and records of the case conclusively show there is no factual issue presented by the motion upon which a hearing is required. Rule 93(b), [§ 21-1-1(93) (b), N.M.S.A.1953 (Supp.1969)]. This ruling is reviewable on appeal. State v. Reece, 79 N.M. 142, 441 P.2d 40 (1968); State v. Byrd, 79 N.M. 13, 439 P.2d 230 (1968); State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct.App.1968).

Defendant asserts he had a right to be represented by counsel at every stage of the proceedings leading to his conviction, and this right remained with him until intelligently, understandingly and competently waived by him. With these assertions we agree. However, we do not agree with his contention that he could not possibly have "knowingly" and "understandingly" waived his right to counsel because of his age, education, mental condition and lack of experience in court procedures.

Complaints were filed against defendant in a Justice of the Peace court charging him with the crimes of (1) unlawful taking of a motor vehicle, contrary to § 64–9–4, N.M.S.A.1953, (2) burglary, contrary to § 40A–16–3, N.M.S.A.1953 (Repl. 6), and (3) robbery armed with a weapon, contrary to § 40A–16–2, N.M.S.A.1953 (Repl. 6). On March 15, 1966, he appeared in the Justice of the Peace court. The complaints were read and the penalties for the different offenses explained to him. He was advised of his right to counsel; that he might call or have word sent to any attorney he wished; and that an attorney would be appointed to represent him if he so desired and was financially unable to retain one. After being so informed and advised, he voluntarily signed a waiver of counsel.

Defendant was also informed by the Justice of the Peace as to his rights to a preliminary hearing; against self-incrimination; to remain silent; to have witnesses called on his behalf; to cross-examine the State's witnesses; to a continuance of the preliminary hearing if necessary so as to arrange for the presence of witnesses or counsel; to be released on bond; the fact that any statement he might make could be used against him; and the fact that he could waive preliminary hearing if he so desired.

He advised the Justice of the Peace that he was twenty years of age; had completed 11 years of elementary and high school; his regular employment was that of mechanic; and he had a "* * * good and complete understanding of the English language and [was] able to speak, read and write * * *" it. He waived the preliminary hearing, and pleaded guilty to the charges.

Defendant was then bound over to the district court and was informed against for the alleged offenses. He appeared before the district court for arraignment on April 5, 1966. His appearance before the Justice of the Peace and his actions taken at that time were discussed with him step by step. He stated he understood he had waived his rights to a preliminary hearing and to counsel, and it is apparent from the responses he made to questions by the court that he did understand these rights and that he had waived them. The charges were again read to him and he was advised as to the penalties which could be imposed for conviction of each charge. He stated he understood both the nature of the charges and the possible penalties. He was again advised of his right to counsel, and he again stated he did not want a lawyer and wished the court to proceed with the arraignment.

He was advised of his right to a jury trial, of the presumption of his innocence, of his right to plead not guilty, or stand mute, if he so chose, and of his right to put the State to the burden of proving his guilt. He was questioned as to his educational background, his physical and mental health, and as to whether his pleas would be free and voluntary. Not until the court had satisfied itself that defendant understood the nature of the charges and the possible penalties, and had knowingly, voluntarily and understandingly waived his rights to a preliminary hearing and to counsel in the Justice of the Peace court, and to a jury trial and counsel in the district court, did the court proceed to take a plea on each of the charges. Before finally accepting the pleas of guilty, the court asked the District Attorney to relate what defendant had done which constituted the violations with which he was charged. Defendant heard the statement by the District Attorney, agreed the described acts and

conduct on his part, as related by the District Attorney, were substantially correct, and admitted he had committed the offenses. Before being sentenced, defendant told of a prior conviction of burglary in Missouri.

Nothing in the record suggests a lack of knowledge or understanding on defendant's part of his rights, or that he was not acting voluntarily when waiving his rights to a preliminary hearing and to counsel, and when entering his guilty pleas. The fact he was twenty years of age, had either an eighth or an eleventh grade education, was a mechanic, and was not trained in court procedures, presents no issue upon his ability to understand and appreciate what he had done, or upon his capacity to knowingly, intelligently and understandingly waive his rights, which had been so fully explained to him and which he had so consistently stated he understood. Compare State v. Sexton, 78 N.M. 694, 437 P.2d 155 (Ct.App.1968); State v. Martin, 80 N.M. 531, 458 P.2d 606 (Ct.App.1969).

There is no claim defendant was suffering from mental incompetency when he waived his rights and entered his guilty pleas. His claim is he had at some time "* * * been discharged from the United States Army for mental incompetency. * * *" At most this is a mere suggestion or conclusion of mental incompetency at the times of his waivers and pleas, and it is based upon a claimed prior discharge from the Army for incompetency. This suggestion or conclusion is not sufficient to raise an issue requiring a hearing thereon. State v. Smith, 80 N.M. 742, 461 P.2d 157 (Ct. App.1969); State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct.App.1969); State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct.App. 1968).

The order denying the motion should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

475 P.2d 40

E. C. TUCKER et al., Petitioners,

v.

STATE CORPORATION COMMISSION of New Mexico, Respondent.

No. 9131.

Supreme Court of New Mexico.

Sept. 24, 1970.

Original Prohibition Proceeding

Ordered that petition for alternative writ of prohibition be and the same is hereby denied.

475 P.2d 40

STATE of New Mexico ex rel. WYLIE BROS. CONTRACTING CO., a corporation, Petitioner,

v.

Honorable Dee C. BLYTHE, District Judge, Curry County, New Mexico, Respondent.

No. 9146.

Supreme Court of New Mexico.

Oct. 14, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

475 P.2d 40

STATE of New Mexico ex rel. BARBER'S SUPER MARKETS, INC., a New Mexico Corporation, Petitioner,

v.

Lafel E. OMAN, Judge of the Court of Appeals, sitting as District Judge of the District Court of Bernalillo County, Respondent.

No. 9133.

Supreme Court of New Mexico.

Oct. 1, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

475 P.2d 40

REALIA SCHOOL, INC., a New Mexico Corporation, and Efren Reveles, Ph.D., Petitioners,

v.

NEW MEXICO STATE BOARD OF EDUCATION and Virgil W. Henry, Frederic G. Comstock, Mrs. Laura E. McKinley, Albert Amador, Ed Heringa, Mrs. Thelma Inmon, K. I. Langley, H. M. Mortimer, M.D., Charles C. Murphy, and L. Grady Mayfield, Jr., Members of said Board, Respondents.

No. 9151.

Supreme Court of New Mexico.

Oct. 16, 1970.

Original Mandamus Proceeding

Ordered that petition for writ of mandamus be and the same is hereby denied.

475 P.2d 41

Bill SPILLERS, d/b/a Spillers Moving and Storage Company, Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 462.

Court of Appeals of New Mexico.
July 24, 1970.
Rehearing Denied Sept. 15, 1970.
Certiorari Denied Oct. 15, 1970.

Malcolm W. deVesty, Franks & deVesty, Albuquerque (Irwin S. Moise, Sutin, Thayer & Browne, Albuquerque, on rehearing), for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Benjamin J. Phillips, Special Asst. Atty. Gen., for appellee.

OPINION

SPIESS, Chief Judge.

This is an appeal from a decision and order of the Commissioner of Revenue. The order resulted in the imposition of a gross receipts tax upon commissions paid to a resident agent of an interstate carrier of household goods for initiating or "booking" interstate transportation of such goods. The commissions were paid during the year 1968 and the month of February, 1969.

The law under which the Commissioner acted and which was applicable to the period was Laws of 1966, Ch. 47, [§§ 72-16A-1 through 72-16A-29, N.M.S.A.1953 (Supp. 1967)]. This Act has in certain respects been amended and in others has been repealed.

The questions on this appeal are (1) whether New Mexico can constitutionally

impose its gross receipts tax upon commissions received by a resident agent of an interstate carrier for initiating an interstate shipment of property, and (2) whether gross receipts of the agent derived from the stated activity are deductible under statutory authority from the gross receipts upon which the tax is imposed.

The facts involved are the subject of a stipulation between Taxpayer (Bill Spillers, d/b/a Spillers Moving and Storage Company) and the Commissioner. The Taxpayer is a common carrier maintaining his principal office in Santa Fe, New Mexico. He is engaged in transporting household goods and in performing supporting services in connection with such transportation. Where the transportation is intrastate Taxpayer performs such transportation and services pursuant to a certificate of convenience and necessity issued by the State of New Mexico. Where such transportation and services involve interstate commerce Taxpayer acts as a franchised agent under contract with Bekins Van Lines Co. of Hillsdale, Illinois, which is authorized to transport household goods in interstate commerce.

In accordance with Taxpayer's agreement with Bekins, he receives twenty per cent of the transportation proceeds for having initiated an interstate order. He likewise receives a percentage of the proceeds for additional services performed by him in connection with such transportation.

The Taxpayer filed with the Commissioner his report of gross receipts for the period involved. He excluded from such receipts commissions received by him for initiating interstate transportation. The Commissioner, following an audit of taxpayer's records, added the amount of such commissions so received to taxable gross receipts and, as stated, imposed a tax thereon.

A case treated by the parties as typical and included within the stipulation is one in which a proposed shipper contacted Taxpayer requesting that his household goods be shipped from Santa Fe, New Mexico, to Lubbock, Texas. Taxpayer, as agent of Bekins, contracted with the shipper for such shipment of his goods through use of a UNIFORM HOUSEHOLD GOODS BILL OF LADING AND EXPENSE BILL. The total transportation charges were $582.20, of which Taxpayer was paid twenty per cent for having initiated the order, or the sum of $116.44. Taxpayer did not include this amount as taxable upon filing his gross receipts return. The Commissioner, however, imposed the gross receipts tax upon this sum, together with others of a like nature.

The gross receipts tax, which is a subject of this appeal, was imposed upon the privilege of engaging in business generally in New Mexico. It is not confined to interstate transactions but is extended to substantially all forms of business activities. The tax is measured by the gross receipts of those so engaged. The purpose of the tax was to provide revenue for public purposes.

"Gross receipts" is defined in Laws of 1966, Ch. 47, § 3, [§ 72–16A–3(E), N.M.S.A.1953 (Supp.1967)], as:

> "* * * the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico, or from performing services in New Mexico, * * *.
>
> " 'Gross receipts,' for the purposes of the business of buying, selling or promoting the purchase, sale or leasing, as factor, agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commissions or fees derived from the business."

Taxpayer first contends that taxing the particular gross receipts violates Article I, Section 8, Clause 3, of the Constitution of the United States (the Commerce Clause) and is, therefore, deductible under § 72–16A–14(H), N.M.S.A.1953 (Supp.1967). This section permits deduction from gross receipts "* * * to the extent that the imposition of the gross receipts tax would be

unlawful under the United States Constitution.". Clearly, if the imposition of the tax upon the particular gross receipts is constitutionally lawful then such receipts are not deductible under this section.

It is undisputed that the receipts in question are transactions related to interstate commerce. Taxpayer argues that a state cannot constitutionally impose a tax on receipts or earnings derived from interstate commerce. To support this rule he cites 17 A.L.R.2d 448 in which the annotator has referred to cases which do lend support to this conclusion. However, in our view, no such absolute rule has been promulgated by decisions of the United States Supreme Court. No specific guides for the exercise of state and local taxation as it applies to interstate commerce have been provided through decisions of the Supreme Court. Uncertainty in this field of taxation is reflected by the statement in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959).

> "The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

Taxation of receipts or income from interstate commerce and related activities has not for that reason alone been declared to be violative of the Commerce Clause. The Supreme Court in General Motors Corp. v. Washington, 377 U.S. 436, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1964), in considering a gross receipts tax imposed by the State of Washington, said:

> "We start with the proposition that '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938). 'Even interstate business must pay its way,' Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590 (1919); as is evidenced by numerous opinions of this Court. For example, the Court has approved property taxes on the instruments employed in commerce, Western Union Telegraph Co. v. Attorney General, 125 U.S. 530, 88 S.Ct. 961, 31 L.Ed. 790 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1891); on profits derived from foreign or interstate commerce by way of a net income tax, William E. Peck & Co. v. Lowe, 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049 (1918), and United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 S.Ct., 499, 62 L.Ed. 1135 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, 'the process of manufacturing resulting in no profits until it ends in sales,' Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 282, 45 S.Ct. 82, 84, 69 L.Ed. 282 (1924); by a personal property tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L. Ed. 1283 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); and by a franchise tax levided on an express company, in lieu of taxes upon intangibles or rolling

stock, measured by gross receipts, fairly apportioned, and derived from transportation within the State, Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959).

"However, local taxes measured by gross receipts from interstate commerce have not always fared as well. Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. Cf. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 170, 74 S.Ct. 396, 98 L.Ed. 583 (1954); Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U.S. 326, 346, 7 S.Ct. 1118, 30 L.Ed. 1200 (1887). Such burdens would destroy interstate commerce and encourage the re-erection of those trade barriers which made the Commerce Clause necessary. Cf. Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 521–522, 55 S.Ct. 120, 79 L.Ed. 632 (1935). And in this connection, we have specifically held that interstate commerce cannot be subjected to the burden of 'multiple taxation.' Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, at 170, [74 S.Ct. 396, 98 L.Ed. 583]. Nevertheless, as we have seen, it is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned."

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), in striking down a franchise tax as applied to a foreign corporation engaged exclusively in interstate commerce, said:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business, and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. [citations omitted] The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, * * *."

As has been shown, all interstate commerce is not per se immune from taxation. To attain such immunity a showing must be made of multiple taxation or the lack of a local taxable incident. Such showing is essential to classify the tax as one unduly burdensome to interstate commerce. EVCO v. Jones, 81 N.M. 724, 472 P.2d 987, decided May 28, 1970; Bell Telephone Laboratories, Inc. v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966).

We are unable to perceive, nor has Taxpayer shown how another state could impose a tax upon the receipts resulting from initiating the particular interstate transportation. As we have stated, the tax imposed is not aimed solely at interstate commerce or an activity connected therewith, but applies to gross receipts derived from substantially all taxpayers on account of services rendered or performed within the State of New Mexico. The taxpayer is a resident of New Mexico doing business within the State and the recipient of all benefits this State affords every citizen. The receipts taxed are receipts from the local incident of "booking" or initiating the transaction. The following language in General Motors Corp. v. Washington, supra, is pertinent here.

"A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. * * * [W]e look to the taxpayer's

business activities within the State, i.e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities."

We conclude that the imposition of the tax involved does not violate the Constitution of the United States and consequently is not properly deductible under § 72-16A-14(H), supra. Authorities cited by Taxpayer, in our opinion, do not compel a different conclusion.

We next consider Taxpayer's contention that the gross receipts derived from initiating or "booking" the interstate transportation of the household goods are deductible under § 72-16A-14(I), N.M.S.A. 1953 (Supp.1967).

"I. Receipts from transporting persons or property under a single contract from one point to another in this state may be deducted from gross receipts when such persons or property, including any special or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce."

The Commissioner contends that the language of the statute is not broad enough to permit deduction of receipts not resulting from act or acts of actual transportation. We agree with this interpretation. In Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970), we held that the burden rests upon the taxpayer "* * * to establish clearly his right to the deduction and the intention to authorize the deduction claimed by the taxpayer must be clearly and unambiguously expressed in the statute."

Based upon the rules expressed above, it is our conclusion that the receipts to be deductible must result from an act or acts of transportation as distinguished from receipts derived from the negotiation of an agreement under which transportation may result. This statute is not sufficiently broad in language when considered under the rule of strict construction to authorize a deduction of receipts from the initiation of an agreement for transportation.

For the reasons stated we conclude that receipts from negotiating interstate transportation under the circumstances should not be deducted as claimed by Taxpayer in computing his tax liability to the State, City of Santa Fe and County of Santa Fe.

The decision and order of the Commissioner is accordingly affirmed.

It is so ordered.

OMAN and WOOD, JJ., concur.

475 P.2d 45

ALBUQUERQUE MOVING AND STORAGE COMPANY, Inc., Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 461.

Court of Appeals of New Mexico.
July 17, 1970.
Rehearing Denied Sept. 14, 1970.
Certiorari Denied Oct. 15, 1970.

Malcolm W. deVesty, Franks & deVesty, Irwin S. Moise, Sutin, Thayer & Browne, Albuquerque (on rehearing), for appellant.

James A. Maloney, Atty. Gen., Santa Fe, John C. Cook, Special Asst. Atty. Gen., for appellee.

OPINION

SPIESS, Chief Judge.

This is an appeal from a decision and order of the Commissioner of Revenue imposing a gross receipts tax upon receipts derived by the Taxpayer, Albuquerque Moving and Storage Company, Inc., from certain services rendered by it during the year 1968. Ch. 47, [1966] Laws of N.M. p. 184 (repealed 1969), is applicable to these transactions. The facts are stipulated. Taxpayer is a New Mexico corporation having its place of business at Albuquerque, New Mexico. In the course of its business it renders certain transportation and related services, some of which are intrastate in nature and others are interstate.

While engaged in interstate service Taxpayer does so as a franchised representative of United Van Lines of Fenton, Missouri. United Van Lines is authorized to transport household goods in interstate commerce. The stipulation includes examples of typical cases respecting which the Taxpayer rendered the particular services for which the receipts involved were subjected to tax by the Commissioner. The typical cases include transportation of household goods from out of state to Albuquerque by a civilian and like transportation by the United States for an officer in the military service.

Before further reference is made to these cases we think it is appropriate to say that the tax was imposed by the Commissioner upon receipts for services rendered by the Taxpayer in the handling, storage and local drayage of the household goods. In the civilian case the goods were transported to the consignee at the address of the Taxpayer, Albuquerque Moving and Storage Company, and in the military case the property was consigned to the officer at Albuquerque, New Mexico, and delivery was made to the Taxpayer at its address for handling, storage and local drayage.

The typical civilian case involved the transportation of property from San Diego, California, to Albuquerque, New Mexico, by a shipper who had been transferred by his company from San Diego to Albuquerque. At the time the goods were transported the shipper did not have a home in Albuquerque and, therefore, wished to have his goods stored in Albuquerque until he found a home. The goods were transported to Albuquerque and placed in storage in Taxpayer's warehouse until the shipper gave notice to transport them to his new home in Albuquerque. The shipper, in this case, paid the transportation charges from San Diego to Albuquerque, handling charges for preparing the goods for storing in Albuquerque, storage charges and local drayage charges for transporting the goods to his new home in Albuquerque. Each of these charges was

made pursuant to a tariff filed by United Van Lines with and approved by the Interstate Commerce Commission.

In the typical military case an officer was transferred by the United States Marine Corps from a camp in North Carolina to Kirkland Air Force Base, Albuquerque, New Mexico. The transportation officer at the North Carolina camp secured transportation of the officer's household goods through United Van Lines to Albuquerque. Since the final destination address had not been ascertained a provision was contained in the bill of lading and freight bill for storage in transit up to ninety days. These household goods were transported to Albuquerque and delivered to the Taxpayer. Taxpayer held the goods in storage until notified of the officer's address and they were then delivered to him at such address. In this instance the United States government paid not only the transportation charges but Taxpayer's charges for storage, handling and drayage to the officer's home. Each of the charges are made pursuant to a tariff filed by United Van Lines with and approved by the Interstate Commerce Commission.

In both cases transportation, storage, handling and local drayage were provided for and charges specified under a single contract. The total receipts upon which the tax was imposed resulted from services rendered in instances substantially identical to the typical cases. In neither instance did Taxpayer include the fees received for handling, storage and drayage in its gross receipts tax return, nor did it pay gross receipts tax thereon. As stated, the effect of the Commissioner's decision and order from which the appeal is taken is to impose the gross receipts tax upon receipts derived from these services.

The Taxpayer, in substance, takes the position that these receipts are deductible from gross receipts upon which the tax is imposed in accordance with Ch. 47, § 14(I) [1966] Laws of N.M. p. 198 [§ 72–16A–14(I), N.M.S.A. 1953, (Repl. Vol. 10 Supp. 1967)], which is as follows:

> "Receipts from transporting persons or property under a single contract from one point to another in this state may be deducted from gross receipts when such persons or property, including any special or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce."

It is further argued that the goods involved were in interstate commerce until delivered to the consignee's home and a tax upon receipts for the particular services to the goods while in interstate commerce runs afoul of the commerce clause of the federal Constitution.

Implicit in the decision of the Commissioner is the finding that upon arrival of the household goods at Taxpayer's warehouse they ceased to be in interstate commerce.

This court's scope of judicial review of a decision and order of the Commissioner of the Bureau of Revenue is expressed [§ 72–13–39(C), N.M.S.A. 1953, (Supp.1969)], as follows:

> "Upon appeal, the court shall set aside a decision and order of the commissioner only if found to be (1) arbitrary, capricious or an abuse of discretion, (2) not supported by substantial evidence in the record, or (3) otherwise not in accordance with law."

The determinative question before us is whether the Commissioner's finding is warranted by the stipulated facts. If so, none of the stated grounds upon which the decision and order may be set aside are present and the Commissioner's action must be affirmed.

It is undisputed that if the goods involved were not in interstate commerce when the services respecting them were rendered the receipts from such services would not be deductible under Ch. 47, § 14(I), [1966], Laws of N.M., nor would

they be subject to the protective effect of the commerce clause.

The general and accepted rule in such cases supported by substantial authority is expressed in 171 A.L.R. 283 at 284:

> "It is universally agreed that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the states through which it passes. Where, however, the interstate transit is broken or interrupted in a particular state, the question arises whether the property may thereupon be subjected to local taxation therein. In this situation the principle has been adopted by the Supreme Court of the United States and adhered to by the lower Federal courts and the courts of the various states that if the break in the interstate journey was caused by the exigencies or conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the continuity of the transit remains unimpaired, and the immunity of the goods from state or local taxation is consequently unaffected; but if the interruption in the journey occurred for purposes connected with the business convenience or profit of the taxpayer, or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation."

See Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L. Ed. 1346 (1947); Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131 (1933).

In considering a like question the Supreme Court of the United States in Minnesota v. Blasius, supra, said:

> "* * * If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. Coe v. Errol [116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715], *supra;* Kelley v. Rhoads, 188 U.S. 1, 23 S.Ct. 259, 47 L.Ed. 359; Champlain [Realty] Co. v. [City of] Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195. Formalities, such as the forms of billing, and mere changes in the method of transportation, do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. Champlain [Realty] Co. v. [City of] Brattleboro, *supra,* 260 U.S. 377, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 31 S.Ct. 279, 55 L. Ed. 310; Texas & N.O.R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229, 57 L.Ed. 442; Carson Petroleum Co. v. Vial [279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626], *supra.* The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in futherance of the intended transportation.' Hughes Bros. Co. v. Minnesota, 272 U.S. 469, 476, 47 S.Ct. 170, 172, 71 L.Ed. 359.
>
> "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power. * * *"

Clearly, under the stipulated facts the interruption in the interstate transportation was not caused by exigencies or conven-

iences of the chosen means of transportation, or considerations of the safety of the goods during transit, or natural causes over which the owner has no control. The interruption, however, did occur for purposes connected with the convenience of the owner of the property and it was held by the taxpayer at the pleasure of the owner for local shipment as his interest dictated.

Through application of these rules it is our conclusion that the finding of the Commissioner upon which the tax was imposed was amply supported by the stipulated facts.

We have considered the taxpayer's contention that the transactions involved should be treated as exempt "* * * due to the fact that there has been long standing administrative interpretation of and legislative history concerning the applicable statutes to the effect that the gross receipts tax was not applicable to the type of transactions in question."

In our opinion there is no merit to this contention for the reason that the administrative interpretation of legislative acts and the legislative acts to which we are referred relate to goods or activities in interstate commerce. This was the issue involved here, and, as stated, the supportable finding was to the effect that the goods ceased to be in interstate commerce when delivery was made to the taxpayer.

It follows that the gross receipts derived from services rendered in the handling, storage and local drayage of the household goods under the circumstances were not deductible in computing gross receipts tax payable to the State or City of Albuquerque.

The Commissioner's decision and order is affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

475 P.2d 49

Wallace C. McCROSKEY, Plaintiff-Appellant,

v.

STATE of New Mexico, Defendant-Appellee.

No. 495.

Court of Appeals of New Mexico.

Sept. 18, 1970.

Robert H. Graham, Farmington, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Thomas L. Dunigan, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

Petitioner's first appeal from a denial of post-conviction relief is reported as State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct.App.1968). This second appeal from a denial of post-conviction relief under § 21–1–1(93), N.M.S.A.1953 (Supp.1969) raises two issues: (1) incompetency of counsel and (2) jurisdiction of the trial court to correct the original sentence. Relief was denied after an evidentiary hearing.

Incompetency of counsel.

The counsel alleged to have been incompetent because of inadequate representation are the attorneys representing petitioner from shortly after his arrest in 1962, until he pled guilty in 1967. During most of this interval petitioner was confined in the New Mexico State Hospital.

The claimed incompetency was presented to and ruled on by the trial court. It found: "That there is no evidence to support Petitioner's contention that his counsel, or either of them, were incompetent. * * *" Although in his brief petitioner refers to selected items in the record in support of the claimed incompetency, he disregards the trial court's contrary finding and does not challenge the finding according to the Supreme Court Rules.

Since State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967), it has been clear that the Rules of Civil Procedure, including the rule concerning findings of fact, apply to proceedings under § 21–1–1(93), supra. Here, the trial court made findings of fact. Section 21–2–1(15) (16), N.M.S.A.1953 (Supp.1969) concerns the statement of proceedings which is to be set forth in the brief in chief. Pertinent here is subparagraph (b) which states:

> "Where the trial court has made findings of facts, a concise, chronological summary of such findings as are material to the review with appropriate references to the transcript. If any finding is challenged, it must be so indicated by a parenthetical note. * * *"

Here, there is no reference of any kind to the trial court's finding concerning the competency of counsel.

The New Mexico Supreme Court and this Court have consistently held that a finding which is not attacked is a fact before the appellate court and where no attack is made on a finding it will not be reviewed. These holdings are applicable to proceedings under § 21–1–1(93), supra. State v. Thompson, 80 N.M. 134, 452 P.2d 468 (1969); State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968); State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968); State v. Wheeler, 81 N.M. 758, 473 P.2d 372 decided July 17, 1970; State v. Follis, 81 N.M. 690, 472 P.2d 655 decided June 19, 1970; Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App.1970); Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct.App.1970); State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct.App. 1969).

Instead of challenging the trial court's finding, petitioner has ignored it. Accordingly, there is no issue to be reviewed concerning competency of counsel.

Jurisdiction to correct sentence.

Section 40A–29–25, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969) authorizes credit on a sentence for time spent in presentence confinement. No such credit was given when petitioner was originally sentenced. His motion alleged: (1) that his sentence was void because credit had not been given and (2) that credit should now be given. The trial court ruled that petitioner's sentence should be credited in accordance with § 40A–29–25, supra.

Here, petitioner claims that because credit was not given at the time of the original sentence, the sentence was void. He contends "* * * the Trial Court lost jurisdiction to alter the sentence after the expiration of the term of Court during which the sentence was imposed. * * *" The consequence, according to petitioner, is that "* * * the judgment and sentences * * * should be vacated."

The claim attacks the correctness of the original sentence and on the basis of that

attack concludes that the conviction should be set aside. However, no issue is raised as to the validity of the conviction based on the guilty plea. The only issue under this point concerns the sentence. Since the trial court has corrected the sentence by according the credit authorized by § 40A–29–25, supra, the issue is the authority of the trial court to make such a correction.

Section 21–1–1(93), supra, specifically authorizes the trial court to correct a sentence. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct.App.1968); see State v. Zarzana, 78 N.M. 159, 429 P.2d 357 (1967). The authorization contained in § 21–1–1 (93), supra, is not limited to the term of court during which the incorrect sentence was imposed. Paragraph (a) of that section states: "A motion for such relief may be made at any time."

We need not consider decisions prior to adoption of § 21–1–1(93), supra, since under this rule the trial court is specifically authorized to correct sentences on motion made pursuant to the rule.

The order denying relief is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

475 P.2d 51

STATE of New Mexico, Plaintiff-Appellee,

v.

Willie S. MARTINEZ, Defendant-Appellant.

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike MARTINEZ, Defendant-Appellant.

Nos. 514, 515.

Court of Appeals of New Mexico.

Sept. 18, 1970.

Eugene E. Brockman, Tucumcari, for appellants.

James A. Maloney, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

The defendant in each of these cases was convicted of burglary. Each moved for post-conviction relief under § 21–1–1 (93), N.M.S.A.1963 (Supp.1969). Each motion was denied without a hearing; each defendant appeals asserting he was entitled to an evidentiary hearing on his motion.

Mike's claim for relief is that he was "Mentally harassed into fear of my life—at the age of nineteen year's old—(A minor)—and charged convicted and sentenced through trickery of public—and court officials—to a term of five yerr's [sic] in the Penitentary [sic] of New Mexico—against constitutional law and safegards [sic]—of the Unite [sic] States of America—." Willie's motion makes the same

claim except that he asserts he was seventeen years old.

What form did the harassment take? What resulted to each defendant's detriment as a result of the asserted fear? What trickery and by whom? How did the asserted trickery affect each defendant? The records show that each defendant was represented by counsel and was convicted after a jury trial. The claims made are factually insufficient. They are too vague to state a basis for post-conviction relief. Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct.App.1970) and cases therein cited.

The order denying relief in each case is affirmed.

It is so ordered.

OMAN and HENDLEY, JJ., concur.

475 P.2d 319

Kenneth BALIZER and Arthur Bazan, a minor, by his next friend Isauro Bazan, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Paul W. SHAVER, Chief of Police of the City of Albuquerque, New Mexico, Frank Horan, City Attorney of the City of Albuquerque, New Mexico, Richard B. Wilson, City Manager of the City of Albuquerque, New Mexico, Pete V. Domenici, Harry Kinney, Charles E. Barnhart, Word H. Payne and Louis E. Saavadra, Members of the City Commission of the City of Albuquerque, New Mexico, the City of Albuquerque, a Municipal Corporation, Raymond Stucker and William Hadaway, Defendants-Appellees.

No. 9001.

Supreme Court of New Mexico.

Oct. 9, 1970.

Paul A. Phillips, Albuquerque, for plaintiffs-appellants.

Lynn D. Smith, Jr., Frank M. Mims, Albuquerque, for defendants-appellees.

Rodey, Dickason, Sloan, Akin & Robb, John P. Burton, Albuquerque, for William Hadaway.

OPINION

PER CURIAM.

After this action had been submitted on oral arguments to this court, and without comment on the point by counsel for the parties, we discovered a jurisdictional problem.

Section 16-7-8, N.M.S.A., 1953 Comp. (1969 Supp.) states in part:

> "The appellate jurisdiction of the court of appeals is coextensive with the state, and the court has jurisdiction to review on appeal:
>
> "A. any civil action which includes a count in which one or more of the parties seeks damages on an issue based on tort, including but not limited to products liability actions;"

Here the appeal is from a dismissal of the complaint for failure to state a cause of action. The first count of the complaint is for a declaratory judgment and injunctive relief prohibiting the enforcement of portions of a city ordinance, alleging their unconstitutionality. The second and third counts, however, are for damages for false arrest, a tort action.

The complaint was filed on February 11, 1969. Section 16-7-8(A), supra, became effective on March 1, 1966 (ch. 28, N.M.S.L.1966).

Jurisdiction in this matter having been given to the Court of Appeals, the appeal should have been docketed there, and, therefore, pursuant to § 16-7-10, N.M.S.A., 1953 Comp. (1969 Supp.), we direct the transfer of this case to that court.

It is so ordered.

TACKETT, WATSON and SISK, JJ., concur.

475 P.2d 320

Matias L. CHACON, as Administrator of the Estate of Henry C. Salazar, Sr., Deceased, Plaintiff-Appellant,

v.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Defendant-Appellee.

No. 9032.

Supreme Court of New Mexico.

Oct. 9, 1970.

Chavez & Roberts, Santa Fe, for plaintiff-appellant.

Jones, Gallegos, Snead & Wertheim, B. D. Barberousse, Santa Fe, for defendant-appellee.

OPINION

PER CURIAM.

An appeal has been taken from a summary judgment granted defendant-appellee, in an action brought to recover $122,750.00 compensatory damages and $122,750.00 punitive damages. The action was brought by the administrator against his decedent's insurer with whom decedent had an insurance policy which provided for the payment of up to $5,000.00 for damages suffered by the insured as a result of injuries received through the fault of an uninsured motorist.

The complaint alleges that the actions of the insurer, the appellee here, in moving to dismiss the insured's suit against the uninsured motorist was done in bad faith and was done willfully, maliciously, and without due regard for the consequences; and that this bad faith was the proximate cause of the compensatory damage above indicated. We believe the action sounds in tort.

Appellant does not use the word "tort," and we have been unable to find any cases directly in point. The vast majority of the cases, however, where judgments in excess of the policy limits have gone against insurance companies for their *bad faith* in defending or in refusing to settle have been held to be tort actions, while few have been on the basis of an implied contract. See Comment, 34 N.Y.U.L.Rev. 783 (1959).

Section 16-7-8, N.M.S.A., 1953 Comp. (1969 Supp.), states in part:

> "The appellate jurisdiction of the court of appeals is coextensive with the state, and the court has jurisdiction to review on appeal:
>
> "A. any civil action which includes a count in which one or more of the parties seeks damages on an issue based on tort, including but not limited to products liability actions;"

For the determination of jurisdiction on this appeal, we believe that this civil action "includes a count in which one * * * seeks damages on an issue based on tort * * *."

Thus, as in Balizer v. Shaver, 81 N.M. 53, 475 P.2d 319 (1970), we direct the transfer of this case to the Court of Appeals.

It is so ordered.

TACKETT, WATSON and SISK, JJ., concur.

475 P.2d 321

Frank J. CLINARD, Plaintiff-Appellee,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant-Appellant.

No. 8748.

Supreme Court of New Mexico.
June 29, 1970.
Rehearing Denied Oct. 15, 1970.

White, Gilbert, Koch & Kelly, Santa Fe, for defendant-appellant.

Arturo G. Ortega, William E. Snead, Albuquerque, for plaintiff-appellee.

OPINION

McKENNA, Justice.

This is an action for damages under the Federal Employers' Liability Act, 45 U.S. C.A. § 51 et seq., for injuries sustained by Clinard while an employee of the appellant railroad. The amount awarded was $75,-628.00 but this was reduced by the jury to $60,503.00 for it found that Clinard was contributorily negligent by 20%. Judgment was entered for this reduced sum. The railroad appeals for several reasons.

On February 15, 1965, a cold and bitter, snowy morning, Clinard, a gang foreman, and his three-man crew reported for work. The day's assignment was routine maintenance work on the railroad's track east of Vaughn, New Mexico. His normal crew was the three men, but the railroad requested Clinard to loan his third man to

another crew which could not work without a look-out man to watch for oncoming trains. Under the circumstances, this was expected of Clinard by the railroad. No other man was available for this other crew.

Clinard's crew, short one man, then went to work on the track. One of Clinard's duties was to watch for oncoming trains, but if he was busy with other duties, it would have been the duty of the third man to watch. The work was lifting sections of rail with a hydraulic jack and then tamping the bed ballast with a jack hammer to level the track.

During the course of the morning's work, the air compressor was not functioning properly. His men had raised a joint of the track with the hydraulic jack and they were tamping ballast under it with their jack hammers but the balky air compressor prevented the jack hammer from operating efficiently. Clinard then left the track site where his two-man crew was busily engaged in their work. As we have observed, the missing man would then have been the look-out.

Before leaving, Clinard testified, he told his two men to "Watch out for trains." This testimony was admitted over the objection of the railroad.

While Clinard was working on the balky compressor, he heard a train whistle. He was not expecting a train to arrive at that time. He looked up, saw the train, ran from the compressor up the embankment toward the track where the two men were working with their jack hammers, hollering at them in an effort to warn. The men, working oblivious of their danger, apparently did not hear for they were struck by the train and instantly killed. Their deaths, however, are not the subject of this dispute.

As Clinard was running toward the work site, the train passed over the track, the hydraulic jack was expelled and propelled, striking Clinard, causing the injuries for which $75,628.00 was awarded.

At the time of the accident, Clinard was 64 years of age, a little over a year from retirement age. He suffered fractures of both bones of the right arm and a hairline fracture of the pelvis. The pelvis did heal satisfactorily but the arm eventually required an open reduction and a bone graft. He did not gain full use of his arm and the affected shoulder. There was evidence submitted of some considerable pain and suffering. There was also some back trouble, but Clinard had complained of back trouble for some time prior to the accident. There was some evidence that the injuries precipitated his retirement prior to his contemplated plans. Clinard did not return to his railroad job and retired at 65.

The railroad's first claim is that there was no evidence of any negligence on its part that in any way caused or contributed to the accident. It urges that its motion for a directed verdict should have been granted. Under F.E.L.A. cases, the carrier is liable to an injured employee for the injury resulting *in whole or in part* from the negligence or carelessness of its officers, agents or employees. The *slightest* negligence is sufficient if it played any part or in any way caused or contributed to the injury. Chavez v. Atchison, Topeka and Santa Fe Railway Co., 77 N.M. 346, 423 P.2d 34 (1967). The negligence of the employer can be determined by viewing his conduct as a whole. Blair v. B. & O. Railroad Co., 323 U.S. 600, 65 S.Ct. 545, 89 L. Ed. 490 (1945). If this test is met, it is then a matter for the jury even if there be contributory negligence. Under the Act, supra, the award is to be proportionately reduced by the percentage of contributory negligence found. 45 U.S.C.A. § 53.

Our appraisal is that the plaintiff met this test. The evidence showed that Clinard proceeded to work with a short crew and that this was expected of him by the railroad, for the railroad's benefit. If the third man had been with him, there would have been a look-out to notice the approaching train in time to warn the men and to remove the hydraulic jack which

imperiled the safety of the train's passage. Clinard ran to warn the men, thereby placing himself in the line of the propelled jack. In Chavez, supra, we found negligence where the railroad failed to provide sufficient help to perform a job. Whether or not there was negligence on the part of the two-man crew in not being on the alert, is not before us; however, in F.E.L.A. cases the negligence of fellow employees does not bar a right of an employee to recover damages. See cases collected under Note 497, 45 U.S.C.A. § 51.

The second argument of the railroad is that Clinard's statement telling his crew to "Watch out for trains" was improperly admitted into evidence. Clinard stated he so warned his crew when he left the job site to work on the air compressor. It was some ten minutes later that he heard the whistle of the oncoming train. The railroad's position is that the statement was hearsay and self-serving. Clinard argues that it was admissible under the res gestae doctrine and as a verbal act expressing a mental feeling or a natural reflex which is material and relevant to a pertinent issue. Both sides concede the materiality of the statement. It bears on the possible negligence of the railroad's employees in failing to remove the jack and the issue of contributory negligence of Clinard.

That it may be self-serving is not controlling if the statement falls within the guidelines of res gestae. Bass v. Muenchow, 259 Iowa 1010, 146 N.W.2d 923 (1966). But its self-serving character is a factor which bears on, and is to be considered in determining the trustworthiness attributed to spontaneous exclamations. Roland v. Beckham, 408 S.W.2d 628 (Ky. App.1966). See cases collected in the Annot., at 53 A.L.R.2d 1245. In Nichols v. Sefcik, 66 N.M. 449, 455, 349 P.2d 678 (1960), and in Brown v. General Insurance Company of America, 70 N.M. 46, 52, 369 P.2d 968 (1962), we refused the admission of purely self-serving statements, commenting on the obvious opportunity there presented to manufacture and fabricate the evidence excluded. While not determinative, there is the factor that the crew members to whom the claimed statement was made are dead and there is no one but the plaintiff to testify. This, of course, is two-edged for there is no person for Clinard to go to for corroboration, but lack of corroboration does bear on the element of trustworthiness. See Fischer v. Chicago & N. W. Ry. Co., 193 Minn. 73, 258 N.W. 4 (1934).

In Jameson v. First Savings Bank & Trust Co. of Albuquerque, 40 N.M. 133, 140, 55 P.2d 743 (1936), we discussed the res gestae doctrine. The difficulty of res gestae is always the same: its application to a particular situation and, as observed in Jameson, at page 142, the particular facts of each case must control rather than rigid rules of exclusion which may keep out the truth. In Jameson, supra, we quoted liberally from Roh v. Opocensky, 126 Neb. 518, 253 N.W. 680, 681 (1934), which discussed expressions of bodily or mental feelings or natural reflexes and verbal acts.

The injuries here occurred some ten minutes after Clinard left the job site. While time alone may not be the sole test, it is questionable that the claimed statement is so linked with the later accident in such continuity of action as to be a part of the accident. Nor was the statement made under circumstances of stress as would remove it from the doubtful character generally present in self-serving statements. Clinard was not expecting any train for some time; he left to perform a routine task while routine work progressed.

"Spontaneity," stated to be the most influential factor in determining admissibility under the doctrine of res gestae, is a product of stress. Roland v. Beckham, supra; Annot., 53 A.L.R.2d 1245, supra. Absent stress we question its "spontaneity" as the law uses that term and emphasize the self-serving nature of the statement. Compare State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct.App.1969).

Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, at 716, 41 A.L.R.

1027 (1925), tends to support the arguments for admissibility. There a witness testified as to the statements of the deceased who was struck by a car. A few minutes prior to the accident, the witness stated that the deceased had kept warning his companion witness to keep off the paved highway as "somebody [might] hit you." The court found such testimony admissible as a verbal act and tending to disclose the deceased's mental feeling that he was aware of the dangers of walking over a road at nighttime and was exercising due care. However, and we note again that the testimony in our case came from Clinard rather than from a witness, we believe Hatzakorzian, supra, presents a much tighter link in the continuity of action.

Considering all the factors present, we do not believe that Clinard met his burden of establishing its admissibility. We hold the admission of the testimony was prejudicial error and in itself sufficient basis for granting a new trial.

Since there is to be a new trial, some of the remaining points presented by the appellant must be noticed.

The railroad says that the court should not have given instruction No. 18 for it was repetitious and amounted to the giving of a negative instruction. It reads as follows:

"As I have previously instructed you, this action is controlled by the federal law rather than the laws of the State of New Mexico, which control other types of industrial injuries. In this action the employee is entitled to no recovery from the railroad unless he has proved by a preponderance of the evidence that his injuries were proximately caused in whole or in part by the negligence of the railroad. However, if you should find that the plaintiff has made such proof and accordingly is entitled to recover, I instruct you that such recovery is in no way governed by any compensation schedule, and in considering the amount of your verdict you should completely dispel from your minds any knowledge which you may have as to the amount of recovery for similar injuries sustained by employees engaged in other occupations. The amount of your verdict shall depend solely upon the facts in this case and this Court's instruction to you regarding the various elements of damage which you are allowed to consider and upon which subject the court will now more fully instruct you."

The railroad also complains of the failure to give what is our U.J.I. No. 17.8 (U. J.I., p. 271) which provides:

"You are not to discuss damages unless you have first determined that there is liability.

"DIRECTIONS FOR USE

"This instruction is to be given in every case where the issue of damages is submitted to the jury.

"COMMITTEE COMMENT

"See UJI 14.1 and the comment therein.

"It is the intent that this subject matter be *twice covered* due to the natural sympathy for an injured plaintiff and to expedite the trial of the case." (Emphasis added.)

The court did give U.J.I. No. 14.1 which in part instructs the jury not to engage in any discussion of damages unless liability is first determined. However, as noted above under "Committee Comment," this aspect is to be twice covered by the giving of U.J.I. No. 17.8.

Instruction No. 18 does tell the jury not to do something which is violative of one of the policies of U.J.I. (U.J.I. p. IX.) We specifically do not approve of the granting of a negative instruction but do not perceive this in itself as constituting reversible error. Furthermore, the negative language is primarily cautionary, is not contrary to law and we do not believe it was prejudicial. However, the failure to give U.J.I. No. 17.8 is another matter.

Instruction No. 18 requested by the plaintiff, which we have just discussed

from another aspect, did in part advise the jury that there is to be no recovery unless the plaintiff established by a preponderance of evidence that his injuries were proximately caused in whole or in part by the railroad's negligence. The defendant requested and was granted No. 14.1, but our U.J.I. requires that both 14.1 and 17.8 are to be given, purposely to cover the subject-matter twice. Plainly, both are to be given unless, as provided by our Civil Procedure Rule 51(1) (c) (§ 21–1–1(51) (1) (c), N.M.S.A. 1953 (Supp.1969)), the court finds and states of record its reasons why the proposed instruction is erroneous or otherwise improper. This was not done.

Considerable hours of hard work by both the Bench and the Bar led to the adoption of the Uniform Jury Instructions. They are well-calculated to expedite trials and the administration of justice. This Court will not let that work and those beneficial purposes be chipped away. Without doubt that was part of the sense of our Court of Appeals in Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct.App.1969). We do realize that over-emphasis may be reversible error, Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966), and perhaps the trial court had this in mind since it had given instruction No. 18, but we do not know this from the record. Any over-emphasis must be laid to the plaintiff, for instruction No. 18 was sought by him. As a matter of language we prefer U.J.I. 17.8 for it kernels what instruction No. 18, supra, proliferates. U.J.I. 17.8, specifically requested by the railroad, should have been given and the failure of the trial court to explain why it was not, and to follow the clear, mandatory requirements of Rule 51(1) (c), supra, constitutes reversible error in this case.

Next, the railroad complains of the granting of instructions 23 and 24, which read as follows:

"It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the plaintiff with reasonably safe working conditions. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the working conditions. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the working conditions are reasonably safe, under the circumstances shown by the evidence in the case." (Instruction No. 23.)

"You are instructed that under the law, the railroad is under a continuing duty to exercise ordinary care to provide plaintiff with a reasonably sufficient number of fellow employees to perform safely the work being done, and a violation of that duty upon the part of the railroad constitutes negligence." (Instruction No. 24.)

The evidence warranted those instructions. Clinard testified that section gangs had already been reduced to three men, the bare essentials, and, further, that it was expected of him to lend his third man to another foreman who could not work without a look-out. Whether he should have protested is another matter but, realistically, he was an employee and the release of his look-out was for the defendant's benefit. Short one man gave rise to an unsafe working condition; at least, there was evidence to support such a condition. We see no error, under these circumstances, in the granting of an instruction that an employer is required to furnish reasonably safe working conditions (No. 23), combined with a somewhat specific instruction as to the railroad's duty to provide a sufficient crew to perform safely the required work (No. 24). See Bourguet v. Atchison, Topeka & Santa Fe Railway Co., 65 N.M. 207, 334 P.2d 1112 (1959); Durkin v. Elgin, Joliet & Eastern Railway Co., 12 Ill. App.2d 190, 138 N.E.2d 866 (1957).

The railroad also assigns error as to instruction No. 28. This instruction recited the specific safety rules, permitted the jury to consider such rules on the issue of Clinard's contributory negligence and also permitted the jury to decide if such rules had been abrogated by custom.

Concerning the complaint that the evidence presented did not justify instruction No. 28 on abrogation of the safety rules of the employer by custom, we would note that if the evidence at the new trial warrants the giving of an instruction on the subject, then the jury should be instructed concerning when abrogation by custom occurs. This should include advice that there can be no abrogation by custom unless the violations of the rule were so frequent as to be habitual; that they occurred so often that the master must have had actual or implied knowledge; and that the master actually or impliedly approved of the violations. See the discussion of the controlling evidential elements in Lasagna v. McCarthy, 111 Utah 269, 177 P.2d 734, 739 (1947), and in Covington Coal Products Co. v. Stogner, 181 Okl. 35, 72 P.2d 491, 494 (1937).

Finally, the railroad complains that the verdict of $75,628.00 is excessive as a matter of law, necessarily resulting from passion and prejudice and from the application of a wrong measure of damages. This question was presented to the trial court by a motion for a new trial, and denied. In Mathis v. Atchison, Topeka and Santa Fe Railway Co., 61 N.M. 330, 337, 300 P.2d 482 (1956), we concluded that an appellate court should substitute its own judgment for the trial court *only* when excessive damages appear to have been given under the influence of passion or prejudice, but at the same time observed that an award will not be approved which is so grossly out of proportion as to shock the conscience. Apparently there was nothing in the record in Vivian v. Atchison, Topeka and Santa Fe Railway, 69 N. M. 6, 12, 363 P.2d 620, 624 (1961), to show that the issues were affected by passion and prejudice but, regardless, the verdict was determined to be excessive as a matter of law. We there said:

> "* * * Where the trial court, as here, has allowed the verdict to stand, the appellate court will not weigh the evidence but will look to see whether the evidence, viewed in the light most favorable to upholding the verdict, affords substantial support for the verdict. * * *"

The record here does not contain any specific evidence of passion or prejudice, but the railroad contends that the excessive amount of damages, in view of the facts, is clear evidence of such factors and the jury's desire to punish the railroad. In reviewing excessiveness of a verdict we do not necessarily need to go that route, for Vivian, supra, does permit us to determine from the entire record if there is substantial support for a verdict. We say what has been said to eliminate any misapprehension of what our law is, but we go no farther here since there must be a new trial.

For the reasons herein stated, we reverse and grant a new trial.

It is so ordered.

COMPTON, C. J., and TACKETT, WATSON and SISK, JJ., concur.

475 P.2d 327

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert SANDERS, Jr., Defendant-Appellant.

No. 9043.

Supreme Court of New Mexico.

Oct. 5, 1970.

Lowell Stout, Hobbs, for appellant.

James A. Maloney, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

TACKETT, Justice.

Robert Sanders, Jr., filed motions on October 29, 1969, in the District Court of Lea County, New Mexico, under Rule 93, Rules of Civil Procedure (§ 21-1-1(93), N.M.S.A., 1953 Comp., 1967 Pocket Supp.), to set aside sentences and judgments on charges of unarmed robbery, kidnapping and unlawfully and carnally knowing and abusing a female minor under the age of ten years. The motions were consolidated and denied by order of the court on November 3, 1969, without a hearing.

Sanders has sought relief in the Federal Court, as well as three times in this court. Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964); State v. Sanders, 79 N.M. 587, 446 P.2d 639 (1968).

Sanders contends that the trial court erred in overruling his motion to vacate the judgments and sentences imposed on him.

The only pertinent issue presented in the petition before us, which has not heretofore been passed upon by this court, is the contention that he was not indicted by a grand jury and, therefore, his constitutional rights have been violated. This contention is without merit as it is not supported by anything other than his previous motions to vacate judgment and sentences.

Article II, § 14, New Mexico Constitution, provides for presentment or indictment by a grand jury or information filed by the district attorney or attorney general.

Sanders also contends that his constitutional rights were violated because the motions for post conviction relief were denied without a hearing. The record before us does not warrant relief, therefore, the denial without a hearing was proper. Where the motions, files and records of the case show conclusively (as in the present case) that defendant is not entitled to relief, a hearing is not required. See, State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct.App.1968), with which we agree.

Finding no error, the judgment of the lower court is affirmed.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

475 P.2d 457

Sylvia T. KERR, Plaintiff-Appellant,

v.

David SCHWARTZ, also known as Dave Schwartz, individually and doing business as Reliable Motors, and Western Surety Company, a corporation, Defendants-Appellees.

No. 9047.

Supreme Court of New Mexico.

Oct. 9, 1970.

Neil E. Weinbrenner, Garland, Martin & Martin, Las Cruces, for plaintiff-appellant.

J. D. Weir, R. R. Regan, Las Cruces, for defendants-appellees.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Dona Ana County, New Mexico, by plaintiff Kerr for damages under § 64-8-6, N.M.S.A., 1953 Comp., or, in the alternative, for breach of contract on the purchase of a 1969 automobile by plaintiff from defendant Reliable Motors, or for conversion by Reliable Motors of the purchase money or a 1966 Cadillac given to Reliable Motors as consideration for the purchase of the 1969 automobile.

The case was tried to the court without a jury by Honorable J. V. Gallegos, District Judge sitting by designation. Judg-

ment was entered in favor of defendants Schwartz and Western Surety Company. Plaintiff Kerr appeals. The parties will be designated as they appeared in the lower court as "Kerr," "Schwartz" and "Western."

Kerr contacted Reliable Motors, in particular Isadore Frank, for the purchase of a 1969 Buick, later changed to a 1969 Oldsmobile. Kerr turned over to Frank a 1966 Cadillac and title thereto. It was agreed between Kerr and Frank that the 1966 Cadillac had a value of $1900, for which Kerr took a receipt. Kerr was given a 1966 Pontiac for her use until the new Oldsmobile became available. The 1966 Cadillac was sold to one Prichard for $1900. Kerr was aware of this sale and agreed to leave the $1900 with Frank to be applied against the purchase of the 1969 Oldsmobile, which was never delivered. Subsequent to July 11, 1968, the date of the agreement to purchase the 1969 Oldsmobile, Frank died.

Upon learning of the death of Frank, Kerr, a couple of days later, went to Las Cruces to determine what had happened to the 1969 Oldsmobile and her credit of $1900, and to file a claim against Frank's estate.

Subsequently, Kerr learned that the application to the State of New Mexico for a license to do business as an automobile dealer, as well as the bond issued by Western, were in the name of Schwartz. Kerr, therefore, alleges that Schwartz was doing business as Reliable Motors and that Frank was the agent of Schwartz. She further alleges fraud and misrepresentation on the part of Reliable Motors. Schwartz denied these allegations and contends that he merely made an application for the license and bond in his name as a favor and accommodation to Frank, who could not furnish a sufficient financial statement to warrant the issuance of a bond, and that Frank was not his agent. Kerr also contends that Schwartz was estopped to deny ownership of Reliable Motors. It is to be noted that Frank and Schwartz were friends, with offices next door to each other in the same building, and that Schwartz was the agent for Western. Schwartz contends that he was not doing business as Reliable Motors; that he had no connection with or interest in the operation of the business; that Frank was the sole owner and operator; that he was not estopped to deny ownership of Reliable Motors; and that he made no representations to Kerr.

The trial court made the following findings of fact, which are paraphrased here, all of which were challenged by Kerr as not having substantial support in the evidence. Kerr further claims error on the part of the trial court for rejecting her requested findings of fact. The trial court found that:

(1) Frank was the owner and operator of Reliable Motors.

(2) Schwartz was not a partner of Frank.

(3) Frank, as owner of Reliable Motors, agreed to sell the 1969 automobile.

(4) Schwartz at no time had any ownership or interest in Reliable Motors; did not participate in negotiations with Kerr; all negotiations were between Kerr and Frank; and Kerr never contacted Schwartz in connection with the transaction.

(5) Schwartz never represented to Kerr that he had an interest in or was connected in any way with Reliable Motors.

(6) During the transaction, Kerr had no knowledge that Western had written a bond for Reliable Motors.

(7) Kerr did not rely upon or change position to her detriment by reason of any statement or fraudulent misrepresentation of either Schwartz or Western.

(8) Kerr did not rely upon or change position by reason of the bond, dealer's license and special license plates issued to Reliable Motors,

which stood in the name of Schwartz.

(9) Schwartz and Western were not estopped to explain and prove the true ownership of Reliable Motors.

(10) Frank was not an agent of Schwartz in the operation of Reliable Motors, or in the transaction with Kerr.

(11) Frank tendered the $1900 to Kerr, which was declined.

(12) Kerr got title to the Pontiac automobile.

Kerr relies on twenty-three points for a reversal of the trial court's decision; however, all twenty-three points are challenges of the findings of fact made by the trial court and the rejection of requested findings of fact.

The record in this case has been carefully reviewed and reflects that the challenged findings of fact have substantial support in the evidence. We have repeatedly held that where findings of fact and conclusions of law flowing therefrom have substantial support in the evidence, they will not be disturbed on appeal. Yates v. Ferguson, 81 N.M. 613, 471 P.2d 183 (1970).

The fact that there may have been contrary evidence introduced at trial, capable of supporting a different verdict from that rendered by the trial court, does not permit us to weigh the evidence. All disputed facts are resolved in favor of the successful party, and all reasonable inferences indulged in support of the verdict. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970).

Unless, from the facts found, it must necessarily follow that the trial court erred, its conclusions and judgment cannot be disturbed on appeal. Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970).

It is noted that Kerr turned over the Cadillac and title thereto, signed in blank, to Frank. There is no evidence that, at the time of his receipt of the Cadillac from Kerr and the making of the agreement, Frank fraudulently intended not to keep his promise, nor are there relevant circumstances which would require the trial court to infer a fraudulent intent. Compare, Telman v. Galles, 41 N.M. 56, 63 P.2d 1049 (1936). Section 64-8-6, supra, provides for an automobile dealer's bond and license to protect against failure of title or fraud at the time of purchase. Prince v. National Union Fire Insurance Company, 75 N.M. 313, 404 P.2d 137 (1965). In the present case, although Kerr was a creditor of Frank or Reliable Motors, she was not one entitled to the protection of the statutory automobile dealer's bond.

Kerr urges this court to adopt the rationale contained in the case of William H. Banks Warehouses v. Jean, 96 F.Supp. 731 (S.D.Idaho 1951); however, Banks is easily distinguished from the present case on the facts. First, from an examination of the Idaho statutes:

> "* * * [I]t is certain that the Legislature intended to place the responsibility on the person or corporation who held the permission from the state to operate them. * * *"

There is no such legislative pronouncement in New Mexico. Second, it is clear that Banks, the person to whom the license and bond were issued, controlled the warehouses. In the instant case, Schwartz had no control whatsoever over the business of Reliable Motors. Third, there were many signs which were kept posted during all the time involved in the Banks case:

> "* * * There can be no question but that the representations, contained in these signs were definite and certain representations, which were diametrically inconsistent with and repugnant to the facts, which plaintiffs now attempt to assert, namely, that Banks did not operate that warehouse. * * *"

Finally, Banks conducted a widespread advertising campaign to advise the public that all the warehouses involved were

bonded. None of the above facts appear in the instant case and thus Banks is not controlling here.

We deem it necessary to comment briefly on the additional issue of estoppel which has been raised in this case. Kerr contends that Schwartz is estopped to deny he was the owner and operator of Reliable Motors, due to the fact that the license to do business, the special dealer's plates and bond, were issued in the name of Schwartz. We are unable to agree with this contention, as the elements of estoppel are not here present, as set forth recently in Yates v. Ferguson, supra:

> "'"The essential elements of an 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 the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are:
>
> "'"(1) Lack of knowledge and of the 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 a character as to change his position prejudicially."'"

The evidence is that Kerr had never met Schwartz; did not have any negotiations with him in the transaction; that all of her negotiations were with Frank; that Frank was sole owner and operator of Reliable Motors; and that Kerr had no knowledge during the transaction that the license to do business, special dealer's plates and the bond were in the name of Schwartz.

Since Kerr, as a creditor only, has no action by virtue of estoppel against Schwartz, Ilfeld & Co. v. Stover, 4 N.M. (Gild.) 1, 4 N.M. (John.) 54, 12 P. 714 (1887), and since the bond did not protect Kerr, we need not determine the question as to whether Schwartz would have been estopped to deny liability as principal on the bond.

The judgment of the trial court is affirmed.

It is so ordered.

WATSON and McKENNA, JJ., concur.

475 P.2d 460

STATE of New Mexico, Plaintiff-Appellee,

v.

Juan ARAGON, Defendant-Appellant.

No. 503.

Court of Appeals of New Mexico.

Sept. 25, 1970.

R. N. Franklin, Franklin & Anaya, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Ray Shollenbarger, Richard J. Smith, Asst. Attys. Gen., for plaintiff-appellee

OPINION

HENDLEY, Judge.

Defendant appeals his conviction of the unlawful sale of a narcotic drug, heroin. Defendant raises two points for reversal, the prejudicial effect of the prosecutor's opening statement alleging a prior sale of narcotics by defendant; and that the verdict and judgment was supported by substantial evidence.

We affirm.

(a) *Prosecutor's statement of prior sale.*

In his opening statement the prosecutor stated, "On November the 28th, 1968, after having previously purchased narcotics from the defendant in this case, * * * Mr. Chavez met with three police officers. * *"

We will assume, without deciding, that defendant's immediate objection to the prosecutor's statement sufficiently preserved the matter for review, and was not waived by defendant's failure to object when Mr. Chavez testified regarding the prior sale, or defendant's own direct testimony of the prior sale.

Defendant contends that this statement was an assertion of personal knowledge on the prosecutor's part, and, within the rule of Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), was "apt to carry much weight against the accused" and was prejudicial per se.

Defendant relies upon the rule which was applied in Sunderland v. United States, 19 F.2d 202 (8th Cir. 1927) that "* * * statements by the prosecuting attorney as to matters which he cannot prove or will not be allowed to prove are improper. * * *" Defendant further asserts that the admissibility of the evidence to support the prosecutor's statements determine whether the statement is proper or improper.

Defendant correctly states the general rule that evidence of a collateral offense, though similar in character, is inadmissible in a criminal prosecution to establish a specific crime unless the case falls within an applicable exception. See State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App.1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970) and State v. Mason, 79 N.M. 663, 448 P.2d 175 (Ct.App.1968), cert. denied, 79 N.M. 688, 448 P.2d 489 (1968).

As stated in State v. Mason, supra:

"'Evidence of other crimes than the one charged must however have a real probative value, and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan. These are the key words which express the purpose for

which an exception to the general exclusionary rule is applied under prior decisions. The words are however not without limit as to breadth and meaning. They must be and will be realistically and closely defined and limited. They cannot become an occasion or excuse or device for offering evidence of other crimes which have little or no real probative value or which is cumulative. This matter is obviously a most sensitive one for the accused and for the trial court. The risk and danger is great, and this must be recognized when considering the probative value of such evidence of specific acts offered to prove the crime charged.' "

We cannot agree with defendant that the situation here is subject to the emotionalism of State v. Mason, supra. Here we have a narcotics sale by one admitted pusher-addict to another admitted pusher-addict. We do not see such a danger of prejudice which would outweigh the probative value of that evidence. The two sales were related; they were between the same persons, they were made at the same place, they were made in the same week and they were of the same contraband. Holt v. United States, 342 F.2d 163 (5th Cir. 1965). This evidence of a prior sale established a course of conduct—a continuing plan or design. State v. Kreller, 255 La. 982, 233 So.2d 906 (1970). The proof of one sale would tend to establish the other sale. See generally annotation in 93 A.L.R.2d 1097 (1964).

Defendant contends that State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct. App.1969), with regard to the hearsay objection, is controlling in this case. We need not decide that issue since defendant did not raise this objection in the trial court. The reviewing court will not consider nonjurisdictional matters which were not raised in the trial court. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969).

(b) *Substantial Evidence.*

Defendant contends that, since the State's case was primarily based upon the testimony of an informer, the question is whether the evidence excludes every reasonable hypothesis other than the guilt of the defendant. State v. Malouff, 81 N.M. 619, 471 P.2d 189 (Ct.App.1970). He relies on the inadequacy of the searches of the informant prior to the purchase; the periods of travel between defendant's residence and the meeting place, during which the informant was alone; and the informant's acknowledged addiction.

Defendant's claims go to credibility and evidentiary weight. That is a function for the jury. The jury decided adversely to defendant. For a similar situation, compare State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct.App.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., and OMAN, J., concur.

475 P.2d 462

Thomas Daniel MILLER, Plaintiff-Appellant,

v.

The STATE of New Mexico, Defendant-Appellee.

No. 500.

Court of Appeals of New Mexico.

Sept. 25, 1970.

OPINION

OMAN, Judge.

Defendant appeals from the order denying his motion filed pursuant to Rule 93 [§ 21-1-1(93), N.M.S.A.1953 (Supp.1969)]. His conviction of possession of marijuana has heretofore been affirmed by this court. State v. Miller, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

He relies upon two points for reversal, the first of which is: "THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE HEARSAY TESTIMONY BY OFFICER ARTHUR SEDILLO THAT DEFENDANT WAS ENGAGED IN ILLEGAL MARIJUANA TRAFFIC."

The testimony referred to is the testimony of Officer Sedillo discussed in State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct. App.1969). As stated in the opinion in that case, Miss Alberts and defendant were tried jointly. The conviction of Miss Alberts was reversed and the cause remanded for a new trial as to her, because of the improper admission into evidence of the testimony of Officer Sedillo

Although Miss Alberts and defendant were tried jointly, they were represented by different attorneys. Both of these attorneys are experienced and competent criminal trial lawyers. Defendant made no objection to the testimony of Officer Sedillo, and the point, upon which he now seeks to have his judgment of conviction vacated, was not raised by him in his direct appeal from that judgment. State v. Miller, supra. Even if we assume the error was properly raised and preserved on his behalf in the trial court, still he did not raise the question on appeal. Post-conviction proceedings are neither a substitute for an appeal nor a means for correcting trial errors which are properly and normally raised and corrected by appeal. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969); State v. Blackwell, 79 N.M. 230, 441 P.2d 759 (1968); State v. Sanchez, 80 N.M. 688, 459 P.2d 850 (Ct.App.1969); State v. Se-

Neil C. Stillinger, Stillinger & Lunt, Santa Fe, for plaintiff-appellant.

James A. Maloney, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

dillo, 79 N.M. 254, 442 P.2d 212 (Ct.App. 1968).

The error of the trial court in admitting Officer Sedillo's testimony into evidence was not sufficiently serious to bring this case within the realm of the "extreme cases" referred to in Malone v. United States, 257 F.2d 177 (6th Cir. 1958). Nor was the error so grave as to have deprived defendant of the fundamentally fair trial to which he was entitled. State v. Williams, 80 N.M. 63, 451 P.2d 556 (1969). Fundamental error, as defined and explained in Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968), and State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct.App.1968), was not committed.

Defendant states in his brief in chief: "Certainly, incompetence of counsel may form a constitutional basis for a Rule 93 proceeding. * * *" The question of competency of counsel was not raised in the motion and was not presented to the trial court. Thus, this question cannot properly be raised for the first time on appeal. DeVilliers v. Balcomb, 79 N.M. 572, 446 P.2d 220 (1968); Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967). See also, State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct.App.1969).

In any event, there is nothing in the record which would support a claim that the proceedings leading to defendant's conviction were a sham, a farce or a mockery of justice. Therefore, a claim of incompetency of counsel is not sustainable. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct. App.1970); State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct.App.1969); State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct.App.1969).

In his second point relied upon for reversal, defendant contends: "THE EVIDENCE UPON WHICH PLAINTIFF WAS CONVICTED WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE."

Although defendant asserts he is aware that matters decided on direct appeal may not be relitigated in a Rule 93 proceeding, and that he is not now attempting to do so, it is apparent from a reading of the decision in State v. Miller, supra, that the precise question presented under defendant's Point 2 was considered in the direct appeal. The contention that the marijuana was obtained as a result of an illegal search and seizure was rejected, and defendant's conviction was upheld on the ground that the marijuana was obtained by the officer under the "open view" or "plain view" rule. Defendant now seeks to have us reverse our prior ruling and again consider his contention that the marijuana was seized as an incident to an illegal search and seizure. He may not properly convert a Rule 93 proceeding into another review of matters previously considered on appeal. State v. Blackwell, supra; Nance v. State, 80 N.M. 123, 452 P.2d 192 (Ct.App.1969).

The order denying defendant's motion should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

475 P.2d 464

Esther M. GARCIA and Lupe Suarez, Plaintiffs-Appellants,

v.

UNIVERSAL CONSTRUCTORS, INC., and City of Albuquerque, a Municipal Corporation, Defendants-Appellees.

No. 455.

Court of Appeals of New Mexico.

Sept. 25, 1970.

Avelino V. Gutierrez, Albuquerque, for appellants.

Lynn D. Smith, Jr., and Frank M. Mims, Albuquerque, for appellee City of Albuquerque.

Peter J. Adang, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for Universal Constructors, Inc.

OPINION

SPIESS, Chief Judge.

This action was instituted against Universal Constructors, Inc. (contractor) and the City of Albuquerque by plaintiffs, Garcia and Suarez. Plaintiffs sought recovery of property damage resulting from the settlement and cracking of their homes allegedly arising out of the construction of a sewer line for the City by the contractor.

The trial resulted in a verdict in favor of the contractor and a directed verdict on behalf of the City. The plaintiffs appealed from the judgment favorable to both defendants. The portion of the judgment favorable to the contractor was affirmed by opinion in Garcia v. Universal Constructors, Inc. and City of Albuquerque (Ct.App.), 81 N.M. 703, 472 P.2d 668, decided June 12, 1970. The question now before us is whether the trial court erred in directing a verdict in favor of the City.

Plaintiffs' claim against the City is based upon alleged negligence "* * * in drawing the plans and specifications which permitted defendant, Universal Constructors, Inc., to use improper de-watering methods and to excavate deep trenches without requiring proper shoring and bracing to prevent the lateral flow of ground, * * *" and "* * * in failing to supervise defendant, Universal Constructors, Inc., requiring such defendant to use proper de-watering methods and proper shoring and bracing of excavations so as to prevent settlement and cracking to plaintiffs' homes."

In considering a motion for a directed verdict for defendant at the close of the case the Supreme Court in Loucks v. Albuquerque National Bank, 76 N.M. 735, 418 P.2d 191 (1966), said:

> "* * * It is entirely within the province of the court to determine all questions of law, including the legal sufficiency of any asserted claim or defense, the admissibility of any evidence offered on any proper issue of the case, and the sufficiency of the evidence adduced to raise a question of fact to be submitted to the jury. In determining whether or not a question of fact has been raised on any proper issue in the case, the trial court must view the evidence in its most favorable aspect to support the party raising the issue, and indulge all reasonable inferences or conclusions to be drawn from the evidence. If reasonable minds cannot differ as to the result to be reached from a con-

sideration of the evidence, and all inferences to be drawn therefrom, then, and only then, does the issue become one of law to be determined by the court and to be taken from the jury."

In Merrill v. Stringer, 58 N.M. 372, 271 P.2d 405 (1954), the court said:

"The verdict should be directed only if in the exercise of sound discretion the court can say there is neither evidence nor permissible inference which would support a verdict for the plaintiff."

By application of these rules the trial court, in our opinion properly directed the verdict for the City.

The contract under which the work was performed did not specify the methods or procedures to be followed by the contractor either in dewatering or in shoring and bracing excavations. The manner of performing this work was left to the judgment of the contractor. There is no evidence in the record from which it can properly be said that the contractor was either inexperienced or lacking in the requisite technical knowledge and skill normally required in the performance of this particular type of work.

It is difficult to see how it can be successfully argued, absent a showing of incompetence or lack of knowledge or skill on the part of the contractor, that the city was negligent in omitting from the contract procedures which were to be followed by the contractor in performing the work, and in leaving such matters to the contractor's judgment.

The record does not disclose evidence which would warrant a finding that damage to property in the area could reasonably have been anticipated or foreseen as a result of the methods of dewatering and shoring or bracing of excavations which were employed. To the contrary, testimony in the record would support a finding that the methods employed were common in the particular area and within generally accepted engineering standards.

Therefore, the record does not support plaintiffs' contention that the City negligently failed to supervise by showing that other methods of dewatering and shoring excavations might have prevented the damage complained of. The methods which *were* employed were not shown to be improper.

In our view, the record would not support a verdict for the plaintiffs against the City. The trial court, accordingly correctly directed the verdict against plaintiffs.

The judgment is accordingly affirmed.

It is so ordered.

OMAN and HENDLEY, JJ., concur.

475 P.2d 466

Larry Lee ADAMS, Plaintiff-Appellee,

v.

LOFFLAND BROTHERS DRILLING COMPANY, and the Travelers Insurance Company, Defendants-Appellants.

No. 479.

Court of Appeals of New Mexico.

Sept. 25, 1970.

Byron Caton, White & Caton, Farmington, for appellants.

James L. Brown, John R. Phillips, Jr., Farmington, for appellee.

OPINION

HENDLEY, Judge.

Defendants appeal a total disability judgment in favor of plaintiff in a Workmen's Compensation action. We affirm.

I. Defendants contend that Finding of Fact 6, which states that, "Plaintiff, by reason of the injuries sustained by him is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by reason of age, education, training, general physical and mental capacity and previous work experience[,]" is wholly without evidentiary support. However, defendants state they do not wish to involve us in a contest over substantial evidence but ask us to, "* * * determine

only whether as a matter of law the Court erred in its determination of total disability." We must of necessity review the evidence in order to determine whether the finding of total disability is supported by substantial evidence.

Defendants also contend that it was error for the trial court to refuse their requested findings. These findings primarily relate to the post-injury work history of plaintiff. Whenever plaintiff performed heavy work he was disabled by severe back pain. Plaintiff was employed for a time as a service station attendant on the basis of a four-day work week. The reasons he gave for quitting this employment were that he was not making enough money and his back bothered him "a little bit" while bending in changing flat tires.

Plaintiff also worked as a grademan and oiler on a backhoe. Thirty or forty times a day he would have to pull himself up onto the machine to tell the operator what to do. Plaintiff stated, "That pulling up that step got my back to bothering me pretty bad. I had to get one leg and pull up and it got my back hurting me again."

It is defendants' position that the evidence fails to support a finding that plaintiff was unable to return to his former employment of "roughnecking," and, in any event, there is no evidence to support the finding that plaintiff was wholly unable to perform any work for which he is fitted by reason of age, education, training, general physical and mental capacity and previous work experience.

The determination of the degree of disability is a question of fact for the fact finder. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968). If there is substantial evidence in the record to support a finding, we are bound thereby. In deciding whether a finding is supported by substantial evidence, we must view the evidence and inferences that may reasonably be drawn therefrom, in the light most favorable to support the finding. Corzine v. Sears, Roebuck and Company, 80 N.M. 418, 456 P.2d 892 (Ct.App.1969); cert. denied, 80 N.M. 388, 456 P.2d 221 (1969). All evidence unfavorable to the findings will be disregarded. Lopez v. Schultz & Lindsay Construction Company, 79 N.M. 485, 444 P.2d 996 (Ct.App.1968), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

Total disability is defined in § 59–10–12.18, N.M.S.A.1953 (Repl.Vol. 9, pt. 1, Supp.1969), as follows:

> "As used in the Workmen's Compensation Act [59–10–1 to 59–10–37], 'total disability' means a condition whereby a workman, by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience."

As stated in Quintana v. Trotz Construction Company, 79 N.M. 109, 440 P.2d 301 (1968), the primary test for disability is the capacity to perform work.

In light of plaintiff's post-injury work history, was there evidence to substantiate the trial court's finding of total disability? We think so.

Doctor McDonald, an orthopedic specialist, testified by deposition that plaintiff should not do any heavy work and that plaintiff should be retrained to do lighter work. There is medical testimony that plaintiff was told to return to work. Plaintiff would return to work and, after a brief time, a few days to two months, his back pain would become so severe that he was either hospitalized or returned to bed rest.

Plaintiff is 36 years of age, married, with 2 children. He completed the 11th grade and went immediately into roustabout and roughnecking, and continued such work except for the time spent in the Marine Corps. The evidence discloses that plaintiff could not do work he was performing at the time of the injury, or any

work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience. Quintana v. Trotz Construction Company, supra.

II. Defendants contend that plaintiff, "* * * through his own misconduct, and his failure to follow the advice of his medical doctors, was the sole participating cause of his own condition at the time of trial. In this respect, it is appellants' [defendants] contention that claimant aggravated his injury and through this aggravation prolonged his disability and prevented its alleviation."

The record does not support defendants' contention. The evidence is conflicting. Dr. Smith and Dr. Furry told plaintiff to take it easy for awhile and then to return to work. Dr. Eugenio and Dr. Guerra told plaintiff to return to work. Dr. McDonald recommended plaintiff not return to oil field work. At the time of trial in October, 1969, plaintiff stated that since his injury on June 21, 1968, his back had continuously hurt.

Defendants' contention that the record does not show a causal connection as a medical probability by expert medical testimony is not well taken. The essence of the testimony by Dr. McDonald, an orthopedic specialist, was that plaintiff's disability was a natural and direct result of the accident and injury sustained by him on June 21, 1968.

Defendants contend that plaintiff's continuing to work as a roustabout or roughneck was conduct which broke the chain of causation. The record does not support that argument. The testimony is conflicting. There is evidence to support the findings of the trial court.

Defendants contend that plaintiff "willfully suffered" reinjuries by continually working as a roustabout or roughneck, or by doing heavy work. Section 59–10–8, N.M.S.A.1953 (Repl.Vol. 9, pt. 1). We think the language in Evans v. Stearns-Roger Manufacturing Co., 253 F.2d 383 (10th Cir. 1958), appropriately answers that contention:

> "* * * To hold that the employer's liability should be diminished because his injured workman has seen fit to suffer the discomforts of his infirmity and obtain employment, rather than to simply exist on the compensation the law allows him, seems to us inconsistent with the purpose and intent of the workmen's compensation act. * * *".

The record shows that plaintiff received compensation payments through September, 1968.

III. Defendants contend that the trial court erred in assessing attorney fees of $3,750.00.

The trial court found that $3,750.00 was a reasonable attorney fee. Section 59–10–23, N.M.S.A.1953 (Repl.Vol. 9, pt. 1), permits the trial court to set attorney fees which are reasonable and proper. The award of attorney fees is discretionary with the trial court and will not be disturbed except for abuse of discretion. Ortega v. New Mexico State Highway Department, 77 N.M. 185, 420 P.2d 771 (1966).

The record in this case shows that defendants contested that plaintiff suffered an accidental injury arising out of and in the course of his employment, and that the alleged disability was a natural and direct result of plaintiff's alleged accident. Defendants contended that plaintiff's post-injury work broke the causal connection between the alleged accidental injury. The depositions of five doctors were taken —one in Durango, Colorado, one in Fort Worth, Texas and three in Abilene, Texas.

Although we might not assess attorney fees in the amount given we cannot state, as a matter of law, that the fees

were excessive and the granting thereof an abuse of discretion by the trial judge.

Plaintiff's counsel has attached time sheets to his Answer Brief in support of his award of attorney fees. We do not consider these in arriving at our decision. Matters not of record will not be considered on appeal. Morgan v. State Board of Education, 80 N.M. 754, 461 P.2d 236 (Ct.App.1969).

The judgment is affirmed with an additional award to plaintiff of $1,000.00 for the services of his attorney in this appeal. Section 59-10-23(D), N.M.S.A.1953 (Repl. Vol. 9, pt. 1).

It is so ordered.

SPIESS, C. J., and OMAN, J., concur.

475 P.2d 470

STATE of New Mexico, Plaintiff-Appellee,

v.

James William HINTON, Defendant-Appellant.

No. 488.

Court of Appeals of New Mexico.

Sept. 25, 1970.

Asa Kelly, Jr., Silver City, for defendant-appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

This is an appeal from a judgment denying relief pursuant to Rule 93, § 21-1-1 (93), N.M.S.A.1953 (Supp.1969). The defendant, appellant, entered a plea of guilty on the 9th day of May, 1960, to an information charging rape. He was sentenced to serve a term in the Penitentiary of New Mexico of not less than one year, nor more than ninety-nine years.

Defendant bases his right to post-conviction relief upon the allegation that his plea of guilty was induced by a promise made by the District Attorney that "* * * if he stood trial, he would get 99 years, but if he made a statement and waivered (sic) counsel, and plead guilty he would only get one to five years."

After hearing evidence presented by defendant and the person who was the District Attorney at the time defendant's plea was entered and accepted, the Court made the following findings of fact:

> "The defendant's waiver of his right of counsel and of his right to a preliminary hearing was knowingly, intelligently, and voluntarily made with full knowledge of his constitutional rights and guarantees."

"The defendant's plea of guilty before Judge Vearle Payne on May 9, 1960, in the District Court of Grant County, New Mexico, was knowingly, intelligently and voluntarily made and entered with full knowledge of his right to have all of the constitutional guarantees and safeguards that were available to him and the District Attorney did not by any conduct nor statements do or say anything that would lead the defendant to believe he would receive a lighter sentence if he pleaded guilty."

The judgment dismissing the proceedings was thereupon entered, from which this appeal was prosecuted.

To detail the testimony which was presented would serve no worthwhile purpose. The record contains ample evidence to sustain the findings of the trial judge and support the judgment.

The judgment should be affirmed.

It is so ordered

OMAN and WOOD, JJ., concur.

475 P.2d 775

S. E. WARREN and Home Oil Company, Inc., Plaintiffs-Appellants,

v.

L. E. RODGERS and Betty A. Rodgers, Pueblo Indian Center Foundation, Inc., a corporation, Robert M. Stuart, and All Unknown Claimants in Interest in the Premises Adverse to the Plaintiffs, Defendants-Appellees.

No. 9033.

Supreme Court of New Mexico.

Oct. 19, 1970.

Bigbee & Byrd, F. Joel Roth, Santa Fe, for plaintiffs-appellants.

Henry J. Hughes, Santa Fe, for Pueblo Indian Center Foundation, Inc.

Arthur H. Coleman, Santa Fe, for Robert M. Stuart.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Santa Fe County, New Mexico, to foreclose two judgment liens against an equitable interest in real property under an executory contract for the sale of realty. The cause was tried without a jury before the Honorable D. A. Macpherson, Jr., sitting by designation. Judgment was entered in favor of defendants. Plaintiffs appeal. Rodgers has not participated in this appeal.

The question to be resolved in this case is whether a vendee, under an executory contract for the sale of realty, has an interest in real estate to which judgment liens attach under § 21-9-6, N.M.S.A., 1953 Comp., 1967 Pocket Supp., for the purpose of foreclosure. This question is an-

swered in the negative for the following reasons.

Briefly, the facts are that Rodgers entered into a standard form real estate contract with Pueblo for the purchase of real property on which a service station was to be operated. The contract price was $7500, with a down payment of $1000, $500 to be paid on or before one year from the date of the down payment, and the balance of $6000 payable in thirty-six monthly installments, plus six per cent interest.

Warren was engaged in an oil and gasoline distribution business and sold such products to Rodgers. Warren took an assignment from Inland (not a party to this action) of a claim against Rodgers. Rodgers became indebted to Warren for purchases, as well as the assignment from Inland. Rodgers failed to meet the obligations, therefore, two judgments were taken against Rodgers, which were properly recorded. Rodgers defaulted on the payments under the real estate contract. Pueblo, after due notice, declared a forfeiture and regained possession of the property. Subsequently, Pueblo entered into a lease and option to purchase the property with Stuart. Rodgers filed a petition in bankruptcy on May 22, 1968, and was discharged as a bankrupt on August 27, 1968. Warren filed claims in the bankruptcy proceeding.

The statute upon which Warren relies for relief is § 21–9–6, supra which reads in part as follows:

> "Any money judgment rendered in the Supreme Court, court of appeals, district court or small claims court shall be docketed by the clerk of the court in a judgment docket book, and shall be a lien on the *real estate* of the judgment debtor from the date of the filing of a transcript of the docket of such judgment in the judgment record book in the office of the county clerk of the county in which the real estate is situate. * * *" (Emphasis added.)

This statute is substantially similar to the California statute which uses the words "real property," whereas ours uses the words "real estate."

Warren contends that his two judgment liens attach to Rodgers' equitable interest in the executory real estate contract under § 21–9–6, supra. This statute is not susceptible of construction that would permit the judgment lien to attach to the equitable interest of a conditional vendee. The court views this section as requiring that the judgment debtor shall be the owner, or have a vested interest in the real estate. Mercantile Collection Bureau v. Roach, 195 Cal.App.2d 355, 15 Cal.Rptr. 710 (1961). Here, Rodgers was neither the owner nor did he have a vested interest.

A statutory lien of a judgment upon real estate of the judgment debtor can attach only upon property in which the judgment debtor has a vested legal interest. People ex rel. Ford v. Irwin, 14 Cal. 428 (1859); Cook v. Huntly, 44 Cal.App.2d 635, 112 P.2d 889 (1941); Annot. 1 A.L.R. 2d 727 at 740.

Legal interests only, as distinguished from equitable interests, are subject to judgment liens. Homeland Bldg. Co. v. Reynolds, 49 Cal.App.2d 176, 121 P.2d 59 (1942).

We recognize that there is a split of authority on the question, McDonald v. Senn, 53 N.M. 198, 204, 204 P.2d 990, 993 (1949), but we prefer and adopt the California rule.

We also point out that here the contract of sale was not completed, for vendee Rodgers defaulted and the vendor Pueblo declared a forfeiture and regained possession. Rodgers, who subsequently took bankruptcy, did not contest the claimed default and forfeiture. The trial court found that the contract of sale was in default and concluded that the vendee's interest had been forfeited. There was substantial evidence to support the court's finding. The contract of sale never having been completed by the debtor-vendee, he had no vested legal interest in the real estate on

which the lien could attach within the meaning of § 21–9–6, supra.

A judgment creditor can claim no greater rights than a vendee might have asserted in offering to cure a default. The vendor had no contractual obligation with the judgment creditor and, therefore, was not bound to accept him in lieu of the vendee. Weir v. Jarecki Mfg. Co., 254 Ky. 738, 72 S.W.2d 450 (1933).

Upon the failure of Rodgers to make payments, he was in default under the terms of the contract, a forfeiture was declared and his interest was extinguished. He abandoned the premises.

The judgment is affirmed.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

475 P.2d 778

ALBUQUERQUE MOVING AND STORAGE COMPANY, Inc., Petitioner,

v.

COMMISSIONER OF REVENUE, Respondent.

No. 9141.

Supreme Court of New Mexico.
Oct. 15, 1970.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals cause No. 461, 82 N.M. 45, 475 P.2d 45 be and the same is hereby returned to the Clerk of the Court of Appeals.

475 P.2d 778

Bill SPILLERS, d/b/a Spillers Moving and Storage Company, Petitioner,

v.

COMMISSIONER OF REVENUE, Respondent.

No. 9140.

Supreme Court of New Mexico.
Oct. 15, 1970.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals cause No. 462, 82 N.M. 41, 475 P.2d 41 be and the same is hereby returned to the Clerk of the Court of Appeals.

475 P.2d 778

RUST TRACTOR CO., a Delaware Corporation, and Rust Tractor of New Mexico, Inc., a New Mexico Corporation, Petitioners,

v.

BUREAU OF REVENUE, State of New Mexico, and Franklin Jones, Commissioner of Revenue, Respondents.

No. 9136.

Supreme Court of New Mexico.
Oct. 15, 1970.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals cause No. 471, 82 N.M. 82, 475 P.2d 779, be and the same is hereby returned to the Clerk of the Court of Appeals.

475 P.2d 778

STATE of New Mexico, ex rel. Chris Corless McGRATH, Paul Kendrick McGrath, and Gordon August Noyes, III, Petitioners,

v.

The NINTH JUDICIAL COURT of the State of New Mexico WITHIN AND FOR the COUNTY OF CURRY and the Honorable Dee C. Blythe as Judge thereof, Respondents.

No. 9153.

Supreme Court of New Mexico.
Oct. 26, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

475 P.2d 779

RUST TRACTOR CO., a Delaware corporation, and Rust Tractor of New Mexico, Inc., a New Mexico corporation, Appellants,

v.

BUREAU OF REVENUE, State of New Mexico, and Franklin Jones, Commissioner of Revenue, Appellees.

No. 471.

Court of Appeals of New Mexico.

Sept. 11, 1970.

Certiorari Denied Oct. 15, 1970.

Robert C. Poole, Poole, Tinnin & Danfelser, Albuquerque, for appellants.

James A. Maloney, Atty. Gen., Santa Fe, Richard J. Smith, Asst. Atty. Gen, John C. Cook, Sp. Asst. Atty. Gen., for appellees.

OPINION

SPIESS, Chief Judge.

Appeal is taken from a decision and order of the Commissioner of Revenue pursuant to § 72-13-39, N.M.S.A.1953 (Repl. Vol. 10, Supp.1969).

The appeal presents these questions: First, did the Commissioner properly impose a deficiency assessment at a 3% rate upon Taxpayer's receipts from transactions evidenced by written contracts denominated "lease agreement" involving non-registered vehicles as against a contention that the transactions were installment sales agreements and the receipts taxable as to the particular equipment at 1½% rate (at which rate tax had been paid)? We hold against the Commissioner on this question.

Second, did the Commissioner properly impose a compensating (use) tax upon Taxpayer's equipment which was rented or leased under agreements conceded to be leases as against contentions (a) that Taxpayer having paid gross receipts tax upon rentals received, the imposition of compensating tax resulted in double taxation upon an identical transaction, and (b) that the imposition of the compensating tax under the circumstances is violative of Section 1 of Article VIII of the New Mexico Constitution? We affirm the Commissioner on this question.

The assessments which were imposed covered the period January 1, 1964 to September 30, 1967.

All facts before the Commissioner and relating to both questions were stipulated. Accordingly, if but one inference can reasonably be drawn from the stipulated facts a question of law is presented and a finding of the Commissioner to the contrary is not binding on the reviewing court. If, however, more than one inference can reasonably be drawn then the finding of the Commissioner is conclusive. Northwest Bancorporation v. Board of Governors, Etc., 303 F.2d 832 (8th Cir. 1962); Pabst v. Wisconsin Department of Taxation, 19 Wis.2d 313, 120 N.W.2d 77 (1963); 4 Davis, Administrative Law Treatise § 29.05 (1958).

The questions presented will be disposed of in the order stated. The appeal is prosecuted by Rust Tractor Company, a Delaware corporation, and Rust Tractor of New Mexico, Inc., a New Mexico corporation, which is a wholly owned subsidiary of Rust Tractor Company. The questions affect both corporations alike and for the purpose of this opinion they are treated as a single taxpayer and referred to as "Rust." Rust is an authorized dealer for Caterpillar Company equipment and engaged solely in the sale, leasing and rental of heavy earth-moving and construction equipment and the supply of parts and service in connection with the maintenance and repair of such equipment.

It appears to be conceded, and we think properly so, that the facts stipulated by the parties present the issues involved here as questions of law, hence reviewable by this court.

The following are the stipulated facts material to a consideration of the first question. Rust entered into a number of transactions with customers involving heavy equipment. These transactions are referred to in the stipulation as "lease purchase" or "paid out lease" transactions. A copy of the form of agreement so employed is attached to and made a part of the stipulation. By oral or letter agreement made simultaneously with the execution of the form, it was agreed that upon compliance with the terms of the lease form the customer would automatically, and without additional consideration, become the owner of the equipment described and referred to in the form agreement.

With the exception of the oral or letter agreement the terms of the transactions were governed by the terms of the form agreement. Except in the event of customer's default in the performance of the obligations under the lease, Rust had no right to retake, control or use the equipment in any way at the end of the term. The customer could not terminate the lease ex-

cept by making all payments provided for in the lease. The total amount of payments provided for in the lease was determined by Rust's customary retail price for the equipment plus an additional charge computed on the basis of a percentage of the retail price per year over the term of the lease. The additional charge was computed in the same manner as that used by Rust in computing interest in connection with installment sales under sales and security agreement forms.

The equipment, the subject of the lease form, was not carried as an asset on Rust's books while subject to the lease. The investment tax credit was made available only to the customer and the equipment was not depreciated by Rust on their books at any time. Rust booked all the transactions initially as sales taking into income the excess of the total lease payments over the cost of the equipment and treated them as sales for all accounting and bookkeeping purposes. The total amount of payments to be made under the lease form was treated as receivables on Rust's books and the additional charge was treated as unearned income with amounts transferred to income as payments were received.

Rust treated their interest under the lease form agreements as evidencing a sale with the reservation of a security interest, within the contemplation of the Uniform Commercial Code. The parties have stipulated that the vehicles forming the subject matter of the form agreements are not such as require registration under the Motor Vehicle Code. Rust did make returns and paid gross receipt taxes at the rate specified for transactions covering vehicles not registered under the Motor Vehicle Code in accordance with § 72–16–4.5, N.M.S.A.1953 (Repl.Vol. 10, Supp.1963), and § 72–16A–14(N), N.M.S.A.1953 (Repl.Vol. 10, Supp. 1967). The Bureau, as has been stated, imposed a 3% rate and a 1% rate as to the municipal tax.

The parties are in substantial agreement that if the receipts are from the sale of the vehicles as distinguished from rentals under a pure lease that the deduction provided by § 72–16–4.5, supra, and § 72–16A–14(N), supra, are applicable and the deficiency assessment should be abated. Otherwise the amount of the deficiency assessment is owing.

As we have stated, the terms of the lease agreement are not in dispute. The issue between parties is as to its legal effect, which, in our view, is to be determined under the framework of the Uniform Commercial Code. Section 50A–9–102, N.M.S.A.1953 (Uniform Commercial Code—Secured Transactions) applies "* * * to any transaction (regardless of its form) which is intended to create a security interest in personal property * * *." This Article (Article 9, Secured Transactions) "* * * applies to security interests created by contract including * * * lease or consignment intended as security."

Section 50A–1–201(37) of the Uniform Commercial Code defines the term security interest and provides:

> "'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. * * * Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration * * * does make the lease one intended for security."

[redacted] The terms of the agreement are clear and unambiguous, consequently the intent of the parties must be ascertained from the language used. Brown v. American Bank of Commerce, 79 N.M. 222, 441 P.2d 751 (1968). The agreement provides that upon full payment of the rentals the lessee will become the owner of the property with no other or further consideration. This provision introduces an element under which an equity interest in

the property is being created in the lessee through the payment of rentals. In accordance with the undisputed facts and the language of the agreements the parties are deemed as a matter of law to have intended the lease as one creating a security interest within the meaning of the Uniform Commercial Code. See Transamerica Leasing Corporation v. Bureau of Revenue, 80 N.M. 48, 450 P.2d 934 (Ct.App.1969).

It is our opinion that the so-called "lease purchase" or "paid out lease transaction" created a security interest in the equipment. Receipts by Rust were from the sale of the equipment rendering § 72–16–4.5, supra, and § 72–16A–14(N), supra, applicable with the result that the deficiency assessment made by the Commissioner should be cancelled and abated.

The second question, to which we have referred, is presented by Rust through two points to which specific reference will hereinafter be made. The Commissioner imposed assessments in various amounts and for stated periods as compensating or use tax. The equipment covered by the assessments was equipment which had been out on lease or rental at some time during the assessment period and which remained unsold in Rust's inventory at the end of such period. This equipment was held for sale in Rust's inventory in the ordinary course of its business at all times when it was not out on lease or rental.

It was Rust's general practice to apply all rentals toward the purchase price where the customer wished to purchase equipment which had been rented to him without regard to whether the customer had an option to purchase the equipment. The equipment covered by the compensating tax assessments was never capitalized or depreciated on Rust's books but was treated as inventory for all purposes. On all of the leasing or renting transactions involved Rust paid gross receipts tax on the total lease or rental receipts derived from the transaction at a 3% rate and, where applicable, municipal sales tax at a 1% rate. The compensating tax assessments imposed by the Commissioner were based upon 1½% of the original invoice cost of equipment in conformity with the statutory rate.

Rust's contention under his point two has been summarized as follows:

> "The question presented is whether both a gross receipts tax and a compensating tax may be imposed on a retail equipment dealer as a result of the identical transaction."

Rust takes the position that such taxation, which is termed "double taxation," is not permissible under either the Compensating Tax Act of 1939, as amended, or the Gross Receipts and Compensating Tax Act of 1966, and is contrary to the legislative intent in the enactment of these laws. No specific language contained in the legislative acts is called to our attention, nor have we found any indicating that such taxation is not within the legislative scheme. Compare Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

In our opinion the gross receipts tax and compensating tax were not in this instance imposed upon a single transaction as Rust contends but upon different taxable incidents; namely, (1) the use of property in this state, such use being leasing or renting it to others (compensating or use tax), and (2) the receipts derived from the payment of rental by those to whom the property was leased (gross receipts or sales tax).

We do note that the equipment covered by the compensating tax assessments was equipment which had been leased during the particular assessment period and which had remained unsold in Rust's inventory at the end of the period. Rust actually used the property during the period for the purpose of renting or leasing it and derived revenue through such use. Renting or leasing is a "use" of property within the definitions contained in the compensating tax acts [§ 72–17–2, N.M.S.A.1953, and § 72–16A–3, N.M.S.A.1953 (Repl.Vol. 10, Supp.1967)]. This use, as stated, is the incident upon which the compensating tax was imposed [§ 72–17–3, N.M.S.A.1953

(Repl.Vol. 10, Supp.1963); § 72–16A–7, N.M.S.A.1953 (Repl.Vol. 10, Supp.1967)].

The receipt of money from the leasing of the property is the incident which gave rise to the imposition of the gross receipts and sales tax [§ 72–16–4.5, N.M.S.A.1953 (Repl. Vol. 10, Supp.1963); § 72–16A–3, supra]. We were unable to find in the acts a legislative intent, express or implied, to exempt property from a compensating tax because the rentals are taxable as gross receipts.

It would appear to us that if personal property is sold in New Mexico by a New Mexico dealer to a New Mexico buyer who rents the property to others, the sale by the New Mexico dealer would be subject to the gross receipts tax although rentals received by the New Mexico buyer would also be subject to the gross receipts tax. Consequently, under like circumstances, a sale made by a non-resident dealer to a New Mexico resident, as in the present case, would fall within the language and purpose of the Compensating and Use Tax Acts. [§ 72–17–1, N.M.S.A.1953, and § 72–16A–7, supra.]

In support of its position Rust cites the following cases: Illinois Road Equipment Co. v. Department of Revenue, 32 Ill.2d 576, 207 N.E.2d 425 (1965); Herman M. Brown Company v. Johnson, 248 Iowa 1143, 82 N.W.2d 134 (1957); and Montgomery Aviation Corp. v. State, 275 Ala. 266, 154 So.2d 24 (1963).

The Illinois Road Equipment Company case is distinguishable on the ground that under the applicable Illinois statute the term "use," by definition, excluded use for demonstration. It was established that the equipment involved in the case was leased for demonstration purposes.

In Herman M. Brown Co. v. Johnson, the Iowa use tax had been imposed upon the property which was ultimately sold at retail and the sales tax paid to the state, which is not the situation here. Montgomery Aviation Corp. v. State involved an Alabama statute which was designed to impose a sales tax on the value of personal property which was withdrawn from the business or stock and used or consumed in connection with the business. The court declined to apply a sales tax to an airplane dealer's receipts from the rental of aircraft on the ground that the tax would be collected on the ultimate sale of the airplanes. The evidence was that the sale was at the fixed or original price, without regard being given to the prior use or consumption of the aircraft. A compensating or use tax was not involved.

The Alabama court appears to have been of the opinion that the statute did not permit the same tax to be levied twice upon the same property.

Authorities which tend to support the Commissioner are Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969); Central Marine Service, Inc. v. Collector of Revenue, 162 So.2d 81 (La.App.1964), cert. denied, 246 La. 355, 164 So.2d 353 (1964); compare Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953); Lakewood Lanes, Inc. v. State, 61 Wash.2d 751, 380 P.2d 466 (1963); Gandy v. State, 57 Wash.2d 690, 359 P.2d 302 (1961).

Rust's final point is stated as follows:

"THE PROVISIONS OF THE COMPENSATING TAX ACT OF 1939, AS AMENDED, AND THE EMERGENCY SCHOOL TAX ACT OF 1935, AS AMENDED, AND THE PROVISIONS OF THE GROSS RECEIPTS AND COMPENSATING TAX ACT OF 1966, TO THE EXTENT THEY PERMIT IMPOSITION OF BOTH A GROSS RECEIPTS TAX AND A COMPENSATING TAX ON RUST AS THE RESULT OF AN IDENTICAL EQUIPMENT TRANSACTION, CONSTITUTE AN UNREASONABLE CLASSIFICATION FOR TAX PURPOSES, AND REPRESENT A DENIAL TO RUST OF EQUAL PROTECTION OF THE LAWS AND A VIOLATION OF THE EQUALITY AND UNIFORMITY PROVISION OF

SECTION 1 OF ARTICLE 8 OF THE NEW MEXICO CONSTITUTION."

In considering this contention we point to our conclusion, previously expressed, that the gross receipts tax and compensating tax were not imposed upon an identical equipment transaction.

It is stipulated that Rust acquires all or almost all of its new Caterpillar equipment by purchase directly from Caterpillar Tractor Company and that Rust may not lease equipment from Caterpillar for re-leasing to its customers. It was further stipulated that Rust competes "with other dealers or distributors of heavy construction and earth-moving equipment who lease their equipment from manufacturers or from finance institutions for the purpose of re-leasing equipment to their customers" and also competes "with manufacturers which lease their equipment directly to contractors."

The issue under this point is whether the legislative classification of taxable subjects is unreasonable; if not, the legislation is not violative of Article VIII, Section 1 of the New Mexico Constitution providing: "Taxes shall be equal and uniform upon subjects of taxation of the same class," or Article II, Section 18, which prohibits the denial of "equal protection of the laws" or the Fourteenth Amendment of the United States Constitution likewise prohibiting denial of equal protection of the laws. With respect to the application of these constitutional provisions to the exercise of taxing power the Supreme Court, in Gruschus v. Bureau of Revenue, 74 N. M. 775, 399 P.2d 105 (1965), said:

> "* * * It is likewise well established that in the exercise of its taxing power, the State may select its subjects of taxation, and, so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend these provisions of the State or Federal constitutions. * * *"

Further, and relating to the equal protection clause, the court said:

> "* * * Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does not apply, and that it is so framed as to embrace equally all who may be in like circumstances and situations. * * *"

In Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969), the Supreme Court, in discussing classification in the scheme of taxation, said:

> "In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such as a violation of the Fourteenth Amendment places the burden on the one attacking to negative every conceivable basis which might support the classification. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).
>
> "Unless the classification is clearly arbitrary and capricious or void for uncertainty as in Safeway Stores, supra, [Safeway Stores v. Vigil, 40 N.M. 190, 57 P.2d 287 (1936)] we cannot substitute our views in selecting and classifying for those of the legislature. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct.App. 1967), cert. denied January 31, 1968. * * *"

To the same effect is Edmunds v. Bureau of Revenue, supra.

In accordance with the legislative scheme neither the gross receipts tax nor the compensating tax is payable under the law applicable to this appeal by one who leased property for sublease in this State. Such tax, however, is payable by one who has purchased property for lease in this State, thus the Legislature has made a distinction with respect to tax liability as between purchasers and bailees.

To our mind, there is a real substantial difference between those classes of persons who acquire title and ownership of property and those who acquire only the interest of a bailee under a lease agreement.

In our opinion, the classification is not arbitrary or capricious and does not warrant the conclusion that the legislation is subject to constitutional objection.

The decision and order of the Commissioner of Revenue is reversed insofar as it applied to the transactions referred to as "lease purchase" or "paid out lease transactions." Otherwise it is affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

475 P.2d 785

Bobbie JEWELL, and the minors, Tommie E. Jewell, III, and Michelle M. Jewell, by their next friend, Bobbie L. Jewell, Plaintiffs-Appellees and Cross-Appellants,

v.

Leonard SEIDENBERG and Louise Geng Seidenberg, Defendants-Appellants and Cross-Appellees.

No. 446.

Court of Appeals of New Mexico.
June 12, 1970.
Certiorari issued June 29, 1970.

Allen C. Dewey, Jr., Leland S. Sedberry, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for appellants.

O. R. Adams, Jr., Edward P. Chase, Albuquerque, for appellees.

OPINION

HENDLEY, Judge.

Defendants appeal from adverse verdicts in a medical malpractice action. Defendants' Point III is dispositive of the appeal. We reverse.

"THE TRIAL COURT'S FAILURE AND REFUSAL TO FOLLOW THE NEW MEXICO UNIFORM JURY INSTRUCTIONS DEPRIVED DEFENDANTS OF A FAIR TRIAL."

By Supreme Court Order No. 8000 Misc. dated May 5, 1966, Rule 51 of the Rules of Civil Procedure [§ 21-1-1(51), N.M.S.A. 1953 (Supp.1969)] was amended to read in part:

"(c) * * * the U.J.I. instruction shall be used unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper, and the trial court so finds and states of record its reasons. [As amended May 5, 1966. Effective September 1, 1966.]"

Also stated in Order No. 8000 Misc. is the following:

"NOW, THEREFORE, IT IS ORDERED that the instructions prepared by the New Mexico Supreme Court Advisory Committee on Uniform Jury Instructions, *together with directions as to use* or non-use of instructions on certain subjects, contained in a volume published by West Publishing Company and attached hereto, shall be in effect as New Mexico Uniform Jury Instructions (U.J.I.) and shall be used as provided in Rule 51 of Rules of Civil Procedure (Sec. 21-1-1(51) N.M.S.A.1953), in cases filed on and after September 1, 1966." (Emphasis added).

The "Directions for Use" of U.J.I. 17.1 states:

"This instruction shall be given to the jury in every case and shall replace all instructions of similar import generally much longer but in essence stating the same principle."

Both plaintiff and defendant requested U.J.I. 17.1. Both were refused. The record fails to reflect why the instruction was refused.

The "Committee Comment" on U.J.I. 17.1 states:

"The jury should be impressed with the seriousness of their part in the administration of justice. This instruction is a basic statement of law ordinarily applicable in all jury cases."

As we stated in Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct.App.1969) the purpose of the Order of the Supreme Court, where applicable, was to make it mandatory upon the trial court to use the U.J.I.

A refusal of a mandatory direction is reversible error.

Reversed.

It is so ordered.

SPIESS, C. J., and OMAN, J. concur.

476 P.2d 60

Carlos MONTOYA and Jose A. Montoya, Plaintiffs-Appellants,

v.

The CITY OF ALBUQUERQUE, a municipal corporation, Defendant-Appellee.

No. 8973.

Supreme Court of New Mexico.

Oct. 26, 1970.

Sutin, Thayer & Browne, Jonathan B. Sutin, Albuquerque, for plaintiffs-appellants.

Frank M. Mims, Albuquerque, for defendant-appellee.

OPINION

SISK, Justice.

Plaintiffs appeal from a summary judgment granted to defendant City of Albuquerque. The amended complaint alleged that four police officers, acting under the authority and in execution of the orders of the City, committed the tortious acts of false arrest, false imprisonment, malicious prosecution and assault and battery. Plaintiffs sought damages from the individual police officers and from the City.

This is the second time this case has been before this court. The first appeal was dismissed because no final judgment had been entered as to the defendant police officers. Plaintiffs thereafter dismissed with prejudice their claims against these officers and we now have an appealable judgment in an action against the defendant City alone.

Basically, the City claims that plaintiffs cannot recover any judgment against it because its police department is operated as a governmental function and therefore it has the defense of sovereign immunity. The City recognizes two situations in which this doctrine is not applicable. If the acts complained of were covered by liability insurance authorized by § 5-6-20, N.M.S.A.1953, the defense of sovereign immunity would not be available to the extent of such coverage. No such insurance was carried by the City. Secondly, the City may be liable for the torts of its officers if their acts come within the terms of § 14-9-7, N.M.S.A.1953, which provides:

> "No personal action shall be maintained in any court of this state against any member or officer of a municipality for any tort or act done, or attempted to be done, when done by the authority of the municipality or in execution of its orders. In all such cases, the municipality shall be responsible. * * *"

The City, in effect, argues that this statute is applicable only where the specific acts complained of were authorized or ordered by the City Commission, and that the judgment was proper because of the plaintiffs' failure to allege or establish the existence of such a specific authorization or order. Although the summary judgment also recited that no genuine issue of material fact existed, it is apparent that the trial court's decision was based upon the City's interpretation of § 14-9-7, supra, because the judgment provided:

> "3. That the City Commission of the City of Albuquerque neither authorized nor ordered the execution of the acts of the police officers as alleged in the Amended Complaint."

Briefly summarized, the facts before the court, stated most favorably to the plaintiffs, were as follows: The police officers, in the early morning hours of January 14, 1965, while in the performance of their general duties and while acting under the general authority, orders, rules and regulations of the City of Albuquerque, including the ordinance hereafter quoted, saw plaintiff Jose A. Montoya near a house. Jose began to run, and they chased him to his house. The police officers entered the Montoya house, without a warrant, to see why he ran. During the interview the alleged torts occurred. Jose's father, plaintiff Carlos Montoya, had a seizure and fell against one of the officers who hit him in the ribs; Jose was hit on the head with a flashlight. Both plaintiffs were arrested and taken to jail; Jose was in his undershorts. Both were later released without prosecution.

In deciding a summary judgment motion, the court must view all matters presented and considered by it in the most favorable aspect they will bear in support of the right to a trial on the issues, and all reasonable inferences must be construed in favor of the party against whom the summary judgment is sought. Jacobson v. State Farm Mutual Automobile Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970); Martin v. Board of Education, 79 N.M. 636, 447 P.2d 516 (1968). However, if after considering all such matters in the light of these rules,

there is no genuine issue of material fact and a basis is therefore present to decide the issues as a matter of law, then the summary judgment should be granted. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Worley v. United States Borax & Chemical Corp., 78 N.M. 112, 428 P.2d 651 (1967).

Plaintiffs argue that the acts complained of were actually authorized by the municipality by the terms of the City of Albuquerque Municipal Code, § 3.505 (1949), which reads:

> "Arrests. The Chief of Police and police officers of the City are hereby authorized to arrest any person violating in their presence, or whom they have reasonable cause to believe has violated any ordinance of the City of Albuquerque, or any law of the United States or of the State of New Mexico, and upon arrest being made, the officer making the arrest shall, as soon as practicable, make or cause to be made, a complaint before the proper judicial officer for the issuance of a warrant for the apprehension or detention of the person arrested."

The issue determinative of this appeal is whether the above ordinance constitutes sufficient specific authorization and direction from the City to the police officers to meet the requisites of § 14–9–7, supra, and thus render the doctrine of sovereign immunity unavailable as a defense in all cases falling within the terms of the ordinance. If it does, then summary judgment was improper. If it does not, then the pleadings, depositions, affidavits and other matters before the court, even when considered most favorably to plaintiffs, did not create any material fact issue, the plaintiffs failed to establish the necessary elements of their statutory cause of action, and summary judgment and dismissal of the amended complaint was proper.

■ Before deciding this issue, we will dispose of the City's pending motion to dismiss this appeal, which was based upon its claim that the case is now moot because the claims against the individual defendants had been dismissed. This argument reasons that the police officers are the agents of the City and that the City can only commit a tort through is agents, and because the agents can no longer be held liable as a result of the dismissal, neither can the City be liable. Although this may be the common law rule with regard to a principal's liability, we are not dealing with the common law rule, but rather with a statute which specifically changes that rule. Section 14–9–7, supra, provides that either the City, or the officers, will be liable, but not both. Therefore, respondeat superior is not applicable and dismissal as to the agents does not affect the potential liability of the City under § 14–9–7, supra. The voluntary dismissal does, however, put plaintiffs in the position that if the City is not liable they have no remedy. For the reasons stated, the City's motion to dismiss is denied.

Returning to the determinative issue, does § 14–9–7, supra, contemplate municipal liability only when the governing body has specifically directed its officers to do the specific acts complained of, or are acts done under general authority also included? We must first examine the cases which have involved this statute. The most recent is Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961), where the issue was the sufficiency of the pleadings to hold the City liable under the predecessor statute of § 14–9–7, supra. Plaintiff had alleged that the officer involved was acting for the City and "within the apparent scope of his duty." This court held that this was not sufficient, saying:

> "In order that a good cause of action be pleaded it was required under the cases hereinabove cited that Gallegos not only be an officer of the City, and that he was acting under his commission as a police officer. Beyond the commission it was necessary in order to state a cause of action under the statute that 'the specific tortious act was done under the direction of the city or by its authority,' otherwise the common law rule of municipal immunity remains unchanged. * * *"

The case of McWhorter v. Board of Education, 63 N.M. 421, 320 P.2d 1025 (1958), also mentioned the statute in question and said, with regard to the scope of the statute:

> "* * * The language is sufficiently clear to show that in only a limited class of cases can a municipal corporation of any sort be sued without consent."

Neither of the above cases are determinative of the issue because the court did not specify what it considered to be "direction by the City" or "action under its authority." Although there is indication that something more than action within the authority of the City officer is required, the extent of such requisites, or the limits of such a "class of cases," is not delineated. Also, because no fact finder has made a determination of the facts in our case, including whether or not the officers acted outside the scope of their authority, we are limited to a determination of whether plaintiffs could be entitled to recover from the City under § 14-9-7, supra, even if the factual claims of plaintiffs are taken as true.

Also involving the statute, but of no real help in our inquiry, are Salazar v. Town of Bernalillo, 62 N.M. 199, 307 P.2d 186 (1956); Rascoe v. Town of Farmington, 62 N.M. 51, 304 P.2d 575 (1956); and Cherry v. Williams, 60 N.M. 93, 287 P.2d 987 (1955). In Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952), involving an action against a municipality under the statute in question, the plaintiff was arrested under a warrant issued at the specific direction of the village trustees. The court held that the statute contemplated exactly this type of action and that the plaintiff should have been allowed to recover. However, the court did not go so far as to specifically limit the application of the statute to such situations.

The basic requirements for establishing a cause of action under this statute were considered in Taylor v. City of Roswell, 48 N.M. 209, 147 P.2d 814 (1944). The court said:

> "The question presented is whether a municipality is liable for an assault of its officers when making an arrest or when otherwise dealing with a person where it is not charged that such assault was committed by authority of such municipality or in the execution of its orders. * *"

The court held that a complaint which did not make such allegations did not state a cause of action, but it did not say what constitutes "authority" of the municipality or in the execution of its orders. * * *"

The first case which considered the statute in question originally enacted in ch. 67, § 1, N.M.S.L.1905, is Baca v. City of Albuquerque, 19 N.M. 472, 145 P. 110 (1914). The holding of that case is only that it must be pleaded, as was done in our case, that the tortious act was done by authority of or in execution of orders of the municipality. However, the most important aspects of the case are the illustrations given by the court as to its interpretation of fact situations in which liability under the statute would arise:

> "For illustration, suppose the city council should instruct the chief of police to tear down a building, or to close a ditch, and pursuant to such order he should do so. In such a case the statute says he shall not be individually liable for such act, but that the liability shall rest upon the city. The city authorizes the closing of a street, and under such authority the marshal proceeds to do so. The marshal would not be liable, as he acted under the authority of the city, but the city would be liable under the statute, if damages were recoverable. The statute does not undertake to change the common law rule, except in those cases where the specific tortious act was done under the direction of the city, or by its authority."

Although this language must be considered dicta, we feel that it is highly instructive because it was written at a time quite close to that at which the legislation was passed. It is significant that the court in 1914 would use illustrations which indicate that the statute operates in cases where the City's

governing body specifically directs the doing of the act that caused the injury. Although the opinion does not specifically limit the operation to such situations, we believe that it is significant that only illustrations involving specific governing body direction were used by the court.

Although the cases cited aid in understanding the problem, we must construe the statute itself in order to answer the specific question presented. A statute must be interpreted as the Legislature understood it at the time it was enacted. See Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957); State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953). Therefore, we are faced with the difficult determination of what was intended by the 1905 Legislature when it adopted the statutory language in question.

We are now in an era of change in which, as a result of long and extensive criticism of the doctrine, the concept of municipal immunity is being limited drastically by legislative acts and even by court decisions. See Symposium-Sovereign Immunity and Public Responsibility, 1966 U.Ill.L.F. 795; Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924–1925); 36 Yale L.J. 759, 1039 (1926–1927); Price and Smith, Municipal Tort Liability: A Continuing Enigma, 6 U.Fla.L.Rev. 330 (1953); Green, Freedom of Litigation: Municipal Liability in Operation, 54 Harv. L.Rev. 437 (1940–1941); Smith, Municipal Tort Liability, 48 Mich.L.Rev. 41 (1949–1950).

During the period when § 14-9-7, supra, was enacted, however, the doctrine was still very strong and little criticism of it was heard. It was justified on various theories, including extension of the immunity to the municipality as the representative of the sovereign, and the public policy consideration that governmental bodies would perform their duties more effectively if not hampered by fear of tort liability. See Annot., Municipal Immunity from Liability for Torts, 60 A.L.R.2d 1198 (1958); 3 Abbott, Municipal Corporations § 955 (1906).

In Mechem, Public Officers §§ 850, 851 (1890), the theory was expressed that the municipality was not liable because the officers were agents not of the municipal governing body but of the public, saying:

> "The power intrusted to the corporation in such cases is intrusted to it as one of the political divisions of the State, and it is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens. The officers who exercise this power are not then the agents or servants of the municipality, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions nor the acts or omissions of the subordinates appointed by them."

Other treatises of that era lend similar support to this theory:

> "* * * The municipal corporation in all these and the like cases represents the State or the public; the police officers are not the servants of the corporation; the principle of respondeat superior does not therefore apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability." IV Dillon, Municipal Corporations § 1656, at 2887 (5th Ed. 1911).

Under any of these theories the municipal governing body was immune from tort liability for acts of its police officers. We believe that our 1905 Legislature, though remaining committed to the basic tort immunity, recognized the inequity of allowing the governing body to specifically authorize an act to be done and then remain immune from responsibility, leaving its agent or officer, who merely carried out its order, to be alone liable.

Thus, we interpret the statute as basically protecting the agent or officer when carrying out specifically directed duties or orders, and as giving the injured party some redress against the municipality, but not as removing the governmental immunity in all tort actions where its officers might have been acting within the gen-

eral scope of their authority or in the performance of their general duties. For the Legislature to have so provided would not have been a great departure from the general state of the law in 1905, whereas to provide for broad scale municipal tort liability would have been a startling development. The narrow illustrations of the application of the statute given in Baca v. City of Albuquerque, supra, support our conclusion, as do the old treatises cited above.

Further, in support of our conclusion is the fact that in 1959 our Legislature determined the necessity of enacting §§ 5-6-18 to 5-6-22, N.M.S.A.1953, being Laws 1959, ch. 333, §§ 1-5. Section 5-6-18 states in part that the purpose of the act is "* * to provide a means for recovery of damages * * *" against a city for acts resulting from its employee's negligence during the course of employment. Section 5-6-20 provides in part that "suits may be maintained * * *" against the city for the negligence of its officers or employees in the course of their employment to the extent the alleged negligence is covered by liability insurance. This act constitutes a clear and distinct expansion of municipal tort liability in certain areas and under specific conditions, and weakens plaintiffs' argument that § 14-9-7, supra, is so broad as to eliminate municipal tort immunity in cases within the language of a general ordinance such as § 3.505, supra.

Regardless of what our views might be concerning the doctrine of sovereign immunity in our democratic system, ours is not a legislative function, and we will not knowingly engage in judicial legislation. Any enlargement of municipal tort liability must be accomplished through the Legislature.

We hold that the Legislature in 1905 intended that the statute provide municipal liability only in cases where the governing body or its authorized agents specifically directed the municipality's officers or agents to do the complained of act. In this case, the municipal ordinance does not constitute the specific authorization or order contemplated by § 14-9-7, supra.

Therefore, even if the facts were as claimed by plaintiffs, summary judgment was proper as a matter of law, and the trial court properly dismissed their amended complaint. The judgment is affirmed.

It is so ordered.

WATSON and McKENNA, JJ., concur.

476 P.2d 65

STATE of New Mexico, Plaintiff-Appellee,

v.

Manuel LUJAN, Defendant-Appellant.

No. 456.

Court of Appeals of New Mexico.

June 26, 1970.

Jacob Carian, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Justin Reid, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

OMAN, Judge.

Defendant appeals from his conviction of burglary. We affirm.

He first asserts error on the part of the trial court in refusing his request to dismiss his court appointed counsel and to appoint another attorney to represent him. The attorney was appointed on December 9, 1968. The case was set for trial and was tried before a jury on Monday, February 24, 1969. On Friday, February 21, 1969, defendant and the attorney appeared before the court. The attorney stated their purpose in being before the court was to request that another attorney be appointed to represent defendant.

The attorney stated he was prepared to go to trial, but defendant requested another attorney be appointed to represent him. When the court asked defendant why he was dissatisfied with the attorney, he answered it was because the attorney had advised him to plead guilty and he did not want to so plead. In fact he did not so plead, but was found guilty by a jury.

On the morning of trial, the attorney moved for a continuance. The stated grounds were defendant was dissatisfied with the attorney, defendant was entitled to be represented by an attorney with whom he was not dissatisfied, and he was entitled to be represented by an attorney who was adequately compensated for his services. The motion was denied and the trial proceeded.

The question here presented has very recently been decided by this court, and the decision is against defendant's position. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct.App.1970). See also, State v. Thorne, 104 Ariz. 392, 453 P.2d 963 (1969); People v. Aikens, 74 Cal.Rptr. 882, 450 P.2d 258 (1969); State v. Walker, 202 Kan. 475, 449 P.2d 515 (1969); State v. Miller, 460 P.2d 874 (Or.App.1969).

Under his second point, defendant claims error on the part of the trial court "* * * IN PERMITTING THE JURY TO FIND DEFENDANT GUILTY OF BURGLARY WHEN THERE WAS NO EVIDENCE OF ANY INTENT TO COMMIT THEFT OF ANYTHING OF VALUE."

Defendant was caught in a public school house on a Sunday afternoon by two police officers who had responded to a silent burglary alarm. He had no authority to be in the building, and had gained entrance thereto by breaking a window. When discovered, defendant sought to evade apprehension by running. The officers gave chase and caught him in one of the rooms. He was warned as to his constitutional rights, and promptly claimed he was too drunk to understand. However, the officers could smell no alcoholic odor on or about him and nothing about his appearance or behavior indicated he was intoxicated.

Upon being searched by the officers for weapons, they discovered and removed from his pockets a number of ball point pens, a box of pills, a manicuring set and a pocket knife, all of which were identified by the school principal as items taken from his desk or a storage cabinet in his office.

The evidence substantially supports a reasonable inference of defendant's intent to commit a theft in the school house which he had entered without authorization. State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964). Defendant would have us dis-

tinguish the present case from the Serrano case in that in the Serrano case the building entered was a store, while in the present case it was a school house. There can be no validity to this claimed distinction.

Under this second point, defendant also argues that no chain of custody was established for the items discovered on his person when searched. Assuming the issue is properly before us under this point, there is no merit to the contention. An officer identified the items as those discovered on defendant. The school principal identified them as the items taken. There was no objection to either identification. Further, no contention was made at trial that there had been any change in the condition of the items recovered from defendant. See State v. Harrison, 471 P.2d 193 (N.M.Ct.App. 1970).

Defendant's final point is that the "* * * COURT ERRED IN GIVING THE JURY CONFLICTING, AMBIGUOUS AND CONFUSING INSTRUCTIONS ON INTENT, * * *" The claimed error arises out of the fact that the court concededly instructed the jury correctly as to the requisite intent, but then instructed the jury that voluntary intoxication was no excuse or justification for crime.

No objection was made by defendant to the giving of any of these instructions. He cannot now be heard to complain, even if we were to concede there was error in the instructions as claimed. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966); State v. Carrillo, 80 N.M. 697, 460 P.2d 62 (Ct.App. 1969).

In any event, an instruction such as that here given as to voluntary intoxication is not necessarily inconsistent with instructions as to the requisite intent to constitute the offense charged. See State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962). The State's witnesses testified they detected nothing about defendant or his behavior to indicate he had been drinking or was intoxicated. Defendant and his two witnesses testified defendant was intoxicated, and defendant claimed no recollection of having been in the school house. It was for the jury to determine the facts, and one of the essential facts to be determined was that of defendant's intent, upon which the jury was properly instructed.

The judgment of conviction should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

476 P.2d 67

Dennis CHAVEZ and Teofilo Chavez d/b/a Bel View Motel, Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 497.

Court of Appeals of New Mexico.

Oct. 9, 1970.

Monte Lee Sherrod, Albuquerque, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, James C. Compton, Jr., Richard J. Smith, Asst. Attys. Gen., for appellee.

OPINION

OMAN, Judge.

The taxpayer appeals from a Decision and Order of the Commissioner holding receipts from the Atchison, Topeka and Santa Fe Railway Company during the period of February 1, 1966, to January 1, 1969, were subject to the Emergency School Tax Act, Gross Receipts and Compensating Tax Act, and municipal tax, and that these receipts were not deductible "* * * under either Section 72–16A–14(F), N.M.S.A. 1953 (Supp.1967), and applicable amendments thereto, * * * Section 72–16A–14.8, N.M.S.A.1953 * * *", or "* * * under any provisions of the Emergency School Tax Act." We reverse.

The pertinent stipulated facts are that the taxpayer, a partnership, owns the Bel View Motel, which had previously been operated by the taxpayer as a motel. During the period in question, the Bel View was "* * * leased on an annual basis to The Atchison, Topeka and Santa Fe Railway Company. Bel View [was] not open to the public." The only services provided by the taxpayer were "fresh clean linens" for the beds when used and the maintenance of the "* * * toilet and bathroom facilities in firstclass sanitary condition."

The stipulation does not in any way identify the persons who used the Bel View premises. However, reference is made in the stipulation to an affidavit by one of the partners. This affidavit is included in the record, is undisputed, and reference therein is made to these persons as employees of the lessee Railway.

In the Decision and Order of the Commissioner the moneys held to be subject to the stated taxes are referred to as "* * * receipts of the taxpayer from the lease of their rooms to the Atchison, Topeka and Santa Fe Railway Company * * *."

One fallacy in this conclusion lies in the fact that the taxpayer did not lease rooms to the Railway Company. It is true that at one place in the stipulation of facts refer-

ence is made to a request by the taxpayer for a ruling concerning its receipts from the "* * * lease to The Atchison, Topeka and Santa Fe Railway Company of the rooms in the Bel View Motel. * * *" However, as above quoted, and as appears in the very first paragraph of the stipulation of facts, "* * * Bel View Motel [was] leased on an annual basis to The Atchison, Topeka and Santa Fe Railway Company * * *", and "* * * [was] not open to the public." We understand this to mean a lease of the entire motel premises and not a lease of rooms therein. In fact, at another point in the stipulation of facts it is stated: "The Bel View Motel premises are leased to * * *" the Railway. The rental paid for the motel premises was a fixed daily amount and had no relationship to the number of rooms actually occupied by the Railway employees, or by anyone else the Railway might permit to occupy the same, nor to the number of such occupants.

The only information in the record as to the number of rooms and beds in the Bel View is found in the aforementioned affidavit of one of the partners. This information is that there were 13 rooms and 22 beds. During the last six months of 1966, the average number of daily occupants was 5.5 persons. During 1967 this number was 4.7 persons. During 1968 this number was 6.2 persons. As above stated, these persons were apparently employees of the lessee Railway.

The Commissioner relies upon the rule announced in Spillers v. Commissioner of Revenue (Ct.App.), 82 N.M. 41, 475 P.2d 41, decided July 24, 1970, and Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App. 1970), that deductions or exemptions from a tax must be strictly construed in favor of the taxing authority, must be clearly and unambiguously expressed in the statute, and must be clearly established by the taxpayer claiming the right thereto. If a tax is clearly applicable, except for a statutory exemption, exception or deduction therefrom, the provision for the exemption, exception or deduction must be narrowly but reasonably construed. A tax statute must also be given a fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered. Evco v. Jones [Commissioner of Revenue], 81 N.M. 724, 472 P.2d 987 (Ct.App.1970). In our opinion, the result we reach in reversing the Decision and Order of the Commissioner is consistent with these rules of construction.

Insofar as the Emergency School Tax Act [§§ 72–16–1 through 72–16–47, N.M.S.A.1953, as amended, (Repealed effective July 1, 1966)], is concerned, the Commissioner takes the position that the rent received by the taxpayer from the lessee Railway was income received by a hotel or rooming house from lodgers, guests, or roomers within the contemplation of the Act. The particular sections of the Act relied upon are § 72–16–1, supra, and a portion of § 72–16–4.10, supra. However, § 72–16–1, supra, was repealed by Laws of 1962 (S.S.) Ch. 17, § 4, and was not in force at the time in question. The portion of § 72–16–4.10, supra, relied upon provided:

> "* * * None of the income received by hotels, campgrounds and rooming houses from lodgers, guests or roomers, shall be considered as real estate rentals, irrespective of the duration of the inhabitancy or occupancy of such lodger, guest or roomer."

As shown by the above recited facts, the premises here in question were not being operated by the taxpayer as a hotel or rooming house. They were leased to the Railway on an annual basis at a fixed rental, which had no relationship to whether the Railway Company let the rooms to lodgers, guests, or roomers. The rental received by the taxpayer was not "* * * income received * * * from lodgers, guests, or roomers * * *", but was in-

come by way of rental received from the lessee Railway for the entire premises.

The fact that the taxpayer also furnished clean linens for the beds when used and kept the bath and toilet facilities clean, did not convert the taxpayer into the operator of a hotel or rooming house. All utilities and all other services were apparently furnished by the Railway. It was in charge of the operation and control of the premises. It determined who should occupy any room or other portion of the premises, when rooms or other portions of the premises should be so occupied, and the terms and conditions of the occupancy. At least the stipulation of facts states or clearly implies that the taxpayer had no right or responsibility to do more than to furnish the bed linens and to keep the bath and toilet facilities clean. For these two services and the use of the premises as lessee thereof, the Railway paid a fixed amount by way of rental.

Insofar as the Gross Receipts and Compensating Tax Act [§§ 72–16A–1 through 72–16A–19, N.M.S.A.1953 (Supp. 1969), (effective July 1, 1967 through remainder of period in question)] is concerned, the Commissioner relies particularly upon §§ 72–16A–2 and 72–16A–14(F), supra. Section 72–16A–14.8, supra, referred to in the Decision and Order, and quoted in part in both the brief in chief and the answer brief, was not applicable, since it was not enacted until after the expiration of the period in question.

The applicable portion of § 72–16A–2, supra, states that the purpose of the Act "* * * is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico * * *."

Section 72–16A–14(F), supra, repealed by Laws of 1969, Ch. 144, § 35, insofar as here applicable, provided:

> "F. Receipts from the sale of or leasing of real property, other than the receipts from the sale of or leasing of oil, natural gas or mineral interests exempted by section 12(T) [72–16A–12] of the Gross Receipts and Compensating Tax Act, may be deducted from gross receipts.
>
> "No receipts received by hotels, motels, rooming houses, campgrounds, guest ranches, trailer parks or similar facilities from lodgers, guests, roomers or occupants shall be considered receipts from leasing real property for purposes of this subsection."

What has been said above concerning the inapplicability of § 72–16–4.10, supra, to the rental received by the taxpayer from the lessee Railway is largely applicable here. Instead of "income," as used in § 72–16–4.10, supra, the word "receipts" was used in § 72–16A–14(F), supra, but in the context in which these words were used in the respective acts, and particularly in the context of their applicability to the problem at hand, they are identical in meaning. In § 72–16A–14(F), supra, "occupants" were added to "lodgers, guests and roomers," and "motels" were added to the list of businesses whose receipts from the designated customers or users of the facilities of the named businesses were not to be considered as receipts from the leasing of real property. However, for the purpose of our discussion above as to the inapplicability of § 72–16–4.10, supra, we assumed, as urged upon us by the commissioner, that a "motel" came within the meaning of "hotel." Weiser v. Albuquerque Oil and Gasoline Company, 64 N.M. 137, 325 P.2d 720 (1958).

The Commissioner urges that the Railway was a guest within the contemplation of that term as used in the statutes, and cites as authority for this position, on a compare basis, Moody v. Kenny, 153 La. 1007, 97 So. 21 (1923). We fail to find anything in the opinion of that case which suggests any support for the Commissioner's contention. We likewise fail to find anything in the opinion in Crapo v. Rockwell, 48 Misc. 1, 94 N.Y.S. 1122 (1905), which supports the assertion in the brief in chief that: "* * * It is beyond the realm of logical comprehension and common under-

standing not to continue to classify the premises in question as a hotel operation. * * *" In any event, if the premises in question were being conducted as a hotel operation, the Railway and not the taxpayer was the operator thereof.

In our opinion the lessee Railway was not a lodger, guest, roomer or occupant of the Bel View within the context of these terms as used in the statute, since the taxpayer was not operating the Bel View in any capacity, and particularly not in the capacity of a motel. The premises were no longer open to the public, but had been leased to the Railway, who was then in possession and control of it as lessee thereof.

The Commissioner further urges that the deletion from § 72–16A–14(F), supra, of the words, "irrespective of the duration of the inhabitancy or occupancy," which appeared in § 72–16–4.10, supra, indicates a legislative intent to limit the scope of the deduction, as did the Commissioner's administrative interpretation thereof in Gross Receipts and Compensating Tax Regulation 14–2(F)–2, effective September 22, 1967. He quotes the following two examples which are represented as being explanatory of the said regulation:

"(A) X has lived at the La Posta Motel for fifteen years. He rents his room from the motel for $1,200.00 per year payable in twelve monthly installments. La Posta contends that the rental is a rental of real estate and is deductible for the purposes of computing its tax liability under the gross receipts tax. The receipts which La Posta receives from X are not deductible. The receipts of motels from the rental of rooms is (sic) not deductible.

"(B) B owns a trailer park. He assigns trailer spaces to the owners of trailers and charges them $40.00 per month to park their trailer in the assigned space. The $40.00 fee is not deductible."

We fail to see how the elimination of the above quoted language from § 72–16A–14 (F), supra, or how anything stated in the regulation, and particularly in the two explanatory examples, indicates any legislative, or administrative, intent to limit or deny, as a proper deduction from the taxpayer's gross receipts, the rental paid by the lessee Railway for the lease of the entire premises of the Bel View Motel.

To adopt the position of the Commissioner would be to effectively remove from the clearly stated exemption in the first paragraph of § 72–16A–14(F), supra, rentals derived from the lease of hotel, motel, rooming house, camp ground, guest ranch and trailer park premises, as well as the rental from other real property on which were erected similar facilities. The receipts, which the statute declared were not "receipts from leasing real property," were clearly intended to mean the moneys or rentals normally received by operators of hotels, motels, rooming houses, camp grounds, guest ranches, trailer parks and similar facilities, when being operated as such facilities in their customary and ordinary manner, from the lodgers, guests, roomers and occupants thereof.

It follows from what has been said that the Decision and Order of the Commissioner from which this appeal was taken must be reversed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

476 P.2d 500

CITY OF HOBBS et al., Plaintiffs-Appellees,

v.

STATE of New Mexico ex rel. State Engineer, Steve REYNOLDS, and City of Roswell, Defendants-Appellants.

No. 8953.

Supreme Court of New Mexico.

Nov. 2, 1970.

[redacted]

[redacted]

James A. Maloney, Atty. Gen., F. Harlan Flint, Paul L. Bloom, Special Asst. Attys. Gen., Santa Fe, for State Engineer Steve Reynolds.

Hinkle, Bondurant, Cox & Eaton, John F. Russell, Roswell, for City of Roswell.

Donald D. Hallam, Hobbs, for City of Hobbs.

J. W. Neal, Hobbs, for Town of Tatum.

John N. Sanders, Lovington, for City of Lovington.

L. George Schubert, Hobbs, for City of Eunice.

Finis L. Heidel, Lovington, for Town of Tatum.

Robert W. Ward, Lovington, for individual plaintiffs-appellees John Easley, and others.

Don Maddox, Hobbs, for County of Lea.

OPINION

SISK, Justice.

On April 20, 1967, the City of Roswell and Mescalero Water Corporation entered into a written contract pertaining to applications which had been filed with the State Engineer to appropriate underground water, which applications were assigned by the original applicant to the City of Roswell on May 20, 1967. Under the contract, Mescalero was to obtain the necessary permits on behalf of and for the benefit of Roswell and, dependent upon the occurrence of various conditions, Roswell agreed to make payments to Mescalero.

Plaintiffs protested the applications, and subsequently filed a declaratory judgment action seeking to determine whether the State Engineer had jurisdiction to adjudicate said applications, by reason of § 75–11–3, N.M.S.A.1953, as amended in 1967.

The trial court's judgment declared that the State Engineer lacked jurisdiction to determine the applications, that the Roswell-Mescalero contract was void as violative of the Bateman Act, § 11–6–6, N.M.S.A.1953, and that Roswell was not the real party in interest in the application before the State Engineer.

Defendants, Roswell and the State Engineer, allege four points for reversal. The first two points pertain to the applicability and the constitutionality of § 75–11–3, supra, as it was amended by § 2 of ch. 308 of the New Mexico Laws of 1967. The critical portion of such amendment provides:

"If objections or protests have been filed within the time prescribed in the notice, or if the state engineer is of the opinion that the permit should not be issued, the state engineer shall notify the applicant of that fact by certified mail sent to the address shown in the application. Unless the applicant files within thirty [30] days after the receipt of notice by certified mail an action for hearing in the district court of the county in which the proposed well or wells have been, or will be located, the state engineer may proceed to deny the permit. Said application shall then be heard and tried as cases originally docketed in the district court, and the state engineer shall be a party thereto. * * *

"The decision of the district court, without jury, shall be binding on the state engineer who shall thereafter act in accordance with such decision unless within sixty [60] days after entry of such decision or judgment an appeal shall be taken."

The quoted portion of the amendment thus permitted the removal of a proceeding for application for use of underground water from the jurisdiction of the State Engineer and the placing of such proceeding within the original jurisdiction of the courts. This court recently held that an almost identical provision of the same act, which pertained to change of location of a water well, was unconstitutional as violative of the separation of powers doctrine of our Constitution. Art. III, § 1, New Mexico Constitution. In that case Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970), we also held that the unconstitutional statute was not validated by a subsequent constitutional amendment which neither expressly nor impliedly ratified the unconstitutional provisions, nor was the unconstitutional statute passed in anticipation of the subsequent constitutional amendment. We further considered the exact statute raised by this appeal, § 75–11–3, supra, and said:

"The present controversy involves only the amended portion of § 75–11–7, supra.

This section is § 3 of ch. 308 of the New Mexico Laws of 1967. Our reasoning applies equally to all of the amended portion of § 2 of that act (§ 75–11–3, N. M.S.A. 1953, Application for use of underground water—Publication of notice —Permit—Hearing.), except that portion relating to obtaining an acknowledged statement from the landowner. It also applies to the proviso contained in § 1 of the same act (§ 75–2–15, N.M.S.A. 1953, Hearing required before appeal.). The act does contain a severability clause, so the remainder of the act remains unaffected. * * *"

We have carefully reconsidered our decision in Fellows v. Shultz, supra, in light of the contentions and arguments of appellees in this case. We remain convinced that our reasoning there was correct and is dispositive of the constitutional questions raised in this case. To elaborate upon and clarify the brief reference to § 75–11–3 contained in Fellows v. Shultz, supra, we hereby hold the above quoted portions of the 1967 amendment to such section to be unconstitutional and void. The remaining portion of such amendment, quoted below, is constitutional and valid:

"* * * If the land upon which the well is proposed to be located is privately owned and the applicant is not the owner of the land or the owner or the lessee of the mineral or oil and gas rights under such land, then the application shall be accompanied by an acknowledged statement executed by the owner of the land on which the well is proposed to be located to the effect that the applicant is granted access across the owner's land to the proposed drilling site and has permission to occupy such portion or portions of the owner's land as is necessary to drill and operate the proposed well; however this provision requiring an acknowledged statement executed by the owner shall not apply to the state of New Mexico or any political subdivision thereof. If such application is approved, the applicant shall cause the permit and statement executed by the owner of the land to be recorded in the office of the county clerk of the county wherein the land is located. No application shall be accepted by the state engineer unless it is accompanied by all the information required by this subsection."

Defendants next contend that the trial court erred in finding and concluding that the Roswell-Mescalero contract was void because it violated the Bateman Act, supra. Defendants are correct because it cannot be determined from the present state of the record whether the contract will ever create any current indebtedness in violation of such act.

The Bateman Act was designed to require municipalities to live within their annual incomes. In re Atchison, T. & S. F. Ry. Co.'s Taxes in Eddy County for 1933, 41 N.M. 9, 63 P.2d 345 (1936); James v. Board of Commissioners, 24 N.M. 509, 174 P. 1001 (1918). Though the contract was executed and approved by the Roswell City Council, no action was taken to finance any obligation nor were any funds budgeted. The nature, status and amount of financial obligation, if and when any actually arises, can only be ascertained if and when the State Engineer approves the applications, and other conditions contemplated by the contract have occurred.

If a special fund for a special purpose is created the Bateman Act is not applicable. McMurtry v. City of Raton, 64 N.M. 117, 325 P.2d 707 (1958); Capital City Bank v. Board of Commissioners, 27 N.M. 541, 203 P. 535 (1921). Further, § 14–26–5, N.M.S.A. 1953, permits a municipality by ordinance, which Roswell has not enacted, to obtain, supplement and pay for its water supply and to adopt and enforce water charges sufficient to meet the required payments, and such payments are not general obligations or indebtednesses within the meaning of any constitutional or statutory provisions.

The State Engineer has not rendered his determination on numerous issues, including availability of water, im-

pairment of existing rights, and existence of a beneficial use, and there is no assurance in the record that the applications of Roswell will be approved. Only if they are approved will any type of purchase financing be required and only subsequent to such approval could the amount of the obligation be ascertainable, in which event such financing might be accomplished by means which would satisfy the requisites of either §§ 11–6–6 or 14–26–5, supra. It is therefore premature to say the Bateman Act has been violated, and the trial court erred in so deciding. We do not determine here the standing of plaintiffs to challenge the validity of the Roswell-Mescalero contract because any adverse effect on the plaintiff's water rights is at this stage speculative. Only when such rights are fixed by proper administrative proceedings can we determine if plaintiffs do have a real and substantial interest in the subject matter and are parties aggrieved. See Home Fire & Marine Ins. Co. v. Pan American Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963), and Padilla v. Franklin, 70 N.M. 243, 372 P.2d 820 (1962).

Lastly, defendants contend that the trial court erred in determining that Roswell was not the real party in interest in the applications before the State Engineer. We must agree. Roswell is the named applicant and the applications seek water for its benefit, but we do not reach this issue. Unless and until the State Engineer approves the applications of Roswell, in whole or in part, in the administrative proceeding pending before him, possible impairment of the rights of plaintiffs remains speculative. For the reasons stated above, the district court's determination of the issue of real party in interest was premature. Appeal to a district court from the ultimate decision of the State Engineer must be taken in the manner provided by §§ 75–11–10 and 75–6–1, N.M.S.A. 1953.

The judgment is reversed and the case is dismissed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

476 P.2d 504

Gene BAKER, Petitioner,

v.

The Honorable James M. SCARBOROUGH, District Judge, First Judicial District, Santa Fe County, New Mexico, Respondent.

No. 9161.

Supreme Court of New Mexico.
Nov. 12, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

476 P.2d 504

STATE of New Mexico ex rel. William HIGGS and Wilfredo Sedillo, Petitioners,

v.

Ernestine EVANS, Secretary of State and Member of the State Canvassing Board; David Cargo, Governor and Member of the State Canvassing Board; J. C. Compton, Chief Justice of the Supreme Court and Member of the State Canvassing Board; and The State Canvassing Board, Respondents.

No. 9164.

Supreme Court of New Mexico.
Nov. 13, 1970.

Original Mandamus, Prohibition and Declaratory Judgment Proceeding

This matter coming on for consideration by the Court upon verified petition for Writs of Mandamus, Prohibition and for Declaratory Judgment, and the Court having considered said petition, William Higgs appearing pro se, Wilfredo Sedillo, appearing pro se, and Ray Shollenbarger, Asst. Atty. Gen., appearing on behalf of Respondents.

TACKETT, Justice and SPIESS, Chief Judge and WOOD, Judge, Court of Appeals, concurring; COMPTON, Chief Justice, WATSON, SISK and McKENNA, Justices having recused themselves;

Ordered that petition for writs of Mandamus, Prohibition and for Declaratory Judgment, be and the same is hereby denied.

476 P.2d 504

Leonard MARTINEZ, Petitioner,

v.

JAILER OF the MUNICIPAL JAIL OF the CITY OF SANTA FE, Respondent.

No. 9163.

Supreme Court of New Mexico.
Nov. 13, 1970.

Original Habeas Corpus Proceeding

Ordered that Petition for Writ of Habeas Corpus be and the same is hereby denied.

476 P.2d 505

The STATE of New Mexico, ex rel. David R. SIERRA, Director, Department of Alcoholic Beverage Control, Petitioner,

v.

The Honorable Samuel Z. MONTOYA, District Judge, First Judicial District, Santa Fe County, New Mexico and David H. Hoch, d/b/a Dale's Liquor Store, Respondents.

No. 9157.

Supreme Court of New Mexico.

Nov. 23, 1970.

Original Prohibition Proceeding

COMPTON, Chief Justice, and TACKETT and SISK, Justices concurring; WATSON and McKENNA, Justices, being absent and not participating.

Ordered that the alternative writ of prohibition heretofore issued herein on November 5, 1970, be and the same is hereby discharged.

476 P.2d 505

Gene B. BAKER, Petitioner,

v.

The Honorable James M. SCARBOROUGH, District Judge, Santa Fe County, New Mexico, Respondent.

No. 9166.

Supreme Court of New Mexico.

Nov. 23, 1970.

Original Prohibition Proceeding

Ordered that the proceedings herein be and the same are hereby dismissed.

476 P.2d 767

The STATE RACING COMMISSION and its members, Robert M. Lee, George J. Maloof, John Augustine, Jr., Dr. L. E. Farrell and William Gallagher, and La Mesa Park Racetrack Board of Racing Stewards and its members, Richard Thomas, A. R. Barrett, and Henry Zarges, Petitioners,

v.

The Honorable John B. McMANUS, Jr., District Judge, Second Judicial District, Bernalillo County, New Mexico, and Ronnie Ellis, Respondents.

No. 9091.

Supreme Court of New Mexico.

Nov. 2, 1970.

James A. Maloney, Atty. Gen., Mark B. Thompson, III, Asst. Atty. Gen., Santa Fe, for petitioners.

McAtee, Marchiondo & Michael, Pat Chowning, Albuquerque, for respondents.

OPINION

WATSON, Justice.

Having issued an alternative writ of prohibition, we must now decide whether to make the same permanent. Our alternative writ prohibited the respondent district judge from proceeding further in Cause No. A48680, District Court of Bernalillo County. There, the respondent, on the petition of Ronnie Ellis, a jockey, had entered an ex parte order temporarily restraining petitioners from enforcing a suspension of Ellis, required by an order of La Mesa Racetrack Board of Racing Stewards. Their order suspended Ellis for seven calendar days for careless riding.

The New Mexico Racing Commissioners are appointed by the governor with the advice and consent of the senate. Sections 60-6-2 and 60-6-2.1, N.M.S.A., 1953 Comp. The Commission may make rules and regulations governing the conduct of races, § 60-6-2, supra, and may appoint representatives to oversee the races, require observation of the rules and avoid violations. Section 60-6-7, N.M.S.A., 1953 Comp. The Commission has designated as its representatives three stewards for the supervision of each racetrack. The Board at La Mesa joins as petitioner herein.

Pursuant to their statutory authority the Commissioners have adopted rules and regulations. Rules and Regulations governing Horse Racing, filed June 9, 1969, with the State Commission of Public Records & Archives. All persons engaged in racing, their employees, and concessionaires are licensed annually. Rule 4.01, supra. Whenever the Commission or the stewards find that any person or licensee has violated the letter or spirit of the Rules of Racing, they may take disciplinary action in "the form of a fine, suspension, revocation of license, or a combination of these penalties, or the ruling off for life." Rule 24.01, supra. Any license holder aggrieved by any order of the stewards may protest and make a written request for a hearing before the Commission within ten days after issuance of the protested order. Rules 25.-01, 25.02, and 25.03, supra. He will be granted a hearing, will be given specification of the charges if requested, may appear personally or by counsel, and may receive a transcript of the record if paid for by him. Rules 25.04, 25.05, and 25.07, supra. The decision of the Commission is final. Rule 25.06, supra.

We are at once struck with the apparent failure of Ellis to exhaust the administrative remedies provided by the rules mentioned above. However, we note that the respondent did exercise jurisdiction in this case, implicit in which action is the determination by him, on the facts presented, that all jurisdictional prerequisites had been met. Thus, in order for us to find a lack of jursidiction on the ground of failure to exhaust administrative remedies, we have to review a determination by the trial court which it had power to make, and this is not a proper inquiry for this court on prohibition. We explain.

The difficulty of determining whether the jurisdictional question is one for our decision in a prohibition action or one to be determined by the district judge and only reviewed by us on appeal has been fully recognized by this court. The problem was discussed in State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962), where we said:

> "The correct rule is that announced generally in Gilmore v. District Court, etc. [35 N.M. 157, 291 P. 295 (1930)], supra, and applied specifically in a workmen's compensation case in State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court, etc. [38 N.M. 451, 34 P.2d 1098 (1934)], supra, to the effect that jurisdiction being present of both the subject matter and the parties, ordinarily prohibition will not issue, and further that the question was not whether the court had a right to decide the issue in a particular way, but did it have the right to decide it at all." 70 N.M. at 481, 375 P.2d at 122.

The rule was thus stated by Justice Sadler in State ex rel. Heron v. District Court of First Jud. Dist., 46 N.M. 296, 128 P.2d 454 (1942):

"We think it fair to say of our decisions on the question when to prohibit, in line with what has just been quoted from State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court of Eighth Judicial District, supra, that if, absent prohibition in the given case, the judgment therein rendered, unless reversed for error on direct review, would be binding on the parties and not subject to collateral attack as a mere nullity, then prohibition will not lie; otherwise it will." 46 N.M. at 302, 128 P.2d at 458.

See also State v. Patten, 41 N.M. 395, 69 P.2d 931 (1937), where the distinction between "jurisdiction" and "exercise of jurisdiction" is made.

If we have departed from the rules above quoted, or drawn the line too far in favor of our determination of the jurisdictional question in State ex rel. Attorney General v. Reese, 78 N.M. 241, 430 P.2d 399 (1967); State ex rel. Board of Education v. Montoya, 73 N.M. 162, 386 P.2d 252 (1963); or in State ex rel. State Corporation Comm. v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), we hereby reaffirm the rule as set forth in State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, supra. See Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Under the rules just discussed, it was the duty of the respondent to examine the facts presented upon which his jurisdiction depended, and since respondent exercised jurisdiction, he implicitly made that determination. We cannot believe that such a determination could be successfully attacked collaterally, and thus we cannot prohibit respondent, under the authorities cited above.

Our inquiry, however, does not end merely because of this determination. Petitioners earnestly contend that since this case is one involving great public interest and importance to the people of the state, we should exercise our superintending control, through the writ of prohibition, in order to determine whether the trial court should have acted as it did. There is authority for such a course. In State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967), we said:

"* * * Also, prohibition will lie even where there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment * * *." 78 N.M. at 74, 428 P.2d at 476.

The same reasoning has been used in the cases of State ex rel. Castillo Corp. v. New Mexico State Tax Comm., 79 N.M. 357, 443 P.2d 850 (1968); State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965); and State ex rel. West v. Thomas, 62 N.M. 103, 305 P.2d 376 (1956); all of which involved writs of mandamus which were issued solely because of the great public importance of the questions involved and which would not otherwise have properly issued. Therefore, our inquiry now becomes: Is the question here involved one of great public importance requiring the use of our power of superintending control?

In examining the circumstances we find that in 1969, 705,689 persons attended races during 190 racing days at the four state-licensed tracks. Over 35 million dollars were wagered, of which $739,404.00 was paid to the State after deducting all expenses of supervision. New Mexico State Racing Commission 1968–1969 Biennial Report, filed February 3, 1970 with the State Commission of Public Records & Archives. Respondents do not deny the public interest nor dispute the evidence submitted to us pursuant to Supreme Court Rule 24(5) [§ 21–2–1(24) (5), N.M.S.A., 1953 Comp.], of the frequency of small fines and seven-day suspensions imposed by the stewards on the State's racetracks. For example, on June 21 and 22, 1970, three 7-day suspensions, six $25.00 fines, and one $50.00 fine, all for riding violations, were imposed upon jockeys by the stewards at Ruidoso Downs. On June 22, 1970, two 7-day suspensions for

riding violations were imposed at La Mesa Park, where Ellis received a similar suspension on June 29. The Attorney General complains of the frequency of the receipt of temporary restraining orders from the courts which are entered after ex parte hearings permitting the jockey to ride. Thus he states the court, rather than the Commission acts as the umpire at the racetracks.

Although this continuing problem is one of great importance to the State in its policing of this gambling activity, taken separately the penalty involved in each case is generally so small that the probability of a case reaching us on appeal is remote. All jockeys licenses expire at the end of each year. A jockey, whose license is suspended toward the end of the season, might not be interested in either pursuing his administrative remedies or in further litigation. Thus the matter in many cases would become moot.

It appears that the problem is not only one of publici juris, but our refusal to entertain jurisdiction might amount to a denial of justice. For these reasons we will resort to our extraordinary writ, State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912), and examine the entire matter in order to determine what result should have been reached.

Because the respondent district judge had already entered his order staying the suspension order of the stewards, a true writ of prohibition from this court may not be the proper remedy. We cannot prohibit that which has already been done. See State Game Commission v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962). Only under our power of superintending control can we, in an original proceeding, reverse that which has been done. State ex rel. State Tax Commission v. First Judicial District Court, 69 N.M. 295, 366 P.2d 143 (1961).

The petition for injunctive relief, upon which the respondent judge's order restraining the Commission was based, recites that the horse Ellis was riding "lugged" with a horse crossing diagonally, in spite of all the efforts of petitioner to prevent it; but that the Board of Racing Stewards, upon reviewing the film of the race, decided he was guilty of careless riding and suspended him; further, that the stewards acted arbitrarily and capriciously and without authority in suspending him without a full investigation and without granting him a hearing or an opportunity to be heard. The petition states that the Rules and Regulations which allow petitioner to be suspended *prior to a hearing* are unconstitutional, and that the stewards' action was in excess of their authority. With this petition, an affidavit of Ellis's attorney was filed, which reads in part:

> "That he [William C. Marchiondo] has notified the Racing Stewards at La Mesa Park that he would present this cause of action to the Court and request a restraining Order and they still refuse to allow Plaintiff a hearing. In addition, he contacted the Racing Commission of the State of New Mexico and informed them of the cause of action that he would take and requested that they rescind the Order suspending Plaintiff pending a hearing, however, they refused."

It is clear that at the time Ellis petitioned respondent judge he had not exhausted his administrative remedies since he did not make a written request for a hearing before the Commission to protest the ruling of the stewards, as required by Rule 25.03, supra.

Before he can apply to the courts for relief, the protestant must exhaust his administrative remedies. State ex rel. State Corporation Comm. v. Zinn, supra. There we cited Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954). In the latter case, the operator of a cafe and tourist court sought an injunction against the gas company to prevent its turning off his gas for non-payment, charging discrimination and claiming that the rate charged was from the wrong schedule. The trial court, relying upon the statute which provided for a hearing before the Public Service Commission in such cases, denied the relief sought because the plaintiff had

not exhausted his administrative remedies, and we affirmed on appeal. There, we said:

"We have held in many cases the district court gets its jurisdiction from the Constitution, and it is not to be circumscribed or restrained by the legislature. State v. McKinley, 1949, 53 N.M. 106, 202 P.2d 964; Dunham v. Stitzberg, 1948, 53 N.M. 81, 201 P.2d 1000; Guthrie v. Threlkeld Co., 1948, 52 N.M. 93, 192 P.2d 307. As will later appear, what has been done in the Public Utility Act is not a deprivation or ouster of jurisdiction of the courts, but a postponement until the commission has passed upon the complaint." 58 N.M. at 199, 269 P.2d at 747.

Smith v. Southern Union Gas Co., supra, came to us on appeal, but State ex rel. State Corporation Comm. v. Zinn, supra, was an original prohibition action here, similar to the present action. In Zinn, we said of the above quote from Smith:

"* * * Applying this pronouncement in the instant case, the conclusion is inescapable that so long as relator was proceeding under its statutory authority and administrative remedies had not been exhausted, the district court was without jurisdiction to entertain the proceedings, and accordingly was subject to prohibition by this court." 72 N.M. at 36, 380 P.2d at 186.

Respondent, however, claims that Ellis was not required to exhaust the available administrative remedies because they were unconstitutional in allowing a jockey to be suspended *prior* to the administrative hearing. We examine this contention.

In Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940), we held that cancellation of a liquor license without *prior* notice and hearing was not unconstitutional. The license granted the jockey here is a privilege similar to that granted to owners and trainers; it is not a vested right within the meaning of the due process clause of the state and federal constitutions. Sanderson v. New Mexico State Racing Commission, 80 N.M. 200, 453 P.2d 370 (1969). Nevertheless, as a citizen, respondent Ellis has a right to engage in his chosen profession and is entitled to due process of law if he is to be lawfully denied an opportunity to do so. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957). See also State Bd. of Medical Examiners v. Weiner, 68 N.J.Super. 468, 172 A.2d 661 (1961). We believe the statutes and regulations above set forth provide constitutionally adequate due process of law. Ellis simply did not choose to avail himself of the remedy provided.

The courts of other states have held that due process does not require a hearing *prior* to a suspension in similar cases. In discussing the requirement of the suspension of a security broker's license prior to hearing, the Supreme Court of Wisconsin, in Halsey, Stuart & Co. v. Public Service Commission, 212 Wis. 184, 248 N.W. 458 (1933), said:

"It is said that there is no provision for a hearing. It is true that there is none prior to suspension. We do not regard this as fatal to the validity of the law. Having in mind that this is an exercise of the police power, and that it is valid in so far as it is reasonably necessary and appropriate to the promotion of the public welfare, it seems to us that the act must be sustained. * * * The rights of the public to exercise the police power in its own protection are superior to those of any individual broker to sell under his license or certificate.

"Further than this, there is a provision for hearing upon the suspension order. The statute provides that the certificate holder thus suspended may, within thirty days, serve upon the commission a demand for a public hearing, which must be held within a reasonable time thereafter * * *. It is our conclusion that the statute does not deny due process. In the interest and protection of the public, provision is made for a summary suspension, followed by provisions for a speedy hearing upon the merits of the

suspension order if and when demanded by the broker affected. This amounts to no more than a reasonable and valid exercise of the police power." 248 N.W. at 461.

We agree with the reasoning of the Wisconsin court and apply it to the case before us, although, as petitioners point out, the seven day suspension here might be more comparable to the ruling of an umpire or a referee. Thus, where there was no showing of bad faith or abuse of discretion on the part of the stewards or the Commission, if the matter were before us for review, we could only conclude that the trial court erred in staying the temporary suspension. In the original proceeding here, using our power of supervisory control, we determine that respondent district judge had no jurisdiction in the matter because of the failure of the jockey, Ellis, to first exhaust his administrative remedies.

Our alternative writ of prohibition is, therefore, made permanent, and, in addition, respondent's temporary restraining order entered on July 2, 1970, is declared void.

It is so ordered.

COMPTON, C. J., and TACKETT, SISK and McKENNA, JJ., concur.

476 P.2d 772

Tom J. TERRY, Plaintiff-Appellee,

v.

Jewell R. TERRY, Defendant-Appellant.

No. 9018.

Supreme Court of New Mexico.

Nov. 2, 1970.

Chavez & Roberts, Santa Fe, for defendant-appellant.

Fred T. Hensley, Portales, for plaintiff-appellee.

OPINION

McKENNA, Justice.

This is an appeal from an order modifying child custody.

In an earlier divorce proceeding between these parties, the district court granted the appellant mother custody of their minor child, Wayne Rea Terry, for the months of September through May of each year, and

the appellee father custody during the summer months of June, July and August, each party having the right of reasonable visitation. By subsequent order entered January 4, 1961, the district court modified the custody decree to provide that neither party should remove Wayne Rea Terry from the State of New Mexico without the written consent of the other party or by order of the court. In the order the court specifically stated that it was retaining jurisdiction of the cause with respect to future custody.

On July 25, 1969, the district court issued an order to the appellant to show cause why permanent custody of the child, then ten years old, should not be given to the father, with visitation rights in the mother. The father's motion for the order to show cause alleged that she removed the child to Colorado without his consent or the approval of the court. The appellant answered praying for a modification of the original decree of custody to shorten the custody rights of the father and to modify or vacate the restriction on removing the child from New Mexico. Both parties, as well as the child, appeared before the district court at the hearing.

Some time in 1969, the District Court of Boulder County, Colorado, entered an order changing the custody rights, in a suit brought by the mother against the father, in which both parties appeared.

Our court found, in part, that (1) the child was within the State of New Mexico and subject to the court's continuing jurisdiction; (2) although the appellee's motion failed to specifically allege a change of circumstances, such change of circumstances was implicit in the appellee's motion and, in any event, the matter was fully litigated and the court would consider the pleadings amended to conform to the evidence; (3) changes have occurred since the original decree was entered, namely, that the appellee was now married and has a home for the child who would then have a suitable mother and father in that home, and (4) the child, who expressed his desires that he remain with the father, now needed a father. The court specifically found the minor child of sufficient maturity and intelligence for the court to give some weight to the child's wishes. Based upon the findings, the court entered its order changing the custody in favor of the father. Generally speaking, the order gave the father custody during the winter months and the mother during the summer months.

The appellant's first point is that the district court erred in failing to give full faith and credit to the 1969 Colorado decree. First of all, we cannot speculate as to what the Colorado decree stated, for it was not introduced into evidence nor even tendered. We do not know what facts or circumstances were presented to the Colorado court on which it rested an adjudication. Secondly, the proceedings here in our district court which culminated in the order of February 18, 1970, were for a modification of custody. Both parties, including the minor child, appeared. The court found and concluded that changes in conditions and circumstances had occurred since its first decree sufficient to modify the original decree of the court by increasing the custody rights of the father. As always, the primary concern is what is best for the child's welfare. Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570 (1968). The child testified that he *now* wanted to remain with his father, and the court found that it was in his best interests that he remain with his father during the school term of each year. The court specifically found that all of the boy's past life was without a father and *now as he grows older,* he is more and more in need of a father figure. As stated in Evens v. Keller, 35 N.M. 659, 6 P.2d 200 (1931), a judgment of a sister state awarding custody is entitled to full faith and credit on the state of facts then existing but if subsequent thereto a substantial change of conditions has occurred calculated to affect the child's welfare, the court may in a later hearing render such decree as the child's welfare requires. The discretion of the trial court in child custody matters is wide. Kotrola v. Kotrola, supra; Martinez v. Martinez, 49 N.M. 405, 165 P.

2d 125 (1946); § 22-7-6, N.M.S.A.1953. Having found a change of circumstances and conditions, the court's hands were not tied and it had power and authority to modify its previous custody award as it deemed best for the child.

The appellant's second point is that the district court was without jurisdiction to modify its previous custody decree since the appellee's motion to modify failed to specifically allege that a change of circumstances had occurred. Regardless of this, the question that was litigated, and in which the appellant fully participated, was whether the custody provisions should be changed. Paragraph VII of the appellee's motion requested a change of custody; the appellant claimed no surprise and made no objection to the custody issue being heard. In Berkstresser v. Voight, 63 N.M. 470, 473, 321 P.2d 1115, 1117 (1958), we said: "It is well established that where issues are tried by express or implied consent of the parties, they will be treated as if they had been raised in the pleadings." Nor was it necessary for the appellee to formally move to amend his pleadings for "failure so to amend does not affect the result of the trial" on the issues litigated. Rule 15(b) (§ 21-1-1(15) (b), N.M.S.A.1953); Berkstresser v. Voight, supra, at 473. There was notice, a hearing, and the appellant had every opportunity to and did present her evidence and, moreover, as observed in Bell v. Odil, 60 N.M. 404, 408, 292 P.2d 96, 98 (1956); "We think it is true that the pleadings and procedure upon modification of a custody award are, and because of their nature should be, far more elastic than is the case with usual adversary proceedings." Tuttle v. Tuttle, 66 N.M. 134, 137, 343 P.2d 838 (1959).

During the hearing the court heard testimony from the minor child, then over ten years of age. The appellant urges that the court erred in finding that the boy had sufficient maturity and intelligence to state a decision as to his choice of whom he wished to live with. The court found that because of his maturity and intelligence it could give some weight to his wishes. To do so was well within the court's discretion and we will not interfere, where nothing is presented to show an abuse. Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968).

The appellant also complains of the court's refusal to grant her motion to dismiss for failure to show a material change of circumstances. She also urges that there was no substantial evidence to support certain findings as to changes of circumstances and the suitability of the present wife of the appellee to help raise the boy. We have examined the record and substantial evidence was presented of changed circumstances of material import and, accordingly, the court had sufficient basis for modification of custody and acted properly in denying the motion to dismiss. See Martinez v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970); Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968); Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967).

There is one final matter to be noted. On June 12, 1970, while this appeal was pending, we issued a writ of certiorari for diminution of the record and we are in receipt of a supplemental transcript of record. The supplemental transcript reveals that since the hearing before the district court the wife of the appellee has divorced him. We will not consider that new matter here. Suffice it to say, it is for the appellant if she so desires to present this new circumstance to the district court for consideration.

The order of the trial court is affirmed.

It is so ordered.

TACKETT and SISK, JJ., concur.

477 P.2d 292

J. H. McCAUGHTRY and Dewey S. Mosley, Petitioners-Appellants,

v.

NEW MEXICO REAL ESTATE COMMISSION, Respondent-Appellee.

No. 9065.

Supreme Court of New Mexico.

Nov. 23, 1970.

Howden & Turpen, Albuquerque, for petitioners-appellants.

James A. Maloney, Atty. Gen., Fred M. Calkins, Jr., Sp. Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

WATSON, Justice.

This is an appeal from the judgment of the District Court of Bernalillo County affirming the decision of the New Mexico Real Estate Commission which suspended the real estate broker's license of petitioner, J. H. McCaughtry, and the real estate salesman's license of the petitioner, Dewey S. Mosley, for periods of six months each pursuant to § 67–24–29, N.M.S.A., 1953 Comp. The parties have stipulated that the court review was under the provisions of § 67–26–20, N.M.S.A., 1953 Comp., which provides for the review of any board decision under the Uniform Licensing Act set forth in §§ 67–26–1 through 67–26–28, N.M.S.A., 1953 Comp.

Appellants complain that the Commission misconstrued the law which requires that deposit money in a real estate transaction be placed in a trust fund, and that its findings were not supported by substantial evidence. Appellants also claim that they

did not receive a fair hearing for the following reasons:

First: Because during the hearing, Commissioner Morgan said to appellant McCaughtry:

"You said awhile ago you didn't have any reason for not having a trust account after that April statement showed that the service charges probably had eaten it out. The law doesn't say that. The law says you will maintain a trust or an escrow account at all times. You're familiar with that, aren't you? It's been in the law since '59. You're responsible for this man's actions, and it seems to me that you were kind of lax in several things there. Also, it seems like both of you are maintaining separate trust accounts. This man, legally, doesn't have one. He's supposed to turn the money in to you and you are supposed to supervise it."

In the Notice of Hearing, McCaughtry, the broker, was charged with failure to maintain trust accounts, as well as failure to deposit the money in a trust account. It was one of appellant's defenses that he was not then dealing in sales in which moneys belonging to others were involved, and that he was not required to maintain escrow accounts, and that Commissioner Morgan's remarks during the hearing were very prejudicial.

Second: Because the violation of § 67–24–29, supra, is made a crime (§ 67–24–34, supra), appellants should have been warned of their right to remain silent when they appeared pursuant to the Commission's subpoena.

Third: Because the Commissioners deliberated their decision in the presence of Paul Brown, the administrator or executive secretary of the Commission, who brought the charges, made the investigation, and testified against the appellants.

In connection with this Third reason for unfairness, Mr. Brown was called to supplement the record pursuant to § 67–26–20, supra, and he testified as follows before the reviewing court:

"Q When these proceedings of July 10th ended and Mr. Mosley and Mr. McCaughtry left, did the Commission proceed immediately to deliberate?

"A Yes, sir, I believe that is correct.

"Q Did you remain with the Commission?

"A Yes, sir, I did. I believe I did. It is hard to recall exactly, but, normally, I am there and I believe I was there when they deliberated.

"Q Did you participate in the discussion?

"A Only if a question is asked of me."

And Commissioner Morgan voluntarily testified as follows:

"Q And chances are he [Brown] was present at the time the Commission passed on whether or not to revoke Mr. Mosley and Mr. McCaughtry's license, is that correct?

"A I would say the chances are almost one hundred percent that he was sitting there, but we keep him there as a matter or as a source of information in case one of us five commissioners has questions or something that is not too clear.

"Q Does he participate in the Commission's decision as to whether or not to suspend or revoke a license?

"A No, sir, never."

A review of the evidence indicates that although McCaughtry, the broker, had a trust account with the Citizens State Bank it was dormant at the time of the receipt of the check from Mr. Dvoracek, the appellants' client. Although there is substantial evidence that the check received in the transaction was mentioned to McCaughtry by the salesman Mosley, it was not deposited in his broker's trust account. Being uncertain as to whether it was expense money, McCaughtry asked Mosley to call Mr. Brown, the administrator, about it. Although disputed, there is

also substantial evidence to find that the check was one which should have been deposited in such an account. The Commissioners' findings V and VI relating to McCaughtry read:

Finding V: "That the Respondent McCAUGHTRY as Broker knowingly failed to receive from the Respondent MOSLEY the funds tendered by DVORACEK and to deposit said monies in a custodial trust or escrow account, contrary to Sec. 67–24–29 Supra, Sub. Sec. E."

Finding VI: "That at the time DVORACEK tendered the said monies to the Respondent MOSLEY the Respondent McCAUGHTRY did not have a custodial trust or escrow account into which said funds should have been deposited contrary to Sec. 67–24–29 Supra Sub. Sec. H, and Rule 15 of the Rules and Regulations of the New Mexico Real Estate Commission."

McCaughtry was suspended for knowingly violating subsections E, H, J, and K of § 67–24–29, supra, and Rule 15 of the Rules and Regulations of the Real Estate Commission. Subsection H requires the deposit of money received in a real estate transaction in a custodial, trust, or escrow account maintained by the broker, and both this subsection and Rule 15, supra, require the keeping of records of all funds so deposited.

Subsections E, J, and K of § 67–24–29, supra, read as follow:

"The commission shall have the power * * * to suspend or revoke a license at any time * * * where the licensee in performing or attempting to perform any of the actions mentioned herein is deemed to be guilty of:

"* * *

"E. Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, commingling funds of others with his own or failing to keep such funds of others in an escrow or trustee account, or failing to furnish copies of all listing and sales contracts to all parties executing the same;

"* * *

"J. Violating any reasonable rule or regulation promulgated by the commission in the interests of the public and in conformance with the provisions of this act; or

"K. Any other conduct, whether of the same or different character from that hereinbefore specified, which is related to dealings as a real estate broker or real estate salesman and which constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud or dishonesty."

The factual recital of Finding V would not constitute a violation of subsection E, and the factual recital in Finding VI is not supported by the evidence. The result is that the Commission's findings will not support its judgment. Kennecott Copper Corp. v. Employment Sec. Comm., 81 N.M. 532, 469 P.2d 511 (1970). There is no evidence of McCaughtry's violation of subsections J and K, supra, or of Rule 15, supra; and no findings were made regarding their violation. The factual recital in Finding V and the evidence sustaining it probably would have been sufficient for concluding that McCaughtry violated subsection H, but such was not the Commission's finding. Thus, we can only conclude that the Commission acted arbitrarily in making this finding. Ross v. State Racing Commission, 64 N.M. 478, 330 P.2d 701 (1958).

No law or regulation of the Commission has been pointed out to us, nor have we found one, which requires a custodial, trust, or escrow account prior to the receipt of funds appropriate for deposit in such account. The above findings, when considered with the charge in the Notice of Hearing and with Commissioner Morgan's statement at the hearing, convince us that there was a misconception of the law as well as a lack of evidence involved in McCaughtry's suspension. Although we are familiar with the rule that erroneous

findings of fact, unnecessary to the final decision are not grounds for reversal, International Minerals & Chemical Corp. v. New Mexico Public Service Comm., 81 N.M. 280, 466 P.2d 557 (1970), we are here concerned with two other problems: (1) Whether the proceedings before the Commission were within the requirements of the Uniform Licensing Act, supra, or whether they are so permeated with error as to be inconsistent with the essentials of a fair trial, Ferguson-Steere Motor Co. v. State Corp. Comm., 63 N.M. 137, 314 P.2d 894 (1957); and (2) where one penalty is imposed for five separate violations and four of them cannot be sustained, can the court affirm, if the facts but not the finding support the fifth offense?

We proceed to discuss the first problem. The fact that the charges are made by the same body which tries the issues does not, in itself, operate as a disqualification, Seidenberg v. New Mexico Board of Medical Exam., 80 N.M. 135, 452 P.2d 469 (1969); however, the legislature no doubt recognized this entity of court and prosecutor when it set forth the standards required in the Uniform Licensing Act, supra. The Act provides for the right to examine all opposing witnesses, § 67-26-8, supra; it requires that the decision shall be made by a majority of the members of the board, § 67-26-13, supra; and it provides for a complete transcript, § 67-26-12, supra. Relating to the court's review, a pertinent part of § 67-26-20, supra, reads:

> "* * * The court may affirm the decision of the board or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: in violation of constitutional provisions; or in excess of the statutory authority or jurisdiction of the board; or made upon unlawful procedure; or affected by other error of law; or unsupported by substantial evidence on the entire record as submitted; or arbitrary or capricious."

2 Cooper, State Administrative Law, 701, states:

> "* * * As the phrase 'unlawful procedure' has been construed in state court decisions, its application is not confined to instances where an agency has failed to comply with specific statutory directives. Rather, it includes any departure from the modes of procedure deemed desirable, at any stage of the proceedings in a contested case."

In Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1937), the Supreme Court points out the unfairness of ex parte discussions with the active prosecutors before the Secretary of Agriculture made his findings. This was deemed more than an irregularity in practice; it was a vital defect. There, the Court said:

> "* * * The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.
>
> "* * *
>
> "* * * The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the *concluding parts of the procedure* as well as to the beginning and intermediate steps." 304 U.S. at 14, 15, 20, 58 S.Ct. at 775-777. (Emphasis added.)

See also Monon Railroad v. Public Service Commission, 241 Ind. 142, 170 N.E.2d 441 (1960), and In re Amalgamated Food

Handlers, Local 653-A, 244 Minn. 279, 70 N.W.2d 267 (1955).

The fact that there may be substantial and properly introduced evidence which supports the Board's ruling is immaterial if evidence outside the hearing is considered and relied upon. English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22 (1950), where the court said:

> "* * * A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its termination upon information received without the knowledge of the parties." 217 P.2d at 24.

See also State ex rel. Ellis v. Kelly, 145 W.Va. 70, 112 S.E.2d 641 (1960).

Although Mr. Brown did not participate in the Commissioners' decision, his presence at their deliberations and his availability there for ex parte testimony and argument was contrary to the rudimentary requirements of fair play and a violation of the Uniform Licensing Act, supra. Although Commissioner Morgan's remarks at the hearing were a departure from desirable procedure, they probably were not prejudicial per se. The prejudice to appellant McCaughtry was in the Commission's misconception that a trust account must be maintained regardless of whether there are any trust funds applicable to it. This error is reflected in the Notice of Hearing, reiterated in Commissioner Morgan's statement and confirmed in Finding VI; it appears throughout the proceedings. We cannot affirm on such a record, nor can we approve the cloistering of the chief prosecutor with the quasi-judicial body during its deliberations.

With reference to the second problem, can we conclude that these errors did not essentially enter into the Commissioners' determination of the length of the suspension or their determination that any suspension would be imposed? We think not. Section 67-26-20, supra, does not permit the court to make the findings or to fix the penalty. Such is the function of the Commission. See In re Blatt, 41 N.M. 269, 67 P.2d 293 (1937). The statute requires that we must reverse if substantial rights have been prejudiced because of administrative findings or conclusions made on unlawful procedure, failure of substantial evidence, or errors in law, all of which we have found to be present here. The court must act within the bounds of the statute. State ex rel. Transcontinental Bus Service v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949). We must reverse.

We need not determine whether appellant Mosley was prejudiced by Brown's presence during the Commissioners' deliberations, or whether he and appellant McCaughtry should have been warned of their rights to remain silent. Co-appellants' activities are so interrelated that we should reverse in toto the lower court's judgment even if § 67-26-20, supra, does not so dictate. Transcontinental Bus System v. State Corp. Comm., 56 N.M. 158, 241 P.2d 829 (1952).

The judgment of the trial court is reversed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

477 P.2d 296

Bobbie L. JEWELL, and the minors, Tommie Jewell, III, and Michelle M. Jewell, by their next friend, Bobbie L. Jewell, Petitioners,

v.

Leonard SEIDENBERG and Louise Geng Seidenberg, Respondents.

No. 9076.

Supreme Court of New Mexico.

Nov. 16, 1970.

Adams & Vallentine, Edward P. Chase, Albuquerque, for petitioners.

Modrall, Seymour, Sperling, Roehl & Harris, Allen C. Dewey, Jr., Joseph E. Roehl, Leland S. Sedberry, Albuquerque, for respondents.

Willard F. Kitts, Arturo G. Ortega, William E. Snead, Smith, Ransom & Deaton, McAtee, Marchiondo & Michael, Albuquerque, Standley, Witt & Quinn, Santa Fe, amici curiae.

OPINION

WATSON, Justice.

This case is before us on a writ of certiorari to the Court of Appeals. That

court's opinion (decided June 12, 1970), appearing at 82 N.M. 88, 475 P.2d 785 (Ct.App.1970), reversed a judgment for the plaintiff below upon the sole ground that the trial court had failed to give the mandatory New Mexico Uniform Jury Instruction 17.1, which reads:

> "Faithful performance by you of your duties is vital to the administration of justice."

Both parties had requested this instruction, and the record reflects no reason for the court's refusal to give it.

From Judge Hendley's succinct opinion, it appears that the Court of Appeals simply determined that Rule 51(1) (c) of the Rules of Civil Procedure [§ 21-1-1(51) (1) (c), N.M.S.A., 1953 (Repl.Vol. 4)], which became effective on September 1, 1966, and our Order No. 8000 Misc., adopting the Uniform Jury Instructions, made the giving of this instruction mandatory "unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper, and the trial court so finds and states of record its reasons." Rule 51(1) (c), supra. The opinion cites Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct. App.1969), for the proposition that where applicable the trial court *must* use the U.J.I. The opinion concludes with the holding that the refusal to give a mandatory instruction is reversible error.

It appears that of the twenty-six jurisdictions which have "pattern civil jury instructions," the highest courts of only six states (Washington, Florida, Missouri, Illinois, Arkansas, and New Mexico) have as yet officially adopted such instructions. See Pattern Jury Instructions, Am. Judicature Soc'y, Report No. 6 (1969). (Although the pamphlet just cited lists New Jersey as well, we do not include that state because its compiled instructions are used solely by the trial judges of that state as a model in drafting their own instructions.) Of these six states, Washington's pattern instructions appear to be recommended only. See Naranen v. Harders, 1 Wash.App. 1014, 466 P.2d 521 (1970), and the implication contained in the only footnote in the dissent in Miles v. St. Regis Paper Company, 467 P.2d 307 (Wash.1970). Florida has held that their Standard Jury Instructions are not mandatory but are entitled to great respect and should be rejected only when "wholly unwarranted because of unusual circumstances." Florida East Coast Railway Co. v. McKinney, 227 So.2d 99 (Fla.App.1969). See also In re Standard Jury Instructions, 198 So.2d 319 (Fla.1967).

Neither the Missouri nor the Illinois rules, which are quoted in Chapin v. Rogers, supra, have the requirement that the trial court must state into the record its reasons for not using the uniform instructions, as does our Rule 51(1) (c), supra. The Missouri Supreme Court Rule 70.01(c), V.A. M.R., provides:

> "The giving of an instruction in violation of the provisions of this rule shall constitute error, its prejudicial effect to be judicially determined."

The Missouri Supreme Court has held that a deviation from a uniform instruction is presumed to be prejudicially erroneous unless it is clear no prejudice has resulted, and that the burden is on the one claiming that the error is harmless to prove nonprejudice. Gormly v. Johnson, 451 S.W.2d 45 (Mo.1970); Brown v. St. Louis Public Service Company, 421 S.W.2d 255 (Mo. 1967); Murphy v. Land, 420 S.W.2d 505 (Mo.1967). In Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 (Mo.1968), this rule of presumed prejudicial error was held to apply to the omission of a purely cautionary instruction. There, even though the parties had neither requested the instruction nor shown any prejudice, the court reversed the judgment because "it has not been made perfectly clear that no prejudice could have resulted" from the failure to give the instruction.

Although there are no provisions in the Illinois rules or pattern instructions that deviation from the applicable pattern instruction is error, the prejudicial effect of which is to be judicially determined, nevertheless, the Illinois courts reverse unless the record affirmatively shows that the error is not prejudicial. Phillips v. Lawrence, 87 Ill.App.2d 60, 230 N.E.2d 505 (1967); Shore v. Turman, 63 Ill.App.2d 315, 210 N.E.2d 232 (1965). But in Culp v. Olive, 45 Ill.App.2d 396, 195 N.E.2d 729 (1964), in discussing their pattern instructions, the court said:

> "* * * Modern tendency favors a liberal application of the harmless error doctrine to instructions when it appears the rights of the complaining party have in no way been prejudiced. * * *" 195 N.E.2d at 734.

See also Logue v. Williams, 111 Ill.App.2d 327, 250 N.E.2d 159 (1969); Hitt v. Langel, 93 Ill.App.2d 386, 236 N.E.2d 118 (1968); and Garbell v. Fields, 36 Ill.App.2d 399, 184 N.E.2d 750 (1962).

The Arkansas Model Jury Instructions are mandatory and contain a provision similar to our Rule 51(1) (c), supra, requiring that an A.M.I. instruction shall be used unless the trial judge finds that it does not accurately state the law, in which event he will state his reasons for refusing the instruction. Per Curiam Order of Supreme Court of Arkansas, April 19, 1965. Arkansas has no provision, however, concerning the determination of prejudicial effect as does Missouri.

In Smith v. Alexander, 245 Ark. 567, 433 S.W.2d 157 (1968), the Arkansas court held that failure to give A.M.I. 101 was not reversible error. A.M.I. 101(a) states: "The faithful performance of your duties as jurors is essential to the administration of justice." There are five other subsections of cautionary instructions in A.M.I. 101. It should be noted that subsection (a) above is nearly identical with U.J.I. 17.1, supra. The Arkansas court said:

> "* * * That instruction is an opening statement to the jury, chiefly concerned with the respective duties of judge and jury. It is designated as a cautionary instruction. The record is silent as to why the trial judge declined to give it. On the other hand there is nothing in the record to show why it should have been given. Appellant made only a general objection. Absent a record to the contrary, we assume the trial judge decided the jury need not be instructed on cautionary matters. It could have been that those same jurors had heard this instruction repeated in previous trials. Considering the state of the record, and the discretion vested in trial courts with reference to cautionary instructions, we are unable to say that reversible error was committed. We would consider it the better practice to give the instruction when requested or recite into the record the specific reasons for refusing to give it. That is because we think the instruction covers substantive matters and a refusal to give it should be an unusual exception." 433 S.W.2d at 158, 159.

It seems clear to us that Rule 51(1) (c), supra, makes the requirements of U.J.I. mandatory, and failure to give a mandatory instruction constitutes error, but, in this case, can we say that the trial court's mere failure to give U.J.I. 17.1 is *reversible error?* We find nothing in our rules, nor in the order adopting the U.J.I., nor in the U.J.I. volume itself which indicates an intent to revoke Supreme Court Rule 17 (10) [§ 21-2-1(17) (10), N.M.S.A., 1953 Comp.], which reads:

> "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. * * *"

We have held that this rule is applicable to errors in instructions. Baros v. Kazmier-

czwk, 68 N.M. 421, 362 P.2d 798 (1961); Porter v. Ferguson-Steere Motor Company, 63 N.M. 466, 321 P.2d 1112 (1958). We have also held that failure to comply with a rule of Civil Procedure does not constitute reversible error unless prejudice is shown. Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965). We can only conclude that when this court adopted the Uniform Jury Instructions, it was intended that they would be enforced within the confines of Supreme Court Rule 17 (10), supra, and thus that every deviation from, or failure to give the applicable U.J.I. instruction, would not necessarily be reversible error.

Thus we cannot agree that the failure to give U.J.I. 17.1, if the sole error of the trial court, would necessarily be reversible error. Unlike Missouri, we cannot conclude that by adopting U.J.I. we created a presumption of prejudice, and that the party contending that such error is harmless has the burden of so proving. By retaining Supreme Court Rule 17(10), supra, we retained the rule of long standing that the appellant has the burden of showing that he is prejudiced by an erroneous instruction. See Pino v. Beckwith, 1 N.M. 19 (1852). He must show that substantial rights have been harmed to obtain reversible error. Apodaca v. United States Fidelity & Guaranty Co., 78 N.M. 501, 433 P.2d 86 (1967). We do not correct harmless error. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966). We agree with the holding of our Court of Appeals in Chapin v. Rogers, supra, that U.J.I. requirements are mandatory, but if any statement therein would seem to make a failure to comply with them reversible error, regardless of a showing of prejudice, it must be modified.

By our adoption of U.J.I., together with directions as to their use and non-use, in Order No. 8000 Misc., supra, and in Rule 51, supra, we indicated that U.J.I. would be the standard in determining if a fair trial had resulted. Prior to the adoption of U.J.I., the giving of cautionary instructions was within the discretion of the trial court. Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967). Unlike Arkansas, we believe that after the effective date of U.J.I., September 1, 1966, this discretion no longer existed. Chapin v. Rogers, supra. However, although the use of U.J.I. is mandatory, we did not intend to place form above substance in adopting the instructions. The standards there set forth will be our first consideration, and any deviation from them shall be held to be error. In determining whether it is reversible error, we will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice. Thus, our determination will be made by viewing the record in light of the standards we have adopted for a fair trial, rather than indulging in a presumption of prejudice if the U.J.I. is not followed.

The record here shows that the jury was first sworn. By this solemn act they are advised of their duty to render a true verdict according to the law and the evidence submitted.

The court initially admonished the jury as follows:

> "The authority thus vested in you is not an arbitrary power but must be exercised with sincere judgment, sound discretion, and in accordance with the law and evidence."

In addition, the jury was given U.J.I. 17.3, which reads:

> "Instruction No. 34—You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.
>
> "You are to apply the law as stated in these instructions to the facts as you find them, and in this way decide the case. Neither sympathy nor prejudice should influence your verdict."

Regardless of our conviction that the U.J.I. is a great contribution to civil procedure and our sincere desire to require strict adherence to the instructions and the directions contained therein, we cannot say that in this case the failure to give U.J.I. No. 17.1 prejudicially affected a substantial right of the parties.

The case is remanded to the Court of Appeals for consideration of the other points raised by the appeal to that court which were not disposed of by the opinion we have herein reversed.

It is so ordered.

TACKETT and McKENNA, JJ., and SAMUEL Z. MONTOYA, District Judge, concur.

COMPTON, Chief Justice (dissenting).

It is my considered judgment that all Uniform Jury Instructions stand on a parity, and that the failure to give any one, where applicable, constitutes reversible error where the error is preserved for review.

It was neither the purpose of the U.J.I. committee nor this court, in adopting its proposed rules, to put trial judges in strait jackets with regard to instructions. The court's action, in entering the mandatory Order 8000, was to give to the Bench and Bar a windfall—a surcease from a practice fraught with danger, drafting instructions in haste and with uncertainty.

The majority points out that the refused instruction was only cautionary. Be that as it may, it is the one the court said must be given. Chipping away of U.J.I. has now begun and will be camping at the door of the trial courts by what is being done.

The majority suggests that this court must keep one eye on our Rule 17(10) (§ 21-2-1(17) (10), N.M.S.A., 1953 Comp.) in construing U.J.I. If and when this is done, U.J.I. will have met its demise.

The majority having reached a different conclusion, I respectfully dissent.

477 P.2d 301

STATE of New Mexico ex rel., James A. MALONEY, Attorney General, Plaintiff-Appellant,

v.

David R. SIERRA (Substituted for L. A. McCulloch, Jr.), Director, Department of Alcoholic Beverage Control, Defendant-Appellee.

No. 8964.

Supreme Court of New Mexico.

Nov. 23, 1970.

James A. Maloney, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Frank P. Dickson, Jr., Albuquerque, for defendant-appellee.

OPINION

McKENNA, Justice.

The Attorney General filed a declaratory judgment action under our §§ 22-6-1 to 22-6-3, N.M.S.A.1953, against the Director of the Department of Alcoholic Beverage Control. He sought a ruling (1) that ch. 280, Laws 1969, signed by the Governor on April 7, 1969 (§§ 46-10-14.1, 46-10-14.5, N.M.S.A.1953 [1969 Supp.]), is unconstitutional; (2) that ch. 216, Laws 1969, signed by the Governor on April 3, 1969, not codified in our statutes, is the controlling statute and that it permits the sale and consumption of alcoholic liquors by the drink on licensed premises of dispensers on Sundays between the hours of 7:00 a. m. until midnight, and (3) that the defendant Director be enjoined from enforcing ch. 280, supra.

The Director answered praying that the district court declare ch. 280 constitutional, that its enactment repealed ch. 216, and in the event ch. 216 is in effect, it does not permit the sale by drink during the Sunday hours but only the service and consumption thereof in accordance with proposed regulation No. 21 of the Director. This proposed regulation generally dealt with the serving of alcoholic beverages on Sundays in counties not subject to the county option provision of ch. 280, provided such beverages are "pre-sold or granted without cost" on a preceding legal day.

The Intervenors maintain public horse-race tracks in the state and are the owners of liquor licenses. They opposed the position of the Attorney General and claimed that § 2, ch. 280, is constitutional and severable from any unconstitutional portions of ch. 280 and that § 2 permitted them to sell, serve or permit the consumption by the drink on their licensed premises on Sundays during racing season between the hours of 12:00 noon and 11:00 p. m.

The defendant Director filed a counterclaim for a declaratory judgment, asking for a construction of § 7(C), ch. 197, Laws

1969 (§ 46-2-14(C), N.M.S.A.1953 [1969 Supp.]):

"To be effective, any regulation issued by the director shall be reviewed by the attorney general prior to being filed as required by law and the fact of his review shall be indicated thereon."

In his counterclaim the Director said that he submitted his regulations 21, 22 and 25 to the Attorney General who rejected them. He claimed that the Attorney General had no power under § 7 of the Act, supra, to reject his proposed regulations, and that a rejection did not affect their validity or enforceability; but if the Attorney General had power to reject his proposed regulations, the action rejecting the three particular regulations was unlawful, arbitrary, capricious and unreasonable. The Attorney General replied that his rejection of the regulations was valid, and denied any unlawful exercise of his authority.

The issues were submitted to the court on stipulated exhibits. Before proceeding any further, we quote in part the liquor acts involved:

Chapter 216, Laws of 1969, First Session of Twenty-Ninth Legislature, signed April 3, 1969, not codified.

"AN ACT

RELATING TO ALCOHOLIC LIQUORS; AND AMENDING SECTION 46-10-14.1 NMSA 1953 (BEING LAWS 1959, CHAPTER 303, SECTION 1) TO PROVIDE FOR THE SERVING OF LIQUOR ON SUNDAY BY DISPENSERS.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

"Section 1. Section 46-10-14.1 NMSA 1953 (being Laws 1959, Chapter 303, Section 1) is amended to read:

"'46-10-14.1. HOURS AND DAYS OF BUSINESS:—

"'A. The license of retailers of alcoholic liquors shall allow them to sell and deliver alcoholic liquors, and the licenses of dispensers of alcoholic liquors and club liquor licensees shall allow them to sell, serve, deliver and permit the consumption of alcoholic liquors on their licensed premises on Mondays from 7:00 a. m. until midnight, on other weekdays from after midnight of the previous day until 2:00 a. m., then from 7:00 a. m. until midnight, and on Sundays only after midnight of the previous day until 2:00 a. m. The licenses of dispensers of alcoholic liquors shall allow them to serve and permit the consumption of alcoholic liquors on their licensed premises on Sundays from 7:00 a. m. until midnight.
* * *

"'B. It is unlawful for any licensed retailer of alcoholic liquors to sell or deliver alcoholic liquors, or for any licensed dispenser or club to sell, deliver, serve or permit the consumption of alcoholic liquors on their licensed premises during hours other than those prescribed by this section.'"

Chapter 280, Laws of 1969, First Session of Twenty-Ninth Legislature, signed April 7, 1969 §§ 46-10-14.1, 46-10-14.5, N.M.S.A.1953 (1969 Supp.).

"AN ACT

RELATING TO ALCOHOLIC LIQUORS; PROVIDING FOR COUNTY-WIDE LOCAL OPTION FOR SUNDAY SALES IN CERTAIN COUNTIES; PROVIDING FOR SUNDAY SALES AT CERTAIN RACETRACKS; REPEALING SECTION 46-10-14.1 NMSA 1953 (BEING LAWS 1959, CHAPTER 303, SECTION 1); ENACTING A NEW SECTION 46-10-14.1 NMSA 1953.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

"Section 1. Section 46-10-14.1 NMSA 1953 (being Laws 1959, Chapter 303, Section 1) is repealed and a new Section 46-10-14.1 NMSA 1953 is enacted to read:

"'46-10-14.1. HOURS AND DAYS OF BUSINESS.—

"'A. Alcoholic liquors shall be sold, served, delivered or consumed on licensed premises only during the following hours and days specified:

"'(1) on Mondays from 7:00 a. m. until midnight;

"'(2) on other weekdays from after midnight of the previous day until 2:00 a. m., then from 7:00 a. m. until midnight; and

"'(3) on Sundays only after midnight of the previous day until 2:00 a. m. except as provided in Subsection B of this section.

"'B. Alcoholic liquors by the drink may be sold, served and consumed on licensed premises where the licensee holds a dispenser's license, on Sundays from the hours of 12:00 noon to 11:00 p. m., hereinafter called "Sunday sales."

"'C. The provisions of Subsection B are not self-executing but shall become effective as follows:

"'(1) the county commissioners of each county having a population over one hundred fifty thousand at the last official federal decennial census and in each county of the first class having more than twenty-seven million dollars ($27,000,000) in assessed valuation and having a population of not more than sixteen thousand [16,000] and not less than fourteen thousand [14,000] persons according to the 1960 federal decennial census, and in each county of the first class having more than twenty-one million dollars ($21,000,000), but less than twenty-five million dollars ($25,000,000) in assessed valuation and having a population of not more than eight thousand (8,000) and not less than seven thousand (7,000) persons according to the 1960 federal decennial census, shall adopt a resolution submitting to the voters of the county the question of permitting Sunday sales within the county;

"'(2) the question shall be voted upon by the voters of the county at the next succeeding regular or special county-wide election, excepting that the question shall not be put to the voters at the election to select delegates to the state constitutional convention, or the election to approve a new constitution;

"'(3) if a majority of all the voters of the county voting on the question of Sunday sales vote for Sunday sales, Sunday sales shall be legal within the exterior boundaries of that county. If a majority of voters of the county voting on the question do not approve Sunday sales, the question shall not again be submitted by the county commissioners until the expiration of a period of four years from the date of the election.

"'D. Dispenser, retail and club licensees shall close their places of business during voting hours on the days of the primary election, general election, elections for officers of a municipality and any other election as prescribed by the rules and regulations of the chief of the division of liquor control. Dispenser, retail and club licensees shall also close places of business from 2:00 a. m. on Christmas Day until 7:00 a. m. on the day after Christmas.'

Section 2. SUNDAY SALES AT RACETRACKS—Notwithstanding other provisions of the Liquor Control Act or Section 46-10-14.1 NMSA 1953, or the outcome of any election, it is lawful for the holder of a dispenser's license whose licensed premises are located on a public horse-race track, licensed by the state racing commission, to sell, serve or permit the consumption of alcoholic liquors by the drink on Sunday during the racing season between the hours of 12:00 noon and 11:00 p. m."

The district court determined that an actual controversy existed between the parties and that the public interest required a settlement of the controversy. It found that only three counties, Bernalillo, Lincoln and Taos, qualified to conduct a local option election under ch. 280, to decide whether Sunday sales would be permitted. It

found Section 1 of ch. 280, supra, unconstitutional. The specific finding was:

"12. That Section 1, Chapter 280, Laws of 1969, violates Article IV, Section 24, of the New Mexico Constitution. The classification of counties made therein is not based on any substantial distinctions which make the three counties to whom it applies so different from any of the other counties in the state as to require different legislation with respect to them. In addition, the characteristics which form the basis of the classification, to-wit, population and amount of assessed valuation in said counties, are not germane to the sale of alcoholic liquors on Sunday."

As to Chapter 216, the court found:

"16. That Subsection A of Subsection 1, Chapter 216, Laws of 1969, in enacting the provisions for the dispensing of alcoholic liquor on Sundays, omits the word 'sell' and uses the following language:

'The licenses of the dispensers of alcoholic liquors shall allow them to serve and permit the consumption of alcoholic liquors on their licensed premises on Sundays from 7:00 a. m. until midnight.' (Emphasis by district court.)

"17. That the legislature knowingly and intentionally omitted the word 'sell' from that portion of the act dealing with the dispensing of alcoholic liquor on Sundays by dispensers.

"18. That no ambiguity is created by the omission of the word 'sell' from the sentence of Subsection A of Section 1 of Chapter 216, Laws of 1969, dealing with dispensing of alcoholic liquors on Sunday.

"19. That the word 'serve' in its ordinary and commonly understood meaning does not also include permission to 'sell.' "

As to the Intervenors, the court determined that Section 2 of ch. 280, supra, was constitutional as containing a reasonable classification and a reasonable exercise of legislative power, and that Section 2 was severable from the remaining portions of ch. 280.

As to the counterclaim, the judgment was that the Attorney General has power "to review and pass upon regulations issued" by the defendant Director.

Only the Attorney General filed an appeal. He attacks the court's judgment in one respect only, which was that ch. 216, supra, does not permit the sale of alcoholic liquors by the drink on the licensed premises of dispensers on Sundays from 7:00 a. m. until midnight. The Director's answer brief, under Point II, contests the court's judgment on the counterclaim but no appeal or cross-appeal was filed by the Director as required by our Rules 5 and 7 (2) (§ 21-2-1(5), (7) (2), N.M.S.A.1953). Our Rule 17(2) (§ 21-2-1(17) (2), N.M.S.A. 1953) is not applicable. See Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964). Accordingly, the court's judgment on the counterclaim is final.

Furthermore, no one contests the judgment of the court in favor of the Intervenors, and its judgment declaring Section 2, ch. 280, supra, as severable and constitutional, is also final.

Before we proceed to the "serve but not sell" question, we have sensed some concern in our Court as to whether the main suit presented proper subject-matter for declaratory judgment relief. While § 22-6-3, N.M.S.A.1953, provides that:

"For the purpose of this act, the state of New Mexico, 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 the Constitution of the state of New Mexico, or any statute thereof."

there must be an "actual controversy" and an "interested party" petitioning for judgment. § 22-6-1, N.M.S.A.1953. Apparently, the concern is occasioned by the absence of a licensed dispenser as a party.

In State ex rel. Overton v. New Mexico State Tax Comm., 81 N.M. 28, 462 P.2d

613 (1970), Overton, a subordinate county official, received an instruction from his superior, the State Tax Commission, to allow the soldier's exemption against assessed valuation pursuant to an amendment of the basic statute. The county official asked the district court to declare the amendment unconstitutional, stating that a controversy existed between him and the State Tax Commission, which was about to force him to wrongfully apply the exemption, and to prohibit his granting of the exemption to those entitled to it. We held that the county assessor was a subordinate officer subject to direction; that the responsibility for official action was with his superior and, absent "a personal stake" in the outcome of the controversy, he had no standing to sue and no justiciable controversy was presented under § 22-6-1, supra. The nub of the decision is expressed at 462 P.2d 616:

> "The Assessor has no personal stake in the matter. He is under the direction of the State Tax Commission, a superior office. § 72-6-12, N.M.S.A.1953 Comp. The Assessor *has no duty* to protect taxpayers or veterans against wrongful discrimination. * * *" (Emphasis ours.)

Our situation is much different. We have here an administrative stalemate between two superior officers detrimental to public interest. The attorney general is charged by statute with the duty of prosecuting in court any action when in his judgment the interest of the State requires such action. § 4-3-2(B), N.M.S.A.1953 (1969 Supp.) He also must represent the State in any appeal. § 4-3-2(A), N.M.S.A. 1953 (1969 Supp.). The defendant is charged with the duty of administering and enforcing the liquor laws. Both parties are superior officers in separate realms and each in his own area is charged with ultimate responsibility for official action. Because of their duties each is an "interested party." Each in the area of public law has a personal stake involved, a required duty and ultimate responsibility, and the "rights, status or other legal relations of the parties" (§ 22-6-3, N.M.S.A. 1953) not only call for, but the interests of the State and public require that we break the deadlock. In Overton, supra, at 618, we observed that a determination of the necessary personal stake "depends as much on the issues involved as the parties plaintiff, * * *" The element of personal stake, we thought, quoting from Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), was to assure "[the] concrete adverseness which sharpens the presentation of issues * * *."

The issues before the district court were sharp and opposing. The Attorney General said all of ch. 280 was unconstitutional. The Director said no. The Attorney General construed ch. 216 to permit the sale of alcoholic beverages by the drink on Sundays. The Director rejected this interpretation. Presumably, a licensed dispenser would have taken the position of either the Attorney General or the Director. The deadlock presented is not brought into greater or lesser focus by the presence or absence of a licensed dispenser, nor are the statutory duties, responsibilities and relations of the officers involved intrinsically affected by his absence or presence. A real, actual, concrete controversy exists. Our decision will be productive and meaningful by terminating the controversy. Hence we are not departing from reality, or dispensing advice on assumed hypotheses to unconcerned parties. If all parties held the same viewpoint and merely sought confirmation from us, a different situation would be presented. See State ex rel. Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141, 143, 144 (1935).

To force the Director to first issue a citation for a violation of his interpretation of ch. 216 would shorten the purpose of the Declaratory Judgment Act and enshrine needless formalism. As Congressman Gilbert stated, at 69 Cong.Rec. 2030 (1928): "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." We note

the comment of Justice Sadler in Taos County Board of Education v. Sedillo, 44 N.M. 300, 309, 101 P.2d 1027, 1033 (1940):

> "As pointed out by Professor Borchard in his article in 'Current Legal Thought,' there has been a reluctance on the part of some of the courts to apply the new remedy. This results in greatly narrowing the field of its operation."

Professor Jaffe's final thought in his analysis of Standing to Secure Judicial Review: Private Actions, 75 Harvard Law Review 255 (1961), at 305, is that:

> "We do not see the public-law function of the courts as simply the rather unfortunate byproduct—or if not unfortunate, at the most the byproduct—of conventional litigation. The jurisdictional criteria evolved by our great judges have been, and should continue to be, predominantly rules of restraint. But these rules seek to define what is justiciable; and it is my thesis that an issue otherwise justiciable under these rules is not ipso facto nonjusticiable because of the lack of a conventional plaintiff."

To force the Director to issue a citation first would require him to take the risk of proceeding in the face of the conflicting opinion of the Attorney General and place the Attorney General in the public dilemma of agreeing with the alleged violator. Such a situation is surely not in the public interest. This dispute has reached the point found necessary by the Supreme Court in Public Service Comm. of Utah v. Wycoff Co., 344 U.S. 237, 244, 73 S.Ct. 236, 240, 97 L.Ed. 291, 296 (1952), wherein the Supreme Court said:

> "The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them."

Other states have seen it as we see it. In McNichols v. City and County of Denver, 101 Colo. 316, 74 P.2d 99 (1937), the plaintiff was the City and County Auditor who had the duty under the law to protect public funds. He questioned the authority of the City and County of Denver to issue certain bonds and levy taxes for their payment. The purpose of the suit was to secure an "advance" declaration as to the legality of the proposed action. In 74 P.2d, at 102, the court stated that the plaintiff, as auditor, "being a person whose rights and legal relations are affected by the ordinance which authorizes the issuance of these bonds, properly instituted these proceedings." While the court there decided that the judgment would bind the unjoined taxpayers, we cannot say that here for the licensed dispensers, but a declaration by us would not be moot or of no appreciable import or value for it will end the stalemate between the Attorney General and the Liquor Director.

In State ex rel. Sullivan v. Price, 49 Ariz. 19, 63 P.2d 653, 108 A.L.R. 1156 (1937), the Attorney General sought a declaratory judgment as to the validity and constitutionality of a certain provision of the motor vehicle law. The court, at 654, regarded it as a cause of action "so that those whose duty it is under the law to enforce it may quickly know whether they should do so or not, or if the law is defective it may be cured at the coming session of the Legislature."

In Wingate v. Flynn, 139 Misc. 779, 249 N.Y.S. 351, 354, aff'd without opinion in 233 App.Div. 785, 250 N.Y.S. 917, 256 N.Y. 690, 177 N.E. 195, the court stated, at 249 N.Y.S. 354:

> "Future confusion and possible litigation will be avoided by a present determination of the question involved. Public officers should have the right to have their legal duties judicially determined. In this way only can the disastrous results of well-intentioned but illegal acts be avoided with certainty."

Ex parte County Board of Education of Montgomery County, Ky., 260 Ky. 246, 84 S.W.2d 59 (1935), presented a situation where the petitioner board members alleged that they were divided in their opinion as to certain questions and asked for a declara-

tion. The questions were whether a prior judgment controlled future action and what was the proper construction of certain statutory sections, and were they constitutional. The court held there was a justiciable controversy.

In Dietz v. Zimmer, 231 Ky. 546, 21 S.W. 2d 999 (1929), the plaintiff residents, taxpayers and electors of the City of Covington petitioned for a declaration that the defendants be declared disqualified as candidates and certain others be adjudged as entitled to take their place. No justiciable controversy was presented for the reason expressed at page 1000:

> "They present no actual justiciable controversy with respect to any rights of theirs, nor have they any duties to perform respecting which the direction of the court is desired or required."

Our case is quite to the contrary; the parties clearly have duties to perform concerning which a justiciable controversy exists and the direction of the district court was required to resolve the controversy.

The answer filed by the Director praying for opposite declaratory relief pinpointed the issues. In Progressive Party v. Flynn, 400 Ill. 102, 79 N.E.2d 516 (1948), the Party sued election officials to determine its right to participate in a primary and the defendants counterclaimed for a determination of the controversy. An actual controversy was found to exist:

> "The counterclaim filed by certain appellees asking for a declaration of rights on the same statute involved in appellant's application is an admission by them that an 'actual controversy' is involved as required * * *."

Town of Ohio v. People, 264 App.Div. 220, 35 N.Y.S.2d 107 (1942), is a case where the plaintiff asked for a judgment declaring that a certain highway was not its responsibility to be kept open and repaired. The town officials were "in a quandary" as to its responsibility having received notification from the State Public Works that, unless repaired, state aid "will be withheld." The defendants questioned that it was a proper case for declaratory judgment, stating a remedy existed under the statutes to determine the right to state aid. The court declared, at 108, that the suggested remedy was inadequate and decided that a declaratory judgment was both useful and appropriate since the town should *now* have an answer:

> "The objective of a declaratory judgment in our practice is to obtain relief from just such uncertainty or doubt. It aims to enable a party whose rights, privileges and powers are endangered, threatened or placed in uncertainty to invoke the aid of the court to obtain a declaration of his rights or legal relations."

Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939), was an action by the members of the State Budget Board and the defendants were members of various state boards and industrial undertakings carried on by the state. The question in controversy was whether the defendants were required under the statute to furnish a statement of estimated necessary expenditures. The plaintiff said reporting forms were supplied but the defendants had failed to use the forms and submit the information. The defendants said they were not required to do so. Was there a controversy which could be determined under the Declaratory Judgment Act, or was it a request for an advisory opinion or to determine an abstract question?

The court decided that there was a controversy "as to the respective rights and duties of the plaintiffs and the defendants under the law" (284 N.W., at 246), and, further:

> "The reported cases bear ample evidence that public officers and boards frequently have resorted to an action for declaratory relief to obtain determination of a controversy with some other public officer or board, involving questions of official power or duty.
>
> "In his work on Declaratory Judgments, Professor Borchard says: 'Administrative boards and officials frequently sue each other for a declaration

of their respective rights and duties. It is evident that such officials require only adjudication, not coercion, in order to establish and perform their statutory duties, and that the simplest procedure is the best. Hence, the common use of the declaration in such controversies.' Declaratory Judgments, Borchard, pp. 607, 609."

The suit was dismissed as to some of the defendants because as to them it was merely a request for advice on questions or points of law which may never arise.

In Recall Bennett Committee v. Bennett, 196 Or. 299, 249 P.2d 479 (1952), an election officer cross-complained for a declaration of his duty under the law as to the candidate Bennett. We quote from page 490:

"He is reasonably in doubt as to how he should act. As a public officer he belongs to a class which is peculiarly entitled to judicial guidance, for, as said in Wingate v. Flynn, supra [139 Misc. 779, 249 N.Y.S. 351, 354], 'Public officers should have the right to have their legal duties judicially determined. In this way only can the disastrous results of well-intentioned but illegal acts be avoided with certainty.' As said in Cobb v. Harrington, supra, 144 Tex. 360, 190 S.W.2d 709, 713:

"'* * * the action for declaratory judgment "is an instrumentality to be wielded in the interest of preventative justice and its scope should be kept wide and liberal, and should not be hedged about by technicalities."'"

The Supreme Court of Oregon further observed that the assumption of jurisdiction by the trial court was not mandatory but discretionary and, at 491, "was entitled to consider the bearing of public interest upon the question of assumption of jurisdiction." In our case the trial court specifically found that it was in the public interest to settle the controversy.

State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N.W. 627, 103 A.L.R. 1089 (1936), appears to be to the contrary and we decline to follow it as too narrow and unrealistic. There the Governor sought a declaration of his power to make interim appointments, which power the Secretary of State denied. The court thought this was merely a difference of opinion since the Governor had not made any appointments—even though the Governor asserted that the Secretary of State's opinion prevented him from filling vacancies. The soundness of this decision has been criticized severely by Professor Borchard in his Declaratory Judgments (2d Ed., 1941), footnote 68, at page 45:

"* * * There was really no convincing reason why this case was held not justiciable, even in the absence of an actual appointment. The Governor claimed the power, the Secretary seriously denied it and *vacancies existed* to which the Governor wished to make prompt appointments. This situation is as ripe for adjudication as are dozens of other cases discussed in the chapter on administrative powers in which public officials contest their respective powers and duties."

In Harriett v. Lusk, 63 N.M. 383, 387, 320 P.2d 738, 741 (1958), we were convinced "that the construction of a statute can be attacked on both formal or substantive grounds by a party with standing to sue," citing Borchard, supra, at 772. We agree with Borchard, at 771, wherein he observes, with approval, that the "party deleteriously affected" as well as "the attorney general on behalf of the public" have been permitted to raise the questions of the constitutionality and construction of a statute. Under our statutes it is the duty of the attorney general to institute any proceedings "in which the state may be a party or interested when, in his judgment, the interest of the state requires such action, * * *." § 4-3-2(B), N.M.S.A.1953 [1969 Supp.]).

We have every reason to believe that our district courts, when exercising their discretion to entertain a request for declaratory relief, will scrutinize each request with utmost caution so as to not convert our

courts into "judicial ponds" to fish for legal advice. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404, 409 (1949). See Allstate Insurance Co. v. Firemen's Insurance Co., 76 N.M. 430, 415 P.2d 553 (1966).

For the reasons stated, we decide that the district court did not err in entertaining jurisdiction of the dispute presented by the petition and the answer.

We can now proceed to the reason for this appeal. Was the district court correct in declaring that Sec. 1 of ch. 216, supra, does not permit the sale of alcoholic liquors by the drink on licensed premises of dispensers on Sundays from 7:00 a. m. until midnight? In its findings, the court said that the word "serve" in its ordinary and commonly understood meaning does not include permission to "sell"; that no ambiguity was created by the omission of the word "sell" from the sentence of subsection A of Section 1, ch. 216, and that the legislature knowingly and intentionally omitted the word "sell."

The district court is correct.

Very recently, in Tafoya v. State Police Board, 81 N.M. 710, 472 P.2d 973 (1970), this Court stated that absent any clear intent expressed to the contrary, words are to have their ordinary and usual meaning. "Serve" means "to wait at table," "to set out portions of food or drinks." Webster's Third New International Dictionary. While distinguishable for reasons not here material, the Supreme Court of Oregon decided that in its ordinarily accepted meaning, the word "serve" is limited and "sell" is not included therein. City of Coos Bay v. Aerie No. 538, 179 Or. 83, 170 P.2d 389, 397 (1946).

If there be doubt, we are permitted to interpret, to arrive at the intention of the legislature, but rules or canons of construction are not to be invoked to arrive at a construction inconsistent with clear intent, as stated by § 1-2-2, N.M.S.A.1953:

> "In the construction of constitutional and statutory provisions, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the constitutional provision or statute."

State v. Ortega, 77 N.M. 312, 422 P.2d 353 (1966); Montoya v. McManus, 68 N.M. 381, 388, 362 P.2d 771 (1961).

Even if we assume doubt or ambiguity, it is evident that the legislature in its first sentence in subsection A of section 1 of ch. 216, supra, was aware of the word "sell": "* * * [A]nd the licenses of dispensers of alcoholic liquors and club liquor licenses shall allow them to sell, serve, deliver and permit the consumption * * * on Sundays only after midnight of the previous day until 2:00 a. m." Then follows the sentence of concern, which eliminates the word "sell" and allows serving on Sundays by the drink from 7:00 a. m. until midnight.

When the legislature permitted a dispenser to sell by the drink on Sundays, it expressed its intention clearly in ch. 280, supra, in the title: "Sunday Sales"; in subsection B of Section 1: "Alcoholic liquors may be sold, served and consumed * * * on Sundays"; in subsection C, referring to "Sunday sales," and in Section 2 permitting dispensers at public horse-race tracks "to sell, serve or permit the consumption * * * by the drink on Sunday." Even though Section 1 of ch. 280 has been held unconstitutional by the district court, ch. 280 was passed by the same legislature and is in pari materia, Board of Com'rs of Hamilton County v. State, 184 Ind. 418, 111 N.E. 417 (1916); City Transp. Co. v. Pharr, 186 Tenn. 217, 209 S.W.2d 15, 18 (1948): "Conceding the Act * * * to be invalid, it is important as showing legislative intent." See State v. Fidelity & Deposit Co. of Maryland, 36 N.M. 166, at 169, 9 P.2d 700 at 701 (1932), stating, "The two acts * * * are peculiarly in pari materia, having been passed at the same legislative session." State v. Clark, 80 N.M. 340, 342, 455 P.2d 844 (1969); 82 C.J.S. Statutes § 367, at 834: "In construing a particular statute, the court may consider other acts passed

at the same session, although they are unconstitutional or were vetoed."

The Attorney General argues that the word "serve" has acquired a special meaning describing the functions of a tavern-keeper or inn-keeper in providing food or beverage in return for payment, citing support for this special meaning. He states that the legislature is presumed to have employed the word "serve" in that special meaning. He further argues that the word "sell" has no reference whatever to the furnishing of liquor in individual portions, that is, by the drink, and that "sell" refers only to the additional privilege granted a dispenser to "sell and deliver" alcoholic beverages by the bottle or in packages. His conclusion is that the legislature banned dispensers from selling package goods on Sundays but that the dispensers have their added privilege of serving by the drink on Sundays, that is, serving or furnishing in return for payment.

At the outset, just as a matter of practical sense, we have difficulty in assimilating the suggestion that "furnishing in return for payment" means "serve" but not "sell." Be that as it may, the net effect of the Attorney General's argument is that a dispenser does not "sell" when he furnishes for payment alcoholic beverages by the drink for consumption on the premises. This is not what the court decided in People v. Dayton, 18 Mich.App. 313, 171 N.W.2d 57, 58 (1969):

> "* * * George Behrens was not a member of the association known as VFW Post 6252, nor had he contributed to the fund from which the post financed the purchase of the liquor. Thus it cannot be said that he enjoyed rights of ownership in the liquor prior to its being served to him. The fact that he paid for the drinks after they were served to him leads one to the conclusion that the transaction was a sale within the meaning of the Liquor Control Act."

Furthermore, our statutory definition of a dispenser does not support the sought distinction for it defines dispenser as any person "selling, offering for sale or having in his possession with intent to sell, alcoholic liquors by the drink or in packages." § 46–1–1, N.M.S.A.1953. Thus a dispenser "sells" by the drink, not just "serves," and "sell" is not limited to liquor in packages.

We cannot overlook the omission of the word "sell" from the act. We cannot attribute any special meaning to "serve" where the entire statutory scheme for liquor control fails to disclose any support for such a special meaning. We cannot depart from giving ordinary words ordinary meaning where there is no evidence of legislative intent to do otherwise. Our analysis is buttressed by ch. 280, for when the legislature desired to permit sales by the drink on Sundays, it did not say only "serve." It used both words, serve and sell.

The Director interprets ch. 216 so as to permit the serving on Sunday of alcoholic liquors if previously purchased. There are some obvious enforcement problems with the Director's interpretation but those problems do not make his interpretation so absurd or unreasonable as to require us to go in the direction urged by the Attorney General.

Our conclusion is that the word "sell" was purposely omitted from ch. 216 to prevent the sale by the drink on Sundays and the district court was right when it did not grant the Attorney General's prayer that ch. 216 "permits the sale and consumption" of alcoholic liquors by the drink on the licensed premises of dispensers of alcoholic liquors on Sundays between 7:00 a. m. until midnight."

Like it or not, the purpose of liquor control legislation is to regulate and restrain and not to promote. Application of Bethel Township Veterans Home Ass'n, 180 Pa.Super. 159, 119 A.2d 613 (1956). Our conclusion does not offend that policy. That policy and any loosening of it, is the business of the legislature, not ours.

The judgment is affirmed. It is so ordered.

COMPTON, C. J., and SISK, J., concur.

WATSON, Justice (dissenting).

I respectfully dissent.

Before we can proceed to review the action of the lower court we must assure ourselves that it had jurisdiction to act. The jurisdictional questions are: Can the Attorney General and the Director obtain a declaratory judgment on the question and related subjects from the District Court of Santa Fe County in this action? Can the intervenors? Since the question is jurisdictional it must be raised sua sponte and resolved before we can proceed. Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Our declaratory judgment statute, § 22-6-1, N.M.S.A., 1953 Comp., states: "In *cases of actual controversy* the court of record of the state of New Mexico shall have power * * * to declare rights and other legal relations of any *interested party* * * *." (Emphasis added.)

Here the petition filed by the Attorney General states that, in plaintiff's opinion, ch. 280, N.M.S.L.1969, is unconstitutional, but that the defendant Director intends to enforce it, and that, in plaintiff's opinion, ch. 216, N.M.S.L.1969, permits dispensaries to sell alcoholic liquors by the drink on Sundays, but that the defendant may consider this chapter repealed or may interpret it as not permitting such sales. The petition further states that regulations consistent with plaintiff's interpretation have not been adopted by defendant and asks that the court declare in accordance with plaintiff's opinion and restrain and enjoin defendant from enforcing the provisions of ch. 280, supra, against any licensed dispenser in New Mexico. The Director answers the petitioner and asks the court to declare the law to be in accordance with his views. In addition, the Director filed a counterclaim asking the court to interpret ch. 197, § 7(C), N.M.S.L.1969, which requires a "review" by the Attorney General of the Director's regulations. Three racetrack corporations intervened, and by answer they asked that § 2 of ch. 280, supra, which permits the sale by the drink on Sundays from noon to 11:00 P.M. at racetracks during the racing season be declared constitutional.

Two questions are presented. First, are the original parties "interested" so as to make this a "justiciable" controversy? And second, is there a case or actual controversy before the court which would permit it to declare the rights of the racetrack corporations, although they did not allege that any of their rights were being threatened. On this subject we quote from Borchard, Declaratory Judgments at 33 (2d Ed.1941):

> "Justiciability is the necessary condition of judicial relief. It is that which the term 'case' or 'controversy' is designed to insure, and the Supreme Court has had frequent occasion to consider the matter. So have the courts of foreign countries. What, then, are the 'necessary features' of justiciability? While state courts occasionally assume legislative and executive functions which could not be imposed on federal courts, the power to determine contested rights is a traditional function of all judicial courts in the western world. Expediency and the relative danger of conflict with other departments of the government have induced a refusal to decide major political questions or review mere administrative findings. Expediency and a desire not to function in the abstract, but to decide only concrete contested issues conclusively affecting adversary parties in interest, have induced a refusal to render advisory opinions or decide moot cases. Actions or opinions are denominated 'advisory,' when there is an insufficient interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations or where, by reason of inadequacy

of parties defendant, the judgment could not be sufficiently conclusive."

And at page 36:

"The 'necessary features' of justiciability which afford the greatest difficulty in analysis are the requirements of 'interested' parties asserting 'adverse' claims. When has the plaintiff a sufficient 'interest' to warrant judicial protection? When are claims 'adverse'?

"To be 'interested,' some legal relation of the plaintiff must be capable of being affected by the decision; but besides that, the 'interest' must be 'substantial.' Courts differ in their views as to what is 'substantial,' a difference especially notable in actions by taxpayers designed to determine the validity of public action under statute or administrative order. State courts, when they think the public issue important, are disposed to find a taxpayer's interest, however trifling, as adequate to sustain the justiciability of the action. Federal courts are more inclined to scrutinize carefully the nature of the interest of the plaintiff in the public issue presented, and to require *that it be 'substantial' to the plaintiff personally.* The factors giving 'substance' to an interest appear to be the importance of the legal relation, the value of the property, the immediacy of the interest to be affected by the decision. * * *" (Emphasis added.)

See also 6A Moore's Federal Practice, ¶ 57.17 (2d Ed. 1966). As to our requirements for adequacy of a taxpayer's interests, see State ex rel. Overton v. State Tax Commissioners, 80 N.M. 780, 461 P.2d 913 (1969), when public interest requires we exercise our power of superintending control. State ex rel. Castillo Corp. v. New Mexico State Tax Comm., 79 N.M. 357, 443 P.2d 850 (1968).

Here, we do think the Sunday sale of liquor is an issue of public importance, and that the Attorney General and the Director should be commended for their concern over the question. Why shouldn't the court decide it for them in this action? We quote again from Borchard, supra, at 888:

"Administrative authorities find in the declaration a protection against mistaken or illegal conduct and against the resulting penalties and attacks. In general, the traditional law compels an officer to be his own constructionist, and whether he acts, because he assumes he is lawfully authorized thereto, or fails to act, because he assumes he is not, he exposes himself to serious risks in either case, and stakes his security on the accuracy of his guess. This is neither wise nor efficient administration, for the public, for the officer, or for the individual citizen directly affected. While injunction has offered slight relief for these dilemmas, its scope is limited. The declaratory judgment shows the way out. It is hardly possible to measure completely the social advantage accruing from the opportunity to secure a conclusive adjudication upon contested official action before rather than after it is undertaken. *The conditions of justiciability are naturally demanded, to avoid any question of rendering merely advisory opinions.* But the decision when made between the *plaintiff administrative authority,* bringing to issue his or its own power or privilege to act, *and an interested opponent,* serves to clarify the legal position and averts the danger of incurring a criminal penalty, dismissal, or action in tort, and the deleterious public consequences of wrongful official acts." (Emphasis added.)

In the present action, only the intervenors have any interest as to *how* the matter should be decided; the only concern of the plaintiff and the defendant, as public servants, is that the matter be decided. The constitution of a number of states requires or authorizes advisory opinions. The jurisdiction in declaratory judgment actions is consequently broader in those states than it is in New Mexico where advisory opinions are not permitted. Richardson: "Declaratory Judgments and Advisory Opin-

ions as Judicial Legislation," 22 Tenn.L. Rev. 354 (1952).

The question is only one of standing or right to sue as in the Overton cases, State ex rel. Overton v. New Mexico State Tax Com'n, 81 N.M. 28, 462 P.2d 613 (1969), and State ex rel. Overton v. State Tax Comr's, supra, because of the nature of the action here and the lack of an interested party. Either the plaintiff or the defendant would have standing to appear in behalf of the state against an interested opponent. Taos County Board of Education v. Sedillo, supra; Harriett v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958); Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L. Ed.2d 681 (1967); Order of Railway Conductors of America v. Swan, 329 U.S. 520, 67 S.Ct. 405, 91 L.Ed. 471 (1947).

Certainly the plaintiff has standing in an action against other departments of the state if their interests would make them adversaries so as to present a real case or an actual controversy. See State ex rel. Yeo v. Ulibarri, 34 N.M. 184, 279 P. 509 (1929), a mandamus action. In State ex rel. State Highway Commission v. Walker, 61 N.M. 374, 301 P.2d 317 (1956), it was decided that a writ of mandamus would lie if the contention of the Highway Department in its action against the Land Commissioner was correct, and there we said:

> "* * * This fact [the appropriateness of mandamus] has caused us to determine the case on its merits, although the action was brought for a declaratory judgment. It is, therefore, unnecessary to pass upon the question whether under our Declaratory Judgments Act, § 22-6-1 et seq., NMSA, 1953, an action will lie against a state department or official at the suit of another state department or official. In this connection see: Taos County Board of Education v. Sedillo, 1940, 44 N.M. 300, 101 P.2d 1027; and Arnold v. State, 1944, 48 N.M. 596, 154 P.2d 257." (61 N.M. at 376, 301 P.2d at 318.)

The case before us, however, is similar to State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N.W. 627, 103 A.L.R. 1089 (1936). There, the Governor sought a declaration of his power to make interim appointments which power the Secretary of State denied. The court thought this was merely a difference of opinion since the Governor had not made any appointments—even though the Governor asserted that the Secretary of State's opinion prevented him from securing suitable persons in filling the vacancies. There, the court said that this difference in opinion is not enough to make a justiciable controversy. The court said further:

> "* * * Any declaratory judgment that we might now render would in no real sense be binding either upon those who may hereafter be appointed to office or upon the present occupants thereof. That circumstance alone is sufficient to cause us to refrain from rendering a declaratory judgment at the present time, since the rights of the very persons whose protectible interests are sought to be affected by the requested declaratory judgment would not be prejudiced thereby, section 269.56(11), and the uncertainty or controversy so-called, which gave rise to this proceeding, would not be terminated, section 269.56(6). State ex rel. Mellott v. Board of Com'rs of Wyandotte County, 128 Kan. 516, 279 P. 1; Harrell v. American Home Mortgage Co., 161 Tenn. 646, 32 S.W.2d 1023; Sadler v. Mitchell, 162 Tenn. 363, 367, 36 S.W.2d 891; Miller v. Miller, 149 Tenn. 463, 261 S.W. 965." 264 N.W. at 629, 103 A.L.R. at 1093.

See also United States v. West Virginia, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546 (1935), and the cases in the annotation at 103 A.L.R. at page 1094, also the annotation at 149 A.L.R. 349, at 367 and 368.

In State ex rel. Dickson v. Aldridge, 66 N.M. 390, 348 P.2d 1002 (1960), the Attorney General sought to restrain the Chief, Division of Liquor Control, from reclassifying a club license. The holder of the license and the prospective purchaser were permitted to intervene. The "interest" of the Attorney General in the matter was not

questioned, but certainly the "interest" of the intervenor in the matter was substantial and was capable of being affected by the decision. But, in the case before us, the intervenors as well as the principal parties seek only an advisory opinion. The intervenors do not allege that any of their rights are being threatened, nor is there any serious contention made by either the plaintiff or the defendant that § 2 of ch. 280, supra, relating to sales of liquor at the racetracks, is not constitutional as a severable portion of the act so that it would stand even if the rest of the act is unconstitutional.

It is obvious that the intervenors appeared herein simply to avail themselves of the possibility of a precedent being established against their interest and to obtain such assurance as they could against possible future adverse action. Their appearance under these circumstances did not present a justiciable controversy. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). No injunction was sought against intervenors, and no advisory opinion can be rendered by this court in their behalf. Bell Telephone Laboratories, Inc. v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966).

In the case here on appeal there was no licensed distributor before the court below or any other "interested party" sufficient to give it jurisdiction. Its judgment would not even be binding upon the parties hereto if raised in a later action by "interested" persons. As we said in Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923), and reiterated in State ex rel. Overton v. New Mexico State Tax Comm., supra:

> "* * * It is not the duty of this or any other court to sit in judgment upon the action of the legislative branch of the government, except when the question is presented by a litigant claiming to be adversely affected by the legislative act on the particular ground complained of."

Believing that the district court had no jurisdiction to decide the matter before it, I would reverse with instructions to dismiss the action.

TACKETT, Justice (dissenting).

The majority opinion holding contrary, I respectfully join Justice Watson in his dissent and add the following.

The paramount question is whether there is here present an actual or justiciable controversy to declare rights and legal relations of any interested party. We do not have an interested party in this action. The authorities on which the majority relies had an interested party.

We should decline to permit our district courts to be converted into "judicial ponds" to fish for legal advice under the guise of a declaratory judgment. Orange Independent School District v. West Orange Independent School District, 390 S.W.2d 81 (Tex.Civ.App.1965). The majority opinion is opening wide the door to allow fishing in judicial ponds for legal advice. This court has repeatedly held it will not render advisory opinions, yet that is exactly what the majority is doing.

There is one additional matter in the majority opinion which troubles me considerably. The majority opinion states:

> "The Director interprets ch. 216 so as to permit the serving on Sunday of alcholic liquors if previously purchased. There are some obvious enforcement problems with the Director's interpretation but those problems do not make his interpretation so absurd or unreasonable as to require us to go in the direction urged by the Attorney General."

The majority holds that "serve" does not include "sell," but customers can drink on Sunday if the liquor was "previously purchased." I feel that such reasoning invites violation of the law. It encourages dishonesty in the sense that it will encourage those who drink on Sunday to actually pay for the liquor consumed on Sunday, while being forced to claim that the liquor consumed was really "previously purchased."

I respectfully dissent.

477 P.2d 316

Charles A. HEDGECOCK, Plaintiff-Appellant,

v.

R. H. VANDIVER, dba White's Mattress Company, and United States Fidelity and Guaranty Company, Defendants-Appellees.

No. 476.

Court of Appeals of New Mexico.

Oct. 23, 1970.

James M. H. Cullender, Roswell, for appellant.

B. R. Baldock, Sanders, Bruin & Baldock, Roswell, for appellee.

OPINION

SPIESS, Chief Judge.

Claimant appeals from a judgment awarding compensation and other benefits provided by the Workmen's Compensation Act.

It is undisputed that claimant suffered an accidental injury arising out of and in the course of his employment by defendant, Vandiver. The injury involved claimant's left hand, wrist, elbow, arm, shoulder, and muscles of his left side.

The claim was presented, tried, and compensation awarded upon the theory of the loss of use of a scheduled member. [§ 59–10–18.4, N.M.S.A.1953 (Pt. 1, Repl. Vol. 9, Supp.1969)].

The appeal questions: (1) the amount awarded for medical services; (2) the trial court's finding relating to duration of the healing period, and (3) the award of attorneys' fees. We affirm the judgment.

Claimant was treated for his injuries by a doctor of his own choosing; was hospitalized for a period of time and likewise received other medical services. The cost of these services except a portion thereof, not material to this appeal, was paid under the Medicare provisions of the Social Securities Act (42 U.S.C.A. § 1395d). The award did not include the amount paid by Medicare.

Claimant contends that the judgment should have included this amount and argues that the reduction of his claim by the amount

paid through Medicare is not authorized by the Workmen's Compensation Act. Defendants take the position that no liability for the payment of medical services accrued against them because they were not permitted to furnish such services for claimant.

Defendants' position has support in the trial court's finding: "The Defendants were not permitted to furnish hospital and medical services to the Plaintiff [claimant] under the Workmen's Compensation Act of New Mexico, the Plaintiff [claimant] electing to provide these services for himself, and the cost thereof was paid by Medicare. * *"

The sufficiency of the evidence to support this finding is not directly attacked and it is, therefore, binding upon this court. McAfoos v. Borden Implement Co., 75 N.M. 50, 400 P.2d 470 (1965).

Upon this finding the trial court declined, and we think correctly so, to include medical expenses which had been paid by Medicare as a part of the award in claimant's favor. The material portion of the applicable statute, § 59–10–19.1, subd. A, N.M.S.A.1953 (Pt. 1, Repl.Vol. 9, Supp. 1969) states:

> "After injury, and continuing as long as medical or surgical attention is reasonably necessary, not to exceed a period of five [5] years from the date of the workman's accidental injury, the employer shall furnish all reasonable surgical, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine, not to exceed the sum of five thousand dollars ($5,000), unless the workman refuses to allow them to be so furnished."

This statute clearly imposes an obligation on the part of the employer to furnish all reasonable medical services to the injured employee unless, as stated in the Act, "the workman refuses to allow them to be so furnished." Claimant, in not permitting defendants to furnish such services, waived his right to require that the cost of such services be included in the award. See Valdez v. McKee, 76 N.M. 340, 414 P.2d 852 (1966); and Gregory v. Eastern New Mexico University, 81 N.M. 236, 465 P.2d 515 (Ct.App.1970).

Claimant next contends that the court erred in limiting claimant's recovery benefits during the "healing time" to 37 weeks, contrary to the evidence. The court found:

> "* * * the Plaintiff [claimant] was totally disabled for a period from November 20th, 1968, to approximately June 27, 1969, a period of 37 weeks, said period being the healing period for Plaintiff's [claimant's] injuries."

Claimant argues that there is no support in the evidence for this finding. He contends that the undisputed evidence discloses that the healing period extended beyond 37 weeks. We disagree.

The applicable statute, § 59–10–18.4, subd. D, N.M.S.A.1953 (Pt. 1, Repl.Vol. 9, Supp. 1969) in part, provides:

> "In determining the workmen's compensation benefits payable to a workman under this subsection for a disability resulting from a scheduled injury, the workman is entitled to be compensated as provided in subsection A of this section during the healing period, if he is in fact totally disabled during that time."

The testimony did show the nature of claimant's injuries and at the time of trial the doctor had not released him. The doctor testified:

> "A * * * I would say this to the Court, as a statement, this man's arm isn't totally well at the present time, and he still has difficulties in his wrist and he will probably require more care."

The doctor also testified:

> "Q And, as of right now, what would—suppose he doesn't improve any more from what he is now, what do you think about the effects of it?
>
> A I think he has an arm, his only remaining arm, that it is 50% disabled, and this, of course, would impair his earning a living, undoubtedly."

[redacted] In accordance with § 59–10–18.4, subd. D, supra, in order to establish that the healing period extended beyond 37 weeks, claimant was required to show that he was totally disabled during such extended time. Claimant failed to meet this burden.

[redacted] By his final point, claimant challenges the allowance of attorneys' fees. He contends that the award of $150.00 as attorneys' fees is inadequate. The total award to claimant aggregated $644.97, exclusive of the attorneys' fees. It is well established that the amount of the award of attorneys' fees in a workmen's compensation proceedings is discretionary with the trial court and will not be disturbed except for abuse of discretion. Ortega v. N. M. State Highway Department, 77 N.M. 185, 420 P.2d 771 (1966). In Garcia v. J. C. Penney Co., Inc., 52 N.M. 410, 200 P.2d 372 (1948), the court, in considering an attack upon an award of attorneys' fees, said:

> "There are many considerations entering into the fixing of attorney fees. Usually, the ability, standing, skill, the amount in controversy, its importance, and the benefits derived, go to the matter of determining fees. Elsea v. Broome Furniture Co., 47 N.M. 356, 143 P.2d 572; Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873. See also In re Dehner's Estate, 230 Iowa 490, 298 N.W. 656, 143 A.L.R. 672 where cases relating to allowance of fees are assembled. The court has the superior knowledge of the matter at hand, and its award, though not supported by direct evidence, will not be disturbed upon review unless it plainly appears from the record that there had been an abuse of discretion. 5 C.J.S., Appeal and Error, § 1584; Horvath v. Vasvary, 246 Mich. 231, 224 N.W. 365; Anderson v. Contract Trucking Co., supra."

We have considered the record and argument presented by claimant; we are not, however, convinced that the trial court's determination was outside the bounds of reason, under the circumstances, so as to amount to an abuse of discretion. See Baker v. Shufflebarger & Associates, Inc., 78 N.M. 642, 436 P.2d 502 (1968).

The judgment of the trial court should be affirmed.

It is so ordered.

OMAN and WOOD, JJ., concur.

[redacted]

477 P.2d 318

STATE of New Mexico, Plaintiff-Appellee,

v.

Ray WILSON, Defendant-Appellant.

No. 526.

Court of Appeals of New Mexico.

Nov. 13, 1970.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Mayo T. Boucher, Belen, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, John A. Darden, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted upon two charges of knowingly issuing and transferring forged writings, namely, checks, with intent to injure and defraud. He is now in custody under a sentence imposed by the court. He has appealed to this court from an order denying his motion filed pursuant to Rule 93 [§ 21-1-1(93), N.M.S.A.1953 (Supp.1969)].

The first point asserted by defendant is:

"THAT THE COURT ERRED IN HOLDING THAT THE DEFENDANT'S OBJECTION TO THE JUDGMENT AND SENTENCE, ON THE GROUNDS THAT HE WAS NOT AFFORDED AN ATTORNEY AT THE ARRAIGNMENT, WAS NOT WELL TAKEN OR MERITORIOUS."

The record actually discloses that defendant was represented by counsel at arraignment and entered a plea of not guilty. Counsel appointed to represent defendant on this appeal concedes that defendant was so represented but he nevertheless has submitted the point for the reason that the question was raised by defendant in his pro se motion.

Defendant next contends:

"THAT THE COURT ERRED IN HOLDING THAT THE DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE BECAUSE HIS COUNSEL FAILED TO SUBPOENA WITNESSES WHO COULD HAVE TESTIFIED TO HIS INNOCENCE WAS NOT WELL TAKEN OR MERITORIOUS."

It is argued that a Ted Kennedy, who had been charged contemporaneously with defendant and later released by the prosecution, should have been subpoenaed to testify in defendant's behalf; had Kennedy's testimony been secured it would have supported defendant's innocence. In substance, defendant's position is that he was denied effective assistance of counsel because Ted Kennedy was not subpoenaed. We see no merit to this contention.

We have uniformly held that before a defendant can be heard to complain of the inadequacy of his counsel he must show that the proceedings leading to his conviction amounted to a sham, a farce, or a mockery. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970); State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct.App. 1969); State v. Dominguez, 80 N.M. 328, 455 P.2d 194 (Ct.App.1969). No such showing is presented here.

It is finally contended:

"THAT THE COURT ERRED IN HOLDING THAT DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE BECAUSE OF FAILURE OF THE STATE OF NEW MEXICO TO HOLD A CO-DEFENDANT AS A MATERIAL WITNESS

WHO COULD HAVE TESTIFIED TO DEFENDANTS [SIC] INNOCENCE WAS NOT WELL TAKEN OR MERITORIOUS."

Under this point defendant argues that the state suppressed evidence, namely, that which could have been supplied by Ted Kennedy, which resulted in a denial of due process of law.

Suppression of evidence by the prosecution is not supported by the record. Ted Kennedy was known to defendant, and it could be inferred that defendant knew what Ted Kennedy's testimony would be if called as a witness in his behalf. There is, further, no showing that Ted Kennedy could not have been subpoenaed to appear at the trial.

The suppression of evidence to be violative of due process of law generally involves evidence which is known to the prosecution and not to the defendant. See Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965).

The order denying the Rule 93 motion should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

477 P.2d 320

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Charles Simon BACA, Defendant-Appellant.

No. 504.

Court of Appeals of New Mexico.

Nov. 13, 1970.

William S. Dixon, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant has appealed from his conviction on two charges of the sale of a narcotic drug contrary to the provision of § 54-7-14, N.M.S.A.1953. One sale allegedly occurred on October 19, 1968, the other on November 15, 1968. The appeal is presented under four points.

The fourth point asserts reversible error by the admission into evidence testimony of a police officer relating to the contents of a tape recording of certain statements made by an informant. This point, in our opinion, is determinative of the appeal. The following facts and testimony we consider pertinent.

During the course of investigating certain narcotics violations, the police employed one Chavez as an undercover agent, or informant. Chavez had for some time been addicted to narcotics, and professed to be acquainted with persons engaged in the illegal traffic of narcotics in Bernalillo County. This informant testified that he was acquainted with the defendant whom he identified as "Bobby Baca." Chavez testified to having purchased narcotics from defendant Baca on October 19, 1968.

Immediately prior to the alleged sale on November 15, 1968, the informant, Chavez, had been wired with a radio transmitter. A receiver was attached by the police to a recorder which produced a tape of sound which was transmitted. Chavez testified that after the device had been attached to him by the officers he left their presence in his car and met the defendant, Baca, who accompanied him and at that time he purchased a quantity of heroin from the defendant. A police officer testified that following the November 15 event he returned to his office, put the tape on a machine and took notes from the recording.

At the trial the officer was permitted, over objection, to testify as to what was recorded on the tape by reading his notes. The officer's testimony relating to the transmission and recording is, we think, relevant. Upon being asked if he was able, with the equipment, to hear any of the conversations which took place in Chavez' car, the officer answered:

> "There was some conversation heard; however, this happens to be one of the poorest tapes that we have made, and this, I would say, would be the conditions. Now, we had the equipment on Mr. Chavez. We could hear the music from the Music Box as he approached the door and talked to Mr. Baca. When they got back into the car, there was a slight drizzle that day and Chavez had his windshield wipers on, and this, plus some distortions made by the car motor, the most of the conversation—in fact, all of the conversation that is audible to me, that I could hear and make out was due to the fact that Mr. Chavez was the closest one to the mike and it was his voice. You can hear a voice in the background; however, you can not make out what it says, outside of Mr. Chavez' voice."

Testifying from his notes as to the recording, the officer repeated statements attributed to the informant, Chavez, and relating to heroin, including such statements

as: "Give me a cap in a hurry," and "This is good heroin." The officer, further testifying from his notes, said that the tape contained the following recorded statements of the informant, Chavez.

> " 'Good, Bobby. I'm going to see if I can pick up some change and I'll connect some'—or wait—'I'll connect a couple more, a couple of caps more.' "

A number of objections were urged to the officer testifying from his notes as to what was recorded on the tape. One objection was that "no foundation was laid." In our opinion, a proper foundation for admitting the testimony would require a showing, which would assure the authenticity of the recording from which the notes were taken, together with its reliability. We are not cited to, nor do we find a case in this jurisdiction specifically establishing requirements for the authentication of recordings of the kind involved. Applicable, and we think proper rules, are contained in State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962), where the court said:

> "As a condition to admissibility, however, the speakers should be identified and it should be shown that (1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions, or deletions have been made, and (5) in instances of alleged confessions, that the statements were elicited voluntarily and without any inducement."

See also, Belfield v. Coop, 8 Ill.2d 293, 134 N.E.2d 249, 58 A.L.R.2d 1008 (1956); Steve M. Solomon, Jr., Inc. v. Edgar, 92 Ga.App. 207, 88 S.E.2d 167 (1955); State v. Williams, 49 Wash.2d 354, 301 P.2d 769 (1956); Cummings v. Jess Edwards, Inc., 445 S.W. 2d 767 (Texas Civ.App.1969).

The record here discloses that a proper foundation for the admissibility of the officer's testimony was not provided in that no adequate showing was made as to the authenticity of the recording from which the notes were taken.

It was not made to appear that changes, additions, or deletions had not been made. Further, the tape was neither introduced into evidence nor played for the court and counsel so as to permit a determination of the accuracy of the officer's notes.

In our opinion, the objection to the officer's testimony should have been sustained and the admission of the testimony in evidence was reversible error. Since the credibility of the informer was severely attacked and since the inadmissible testimony went to his credibility, the error in its admission goes to both counts.

Because we direct a new trial it is appropriate that we consider the contention that defendant was denied due process of law and the right to a speedy trial in violation of constitutional mandates. Three occurrences of delay are asserted each of which defendant argues is sufficient in itself to warrant dismissal of the indictment. These occurrences are: (1) pre-arrest delay; (2) delay in the appointment of counsel, and (3) delay in bringing defendant to trial.

Defendant was arrested January 23rd, 1969, for offenses allegedly committed October 19, 1968, and November 15, 1968. On May 15, 1969, counsel was appointed for defendant and he was brought to trial November 19, 1969. It is, of course, fundamental that both the federal and state constitutions guarantee due process of law and a speedy public trial to persons charged with crime. Each occurrence will be separately considered.

PRE-ARREST DELAY

As has been shown, delays of ninety-six and sixty-nine days occurred between the alleged commission of the offenses and defendant's arrest. It is defendant's position that the delay was unjustfied, unreasonable, and prejudicial to his defense. Specifically, it is asserted that, as a result of the delay, defendant was unable to reconstruct events of material dates so as to vindicate his innocence. The delay, defendant argues, violated rights guaranteed by both federal and state constitutions.

The charges against defendant, as has been stated, were the result of an under-

cover operation conducted by the police. Marvin Lee Chavez was employed as an informant or undercover agent. Chavez' employment began September 27, 1968, and terminated December 28, 1968. During the period he made 140 purchases of narcotics from fifty-six persons. On January 10, 1969, a substantial number of persons who had allegedly sold drugs to Chavez were arrested. Defendant was placed under arrest January 23, 1969.

The state argues that the delay was required in the accomplishment of effective narcotics law enforcement in that if defendant had been promptly arrested following the alleged sales, other suspected sellers would have become alerted and the usefulness of the informant would have been destroyed.

It has become recognized that in appropriate cases unreasonable pre-arrest delay may so prejudice a defendant as to amount to the denial of constitutional rights. Ross v. United States, 121 U.S.App. D.C. 233, 349 F.2d 210 (1965); Woody v. United States, 125 U.S.App.D.C. 192, 370 F.2d 214 (1966); United States v. Lee, 413 F.2d 910 (7th Cir. 1969); United States v. Jones, 403 F.2d 498 (7th Cir. 1968); cert. denied, 394 U.S. 947, 89 S.Ct. 1280, 22 L.Ed. 2d 480; United States v. Hauff, 395 F.2d 555 (7th Cir. 1968), cert. denied, 393 U.S. 843, 89 S.Ct. 124, 21 L.Ed.2d 113; United States v. Deloney, 389 F.2d 324 (7th Cir. 1968), cert. denied, 391 U.S. 904, 88 S.Ct. 1652, 20 L.Ed.2d 417; United States v. Capaldo, 402 F.2d 821 (2nd Cir. 1968), cert. denied, 394 U.S. 989, 89 S.Ct. 1476, 22 L. Ed.2d 764; United States v. Feinberg, 383 F.2d 60 (2nd Cir. 1967); Chapman v. United States, 376 F.2d 705, (2nd Cir. 1967); United States v. Rivera, 346 F.2d 942 (2nd Cir. 1965). For a cogent discussion of relevant opinions, see State v. Rountree, 106 N. J.Super. 135, 254 A.2d 337 (Middlesex Co. Ct. 1969).

An appropriate statement is contained in the concurring opinion of Wright, J., in Nickens v. United States, 116 U.S.App.D.C. 338, 323 F.2d 808 (1963).

"* * * The right of a suspect to speedy determination of guilt or innocence is not lost merely because the delay in the process occurs before the formal charge, rather than after."

* * * * * *

"Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

In *Ross*, supra, cited by defendant, a conviction involving a narcotics violation was reversed and a conclusion expressed that defendant had been denied due process in that his defense was impaired where charges against him were not made for some seven months following the alleged commission of the crime. A further circumstance apparently influencing the reversal was that the conviction was based solely upon the uncorroborated testimony of an undercover police officer whose recollection of events and identification of defendant depended solely upon his notebook.

The court in *Ross* recognized the practical necessity for undercover investigations in the accomplishment of effective police work, particularly in detecting violations of the narcotics laws. It was there conceded that the effectiveness of an undercover agent would terminate when it becomes known that he is such an agent.

Under the rule announced in *Ross* the reasonableness of the conduct of the police in the particular case is to be weighed against the possible prejudice to the de-

fendant resulting from delay in arrest. In the case at Bar, as had been shown, the defendant's arrest was postponed in the interest of effective police work, and was not unreasonably delayed after the general investigation was concluded. The refusal of the trial court to dismiss the indictment was not error.

DELAY IN APPOINTMENT OF COUNSEL

Defendant contends that the state was negligent in failing to appoint counsel for him until May 15, 1969, approximately four months after his arrest and seven months after the alleged commission of the first offense for which he was indicted. The record discloses that defendant was indicted May 9, 1969, and counsel was appointed to represent him by the District Court on May 15, 1969.

Rule 92 of the Rules of Civil Procedure (§ 21–1–1(92), N.M.S.A.1953 (1967 Pocket Supp.) makes it:

> "* * * duty of the judge of any inferior court, sitting as a committing magistrate, immediately upon any defendant's being brought before him following his arrest upon a charge constituting a felony, to inform such person of his right to assistance of counsel at every stage of the proceeding, and that if he is indigent, that counsel will be appointed to represent him. If after being so informed, unless waived as hereinafter provided and such person is in fact indigent, the judge of such inferior court shall immediately certify such facts in writing to the district court, requesting the appointment of counsel on behalf of such defendant by the district judge."

The record is silent as to when defendant was brought before a magistrate following his arrest, or as to what there occurred. The record is likewise silent as to whether a showing of indigency was made by defendant before a magistrate following his arrest, which showing is a prerequisite to the right to court-appointed counsel. State v. Powers, 75 N.M. 141, 401 P.2d 775 (1965).

We find no basis in the record for a contention that the state negligently failed to appoint counsel for defendant until the 15th of May, 1969. It is not shown that the refusal of the trial court to dismiss the indictment upon this ground was improper.

DENIAL OF SPEEDY TRIAL

Part of the delay between commission of the offenses and time of trial was in the interest of effective narcotics law enforcement. This is the pre-arrest delay. The record shows that defendant was "out on bond" but does not show when, after his arrest, he was released on bond. The grand jury indictment was May 9, 1969, an order for court appointed counsel was entered May 15, 1969, arraignment was June 2, 1969, numerous defense motions were filed July 10, 1969. Notice of trial on October 13, 1969 is dated August 29, 1969. Another defense motion was filed October 2, 1969. The defense motions were heard October 17, 1969 and trial began on November 19, 1969.

Defendant claims a denial of a speedy trial solely because of the elapsed time between the offenses and his trial. He does not claim any prejudice resulting from this elapsed time. Defendant's claim is an insufficient basis for a holding that his constitutional right to a speedy trial has been denied. All the circumstances must be considered. The circumstances outlined above give an explanation of the delay. These circumstances include delay for purposes of law enforcement and some delay due to the defense motions. We hold that on the record before us, there has been no deprivation of the right to a speedy trial. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct.App.1969); State v. McCroskey, 79 N. M. 502, 445 P.2d 105 (Ct.App.1968). We so hold without considering the fact that defendant did not request an earlier trial or raise the issue to the trial court. See Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967).

It follows from what has been said that the conviction of defendant upon both counts of the indictment should be reversed and the cause remanded to the district court with instructions to grant defendant a new trial.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

477 P.2d 325

Martin T. GALINDO and Delores M. Galindo, his wife, Plaintiffs-Appellees,

v.

WESTERN STATES COLLECTION COMPANY, Inc., and E. M. Stoll and John L. Martin, Defendants-Appellants.

No. 486.

Court of Appeals of New Mexico.

Oct. 30, 1970.

Larry D. Beall, James R. Toulouse, Toulouse, Moore & Walters, Albuquerque, John J. Wilkinson, Alamogordo, for defendants-appellants.

Don Hancock, Alamogordo, for plaintiffs-appellees.

OPINION

WOOD, Judge.

In this suit for wrongful garnishment, compensatory damages were awarded against all defendants and punitive damages against E. M. Stoll and Western States Collection Company, Inc. (both these defendants are hereinafter referred to as Stoll). The appeal raises issues as to: (1) the liability of Justice of the Peace Martin; (2) the amount of the compensatory damages; (3) liability of Stoll for punitive damages; and (4) the amount of the punitive damages.

Sometime in the spring of 1968 Stoll received, for collection, the account of Mr. and Mrs. Galindo with Aldens of Chicago. Upon being contacted by Stoll, plaintiffs requested "* * * an itemized statement of the account with explanations as to why they owed the account, * * *" This information was not furnished. Instead, on August 9, 1968, Aldens assigned the ac-

count to Stoll. On August 21, 1968, Stoll wrote to plaintiffs threatening suit if the account was not paid immediately.

On September 7, 1968, Stoll brought suit against the plaintiffs in Bernalillo County, New Mexico. Stoll prepared and filed an application for a writ of garnishment. Justice of the Peace Martin prepared a civil summons, a bond which was executed by Stoll, and a writ of garnishment.

The summons was "served" on the Galindos by posting on a bulletin board at the Bernalillo County Courthouse. The writ of garnishment was served at an office of Mr. Galindo's employer in Bernalillo County. As a consequence of service of the writ, Mr. Galindo did not receive two paychecks on the dates they normally would have been received.

When he did not receive his second paycheck, Mr. Galindo inquired of his immediate supervisor and learned on September 26, 1968, for the first time, that his wages had been garnisheed. He consulted an attorney on September 27th. The attorney contacted Stoll on the same date. As a result of this contact, Stoll executed a release of the garnishment on September 27th. The only evidence is that the release was delivered to the Justice of the Peace on the same date. However, Galindo did not receive the two paychecks, dated September 18th and September 26th, until October 4th.

At all material times Stoll knew that plaintiffs were not residents of Bernalillo County, but were residents of Otero County.

Liability of the Justice of the Peace.

Our general statute on garnishments, Chapter 26, Article 2, N.M.S.A.1953 (now repealed—see Laws 1969, ch. 139), permitted garnishment before judgment was rendered against the debtor. Section 26-2-35, N.M.S.A.1953 (now repealed—see Laws 1968, ch. 62, § 171), made the article applicable to proceedings in Justice of the Peace courts. However, the jurisdiction of the Justice of the Peace was limited to the county in which he was elected. See § 36-2-8, N.M.S.A.1953 (Repl. Vol. 6)—now repealed. The judgment against Justice of the Peace Martin was based on his knowledge or lack of knowledge concerning his jurisdiction.

The trial court found that Justice of the Peace Martin: (1) wrongfully accepted the case "* * * without knowing whether he had any jurisdiction over the person of the plaintiffs, * * *"; (2) wrongfully accepted the case "* * * without knowing as to whether he had any jurisdiction over the subject matter of the garnishment * * *"; and (3) knew "* * * that the plaintiffs would only be served by posting of the Summons on the bulletin board in the Courthouse in Bernalillo County, New Mexico."

The record fully supports the findings that Martin had no knowledge of any jurisdictional facts giving his court jurisdiction when he accepted the suit and issued the writ of garnishment. The inferences in the record also support the finding that the only "service" on plaintiffs would be posting on a bulletin board at the courthouse in Bernalillo County and that Martin knew it. However, it does not follow that Martin's knowledge and lack of knowledge was wrongful so as to make him liable for wrongful garnishment.

■ We agree with the trial court's comment from the bench that there is nothing showing that jurisdiction was acquired over the Galindos in the Justice of the Peace suit. Since jurisdiction was not acquired over the Galindos by any of the methods authorized in the garnishment statute, the garnishment proceedings, which were ancillary to the suit against the Galindos, were void. Geren v. Lawson, 25 N.M. 415, 184 P. 216 (1919).

■ However, there is nothing in the garnishment statute requiring that jurisdictional facts be known to the court before accepting the suit or before issuing the writ of garnishment. Martin was not required to know that the Galindos would be properly served, pursuant to the statute,

before accepting the suit and issuing the writ. The writ was to issue if proper grounds were stated in the application and a proper bond was supplied. See § 26-2-3, N.M.S.A.1953. Martin is not to be held liable for his lack of knowledge of jurisdictional facts at the time suit was instituted and the writ of garnishment issued.

Of more concern is Martin's knowledge that the only "service" would be the posting at the courthouse. Even if Martin did not know that the Galindos were not residents of Bernalillo County, he did know that the only effort to give the Galindos notice of the suit would be by posting. He is charged with the knowledge that this posting would not be proper service in this suit. Section 26-2-34, N.M.S.A.1953; and generally, § 21-1-1(4), N.M.S.A.1953. This knowledge is not a sufficient basis for holding Martin liable.

Judicial officers are not liable for erroneously exercising their judicial powers. They are, however, liable for acting wholly in excess of their jurisdiction. The distinction is between an erroneous exercise of jurisdiction and a usurpation of authority, that is, acting without any jurisdiction. Edwards v. Wiley, 70 N.M. 400, 374 P.2d 284 (1962); Vickrey v. Dunivan, 59 N.M. 90, 279 P.2d 853 (1955); compare Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct.App.1969). This rule applies to Justices of the Peace. Edwards v. Wiley, supra.

Here, with knowledge that the Galindos would not be properly served, we assume that Martin acted erroneously in issuing the writ of garnishment. However, he was not acting wholly without subject matter jurisdiction. Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957). Rather, he was acting within his authority in issuing the writ because all requirements for issuing the writ were before him. His knowledge that there would not be service did not make his act "wholly in excess of jurisdiction." An appearance, even without proper service, would have kept the writ of garnishment from being void, and given Martin authority to render judgment against the Galindos. Edwards v. Wiley, supra.

The trial court's conclusion that Justice of the Peace Martin acted wrongfully in connection with the garnishment proceedings is not supported by the facts found by the trial court. Compare Ryan v. Scoggin, supra; Edwards v. Wiley, supra; State ex rel. Heron v. District Court of First Jud. Dist., etc., 46 N.M. 296, 128 P.2d 454 (1942). The judgment against Martin is reversed.

Amount of the compensatory damages.

The trial court awarded compensatory damages, but only in favor of Mr. Galindo. Stoll does not question his liability for compensatory damages in this appeal. He does attack the amount of these damages, which is $525.52. Of this amount, $25.52 is undisputed special damage. Stoll's claim is that $500.00 of the award lacks evidentiary support. The $500.00 amount was awarded for "* * * mental anguish, worry, and embarrassment."

There is evidence that Galindo: was concerned about losing his job as a result of the garnishment; couldn't concentrate and made mistakes at work; had difficulty in eating and sleeping; and was nervous. There is evidence that the store manager was "after" Galindo because he didn't pay his bills.

Galindo had not been concerned about not getting his paycheck due September 18th, attributing the failure to get the check to a mistake. The evidence is that none of the items listed in the preceding paragraph occurred before Galindo learned of the garnishment on September 26th. Since Galindo saw his attorney on September 27th and a release of the garnishment was executed that day, Stoll asserts that Galindo "* * * could have been disturbed about the garnishment *only* on the evening of the 26th. * * *" (Stoll's emphasis). Stoll contends there is no evidence of mental anguish, worry or embarrassment on that evening. Stoll claims

that the $500.00 award is based on Galindo's difficulties with his wife about the alleged unpaid bill with Aldens, and these difficulties occurred prior to his knowledge of the garnishment. These contentions are not based on the record before us.

The record shows that Galindo's concern about the garnishment and the resulting effects began when Galindo learned of the garnishment on September 26th and continued at least until he received the wrongfully garnisheed paychecks on October 4th.

The evidence of a week's concern over possible loss of his job, of having his employer "after" him, of nervousness, of inability to concentrate, and of difficulty in eating and sleeping supports the trial court's award of $500.00 for these items of damage resulting from the wrongful garnishment instituted by Stoll. There is nothing indicating passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages in the award of compensatory damages. See Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969). The award of compensatory damages is affirmed.

Liability of Stoll for punitive damages.

(a) Malice as a basis for punitive damages.

An issue under this point is the basis for an award of punitive damages in an action for wrongful garnishment. Relying on Marron v. Barton, 34 N.M. 516, 285 P. 502 (1930), Stoll asserts that for Galindo to obtain an award of punitive damages he was required to prove actual malice and, in addition, prove there was no probable cause for instituting the garnishment proceedings. *Marron,* supra, does not so hold. In that case the trial court found there was no probable cause for an attachment but refused to find that actual malice existed. The trial court awarded compensatory damages. Our Supreme Court affirmed, holding that compensatory damages were recoverable for the wrongful attachment without regard to the existence of either malice or probable cause.

Stoll also cites two Missouri cases and Countryman, Attachment in New Mexico, 1 Nat.R.J. 303 (1961) and 2 Nat.R.J. 75 (1962) in support of his contention that lack of probable cause as well as malice must be shown. Stoll does not indicate what part of Dean Countryman's article supports his contention. Our review of the article did not disclose to us that the article even discussed the issue of punitive damages for a wrongful attachment. The most support for Stoll's contention that we can find in the article is the proposition that out attachment law was taken from Missouri and, therefore, Missouri decisions are pertinent to our decision. Here, however, we are not dealing with the substance of our law of attachment, or garnishment; we are concerned with the basis for an award of punitive damages for a wrongful garnishment.

Punitive damages are awarded as punishment of the offender. Bank of New Mexico v. Rice, 78 N.M. 170, 429 P.2d 368 (1967); Montoya v. Moore, 77 N.M. 326, 422 P.2d 363 (1967); Loucks v. Albuquerque National Bank, 76 N.M. 735, 418 P.2d 191 (1966); Stewart v. Potter, 44 N.M. 460, 104 P.2d 736 (1940); Sweitzer v. Sanchez, 80 N.M. 408, 456 P.2d 882 (Ct. App.1969). This punishment may be imposed because of various types of conduct. Loucks v. Albuquerque National Bank, supra. One type of conduct justifying the punishment which is punitive damages is conduct amounting to malice. Bank of New Mexico v. Rice, supra; Sweitzer v. Sanchez, supra.

Neither reason nor New Mexico authority justifies the contention that in a claim for wrongful garnishment we should depart from the New Mexico decisions and require a showing of lack of probable cause, as well as malice, before punitive damages may be awarded. New Mexico decisions hold that punitive damages may be recovered on the basis of malice; we apply that rule to the wrongful garnishment with which we are here concerned. Accordingly, we do not concern ourselves with the

trial court's finding of no probable cause in filing the garnishment action. The trial court found malice and that finding is a sufficient basis for an award of punitive damages.

(b) Malice defined.

Stoll also asserts that to sustain an award of punitive damages, there must be proof of actual malice; that malice implied in law is insufficient. We do not concern ourselves with this asserted distinction since the malice sufficient for an award of punitive damages has been defined. Loucks v. Albuquerque National Bank, supra, states:

> "Malice as a basis for punitive damages means the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it." (Citations omitted)

Bank of New Mexico v. Rice, supra.

(c) Evidence to sustain a finding of malice.

Is there evidence of malice as defined in *Loucks,* supra? It is contended that Stoll knew there were no statutory grounds for obtaining the writ of garnishment and that this knowledge supports the trial court's finding of malice. Stoll swore to four of the grounds stated in § 36–7–1, N.M.S.A.1953 (Repl. Vol. 6), which grounds are made applicable to garnishment proceedings by § 26–2–1, N.M.S.A. 1953. While Stoll's affidavit may be considered a "scattershot" application, nevertheless the undisputed testimony is that Stoll specifically identified the ground on which he applied for the writ to the Justice of the Peace. That ground was for necessities of life. See § 36–7–1, supra. Further, the evidence is undisputed that Stoll believed he had a sufficient basis for this ground when he instituted the garnishment proceedings. There is no basis for an inference that Stoll knew he was doing a wrongful act in identifying "necessities of life" as the ground on which he instituted the garnishment proceedings. Thus, the ground on which the writ of garnishment was obtained does not support the finding of malice.

It is also contended that the method of "service" supports the finding of malice. We agree. Stoll's practice in instituting suits before Justice of the Peace Martin was to tell the Justice of the Peace where the defendants in the Justice of the Peace suit lived. Stoll could not remember whether he followed that practice in this case and could not remember whether he told the Justice of the Peace, of the fact undisputedly known to him, that the Galindos lived in Otero County. The Justice of the Peace testified that Stoll did not give him an address for the Galindos; that he assumed Stoll had an address; that he gave the suit papers to a deputy sheriff for service. Both Stoll and the Justice of the Peace testified as to the "common practice" of issuing summons to out of county defendants and "serving" them by posting the summons on a bulletin board in the Bernalillo County Courthouse. This was what was done in this case. This evidence supports the finding that Stoll knew the only "service" on the Galindos would be by posting on the courthouse bulletin board. This supports an inference that Stoll intentionally did a wrongful act; the act was in instituting a suit knowing the Galindos would not be given notice of the suit.

It is contended, however, that Stoll did not know the act was wrong. In support of this contention, it is pointed out that all Stoll was doing was following a "common practice" and that in fact no judgment was rendered against the Galindos in the Justice Court suit. However, there is evidence that Stoll had an extensive collection business, both in length of time and volume. Stoll's experience, the fact that Stoll did not disclose his knowledge of the whereabouts of the Galindos, and the fact of the form of "service" permits the inference that Stoll knew he was proceeding wrongfully. With this permissible inference we

cannot say as a matter of law that the trial court's finding of malice, which justifies an award of punitive damages, was wrong.

(d) Conduct that is reckless and in wanton disregard of plaintiffs' rights.

We have previously pointed out that Loucks v. Albuquerque National Bank, supra, authorizes the imposition of punitive damages for various types of conduct. One of the types of conduct authorizing such an award is conduct which may be said to have been "* * * committed recklessly or with a wanton disregard of the plaintiffs' rights. * * *" The trial court concluded that Stoll's actions "* * * showed a reckless and wanton disregard of the plaintiffs' rights." If there are findings to support this conclusion, then Stoll's liability for punitive damages is sustainable on this basis alone, regardless of the finding of malice.

The trial court found that Stoll knew the Galindos lived in Otero County and would be "served" only by posting of the summons on a bulletin board in the Bernalillo County Courthouse. The trial court also found that no service was ever made upon the plaintiffs. The result of these findings is that Stoll knowingly garnisheed the paychecks in a proceeding of which the Galindos had no notice and would not receive notice because of the form of "service." The findings support the trial court's conclusion that Stoll proceeded recklessly and with a wanton disregard of the rights of the plaintiffs.

Thus, there are two grounds for holding Stoll liable to Mr. Galindo for punitive damages—his malice and his conduct which was reckless and in wanton disregard of the rights of Mr. Galindo. Either basis would sustain Stoll's liability; here, both grounds sustain his liability.

The amount of the punitive damages.

The trial court awarded punitive damages of $5000.00. The rule is that the amount of punitive damages is left to the discretion of the fact finder, "* * * but must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason and justice. * * *" Faubion v. Tucker, 58 N.M. 303, 270 P.2d 713 (1954); see Sweitzer v. Sanchez, supra.

Stoll contends the amount of the punitive damages is so unrelated to the injury and and the compensatory damages as to plainly manifest passion and prejudice. However, he argues this point on the basis that only $25.52 of compensatory damages were proven. We have affirmed the compensatory damage award of $525.52. The question is whether the $5000.00 punitive damages is so unrelated to wrongful garnishment and the $525.52 compensatory damages as to plainly manifest passion and prejudice.

In answering this question we consider the circumstances of the case—the nature of the wrong committed and such aggravating circumstances as are shown. Sweitzer v. Sanchez, supra. The nature of the wrong—the wrongful garnishment is established by Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). The wrong is the intentional deprivation of due process; in this case it is intentionally depriving the wage earner of his wages without due process. Yet, there are little, if any, aggravating circumstances. When the error was pointed out to Stoll, he immediately caused the garnishment to be released. Nevertheless, punitive damages are for purposes of punishment and on the record before us the trial court could properly, in its discretion, impose a punishment.

Considering the relationship of the punitive damage award to the offense and the amount of the compensatory damages in the light of the foregoing circumstances, the amount of the punitive damages plainly manifests passion and prejudice. But to what extent? In our judgment the award is excessive by half. We hold that $2500.00 of the punitive damages is erroneous. We conclude that if Martin T. Galindo will,

within twenty days, file a remittitur with the Clerk of this Court in the sum of $2500.-00 from the $5000.00 judgment for punitive damages the judgment for punitive damages will be affirmed in the amount of $2500.00. Otherwise, the judgment as to punitive damages will be reversed and remanded for a new trial on the issue of punitive damages only.

The judgment as against John L. Martin is reversed with instructions that the claim as against him be dismissed.

The judgment for compensatory damages as against Western States Collection Company, Inc., and E. M. Stoll, jointly and severally, in the sum of $525.52, is affirmed.

It is so ordered.

SPIESS, C. J., and OMAN, J., concur.

477 P.2d 332

John WREYFORD, Plaintiff-Appellant, Aetna Insurance Company, Plaintiff-Appellant in Intervention,

v.

Glen R. ARNOLD, Defendant-Appellee.

No. 448.

Court of Appeals of New Mexico.

Sept. 11, 1970.

Rehearing Denied Oct. 29, 1970.

Palmer & Frost, Farmington, for appellant Wreyford.

John R. Cooney, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for appellant Aetna Insurance Co.

Richard L. Gerding, Tansey, Rosebrough, Roberts & Gerding, Farmington, for appellee.

OPINION

OMAN, Judge.

This cause arises out of a collision of motor boats being operated for pleasure on Navajo Lake or Reservoir on July 3, 1967.

Although plaintiff and plaintiff in intervention rely upon two points for reversal, both points relate to the single question of whether Navajo Lake is part of the navigable waters of the United States. We hold it is, and that the trial court erred in finding and concluding otherwise. Thus, we decide only the first point, and briefly consider the question of damages, since the case must be remanded to the trial court for the purpose of awarding damages to plaintiff and plaintiff in intervention.

Plaintiff was the owner and operator of one of the boats at the time of the collision. The plaintiff in intervention was his insurer and intervened to recover the amounts it paid to plaintiff for damages to his boat and his medical expenses. Defendant was the owner and operator of the other boat at the time of the collision.

The trial court found and concluded that the collision occurred as the proximate result of the negligence of both plaintiff and defendant. Neither this finding nor this conclusion is challenged, and plaintiff and plaintiff in intervention concede they are barred from recovery by plaintiff's contributory negligence, if the New Mexico law of negligence is applicable.

It is agreed that if Navajo Lake is a part of the navigable waters of the United States, then maritime law is applicable and damages are recoverable thereunder by plaintiff and plaintiff in intervention. Authority for the applicability of maritime law to navigable waters of the United States is found in Art. III, § 2 of the Constitution of the United States, wherein it is provided: "The judicial Power shall extend to all Cases * * * of admiralty and maritime Jurisdiction; * * *"

The applicability of maritime law to claims arising on navigable waters of the United States is discussed in Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal.2d 365, 159 P.2d 1 (1945), wherein it is stated:

> "Plaintiff's claim arises from a collision on navigable waters of the United States and thus involves a maritime cause of action [authority omitted], which in a federal court sitting as a court of admiralty would be determined under federal maritime law. [authorities omitted] The federal maritime law provides for equal division of damages, if both parties were at fault, even though there was a disparity in fault. [authorities omitted] Jurisdiction of the state court to try the action is based on section 24(3) of the

Judicial Code, 28 U.S.C.A. § 41(3), which in 'all civil causes of admiralty and maritime jurisdiction' saves to suitors 'the right of a common-law remedy where the common law is competent to give it.' The remedy afforded in the state court may be invoked to secure such rights 'as readily admit of assertion and enforcement in actions in personam according to the course of the common law.' [authorities omitted] Plaintiff's action is in personam to recover damages for tort and is 'one of the most familiar of the common-law remedies.' [authority omitted] 'That there always has been a remedy at common law for damages by collision at sea cannot be denied.' [authority omitted] Since contributory negligence generally precludes a plaintiff from recovering damages at common law, defendant contends that the doctrine of contributory negligence is part of the common-law remedy and is therefore binding on a state court in a maritime cause as a limitation of the court's jurisdiction.

"* * *.

"It is now settled that 'The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court,' [authorities omitted] and that the state courts must preserve all substantial admiralty rights of the litigants. [authorities omitted] A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought there, must determine the rights of the parties under the maritime law as a 'system of law coextensive with, and operating uniformly in, the whole country.' [authorities omitted] State law is inapplicable to a maritime cause 'if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' [authorities omitted] * * * 'Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages.' [authorities omitted] Any doubt as to whether the foregoing cases or Belden v. Chase governs maritime causes in the state courts is dispelled by the Supreme Court's declaration in Garrett v. Moore-McCormack Co., supra, 317 U.S. [239] pages 244, 245, 63 S.Ct. [246] at page 250, 87 L.Ed. 239, that: 'In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law, Belden v. Chase, 150 U.S. 674, 14 S.Ct. 264, 37 L.Ed. 1218, an 1893 decision which respondent relies upon as establishing a contrary rule, has never been thus considered in any of the later cases cited.'

"* * *.

"There can be no doubt that the division-of-damages rule in maritime collision cases involving the fault of both parties is as binding on the state courts as the federal rule as to burden of proof with respect to the validity of releases in suits by seamen for maintenance and cure. The right of a plaintiff to a division of damages in a maritime collision case involving the fault of both parties is a substantial right deeply rooted in admiralty, inherent in his cause of action, and such a part of the substance of his claim that it 'cannot be considered a mere incident of a form of procedure.' It is indeed an essential characteristic feature of the substantive law of admiralty. The very basis of the plaintiff's cause of action, which is unquestionably a maritime cause of action, would be destroyed if recovery were denied because of his contributory negligence, for it is only under admiralty law that he has any claim for damages arising from a maritime collision caused by the fault of both parties. If the state court should apply state law rather than admiralty law 'the remedy

afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure.' [authorities omitted] That the United States Supreme Court regards the plaintiff's right in such a case as a substantial admiralty right clearly appears not only from its abandonment of Belden v. Chase, but from its references in the Garrett case to state doctrines of contributory negligence and assumption of risk as doctrines that must give way to admiralty principles in actions at law on maritime torts. * * *

"* * *.

"Federal law governs not only the consequences of the fault of the parties but the question whether their vessels were operated in compliance with the rules governing navigation on navigable waters of the United States. The Federal Inland Rules of Navigation, 30 Stats. 96–102, 33 U.S.C.A. §§ 171–231, are controlling except as they permit the application of special local law. * * *"

See also, generally, as to what are navigable waters of the United States and the measure of recoverable damages under maritime law for damages and injuries sustained thereon, Guinn, An Analysis of Navigable Waters of the United States, 18 Baylor Law Review 559 (1966); Sanders, Admiralty in the Ozarks, 23 Ark.Law Review 96 (1969), (Reprinted in 33 ATL L.J. (1970)).

The question of navigability is one of fact. Arizona v. California, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154 (1931); United States v. Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L.Ed. 844 (1931); The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870); United States v. Rio Grande Dam & Irr. Co., 9 N.M. 292, 51 P. 674 (1898). However, it is a fact of which a court may take judicial notice, at least insofar as the waters are within its jurisdiction. Arizona v. California, supra; United States v. Dam & Irr. Co., supra.

The evidence adduced at the trial relating to the question of navigability is undisputed. The trial court found:

"On the date of the accident, Navajo Lake was a body of water lying within two states, New Mexico and Colorado, and capable of being traveled upon by small boats between the two states."

This finding is not attacked and is unquestionably supported by the evidence. The evidence as to the size of the boats which travel upon this Lake was that they range in size from small ski boats to house boats 52 feet in length, and there was testimony that "any boat you can put in the water" can be operated on the Lake between New Mexico and Colorado.

The collision in question was investigated by the United States Coast Guard, consistent with its duties relative to waters subject to the jurisdiction of the United States. 33 C.F.R. § 2.05–1 (Rev. as of January 1, 1970). Waters subject to the jurisdiction of the United States, for the purpose of enforcement of regulations administered by the Coast Guard, means the navigable waters of the United States, 33 C.F.R. § 2.10–10, supra. Navajo Reservoir has been determined by the Commandant, United States Coast Guard, to be a part of the navigable waters of the United States. 33 C.F.R. §§ 2.26–1 and 2.53–1, supra. This determination is expressed in 34 F.R. 2203, February 14, 1969, as follows:

"A determination has been made that the Navajo Reservoir crosses the border between Colorado and New Mexico and is part of the navigable waters of the United States because it permits navigation or travel between two States, and this interpretation is in 33 CFR 2.26–1 and 2.53–1. The main body of the reservoir extends 35 miles within New Mexico along the San Juan River. After crossing the Colorado-New Mexico State line, the reservoir extends about 7 miles into Colorado."

Although this determination by the Commandant, United States Coast Guard, is not conclusive of the issue of navigabili-

ty, it is relevant evidence thereon. See Lutesville Sand & Gravel Co. v. McLaughlin, 181 Ark. 574, 26 S.W.2d 892 (1930). As already stated, we agree with this determination, and disagree with the finding and conclusion of the trial court that:

> "Navajo Lake is not used nor susceptible of use as a body of water in its ordinary condition over which trade and travel may be conducted in the customary modes of trade and travel on water."

And, therefore, is "not navigable waters of the United States."

In *The Daniel Ball, supra,* the Supreme Court announced the following test:

> "* * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

Navigable waters of the United States may include artificial [or man-made] waterways, as well as those which are natural. Ex Parte Boyer, 109 U.S. 629, 3 S.Ct. 434, 27 L.Ed. 1056 (1883).

The capability or susceptibility for use by the public as a highway for trade and travel is the true criterion by which to determine the navigability of waters. Economy Light & Power Co. v. United States, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921); The Montello, 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874); *The Daniel Ball, supra;* Madole v. Johnson, 241 F. Supp. 379 (W.D.La.1965). This criterion is applicable if the capability can be accomplished by making reasonable improvements. United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L. Ed. 243 (1940); Economy Light & Power Co. v. United States, supra; Pennsylvania Water & P. Co. v. Federal Power Com'n., 74 App.D.C. 351, 123 F.2d 155 (1941).

The type of craft used in accomplishing trade and travel over the waters is of no particular significance. Arizona v. California supra; *The Montello, supra*; The Lucky Lindy, 76 F.2d 561 (5th Cir. 1935); Hahn v. Ross Island Sand & Gravel Co., 214 Or. 1, 320 P.2d 668 (1958), rev'd. on other grounds. 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed.2d 292 (1958).

Applying the capability, or susceptibility, test to the waters of Navajo Lake on the date of the accident, we are of the opinion that these waters were navigable waters of the United States, and that the trial court should have awarded plaintiff and plaintiff in intervention damages consistent with the rules applicable in maritime collision cases.

The judgment is reversed and the cause remanded to the trial court for the purposes of determining and awarding plaintiff and plaintiff in intervention the damages to which they are entitled.

It is so ordered.

HENDLEY, J., concurs.

SPIESS, C. J., dissents.

SPIESS, Chief Judge (dissenting).

The reversal directed by the majority has as its basis a determination that Navajo Lake constitutes navigable waters of the United States and consequently that the rights of the litigants in this action are to be determined by maritime law. This conclusion is based upon a finding of fact made here by the majority. The trial court refused a proposed finding that in effect would declare that the lake constituted

navigable waters of the United States, and made a contrary finding. In my opinion the judgment of the trial court should be affirmed. It is horn-book law that an appellate court should give effect to findings of fact by the trial court which have substantial support in the evidence.

It is fundamental that navigability is a fact question. Those waters which are navigable in fact are navigable in law. United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870).

The burden of proof rests upon the party asserting navigability. The test frequently applied by the Supreme Court of the United States and quoted by the majority is stated in *The Daniel Ball,* supra.

> "* * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

The Daniel Ball, although involving a river, has been considered applicable in principle to other bodies of water, including inland lakes. See Marine Office of America v. Manion, D.C., 241 F.Supp. 621 (1965).

In the trial court, appellants sought to prove that Navajo Lake constitutes navigable waters of the United States and requested findings to that effect. Clearly, to meet the established tests, appellants were required to prove that the lake in its *ordinary condition* forms a continued highway over which commerce is, or may be, carried on between the states of Colorado and New Mexico. To my mind there is no question that the evidence upon this issue was conflicting, and, as disclosed by the record, the trial court resolved the issue by finding:

> "4. Navajo Lake is not used or susceptible of use as a body of water in its ordinary condition over which trade and travel may be conducted in the customary modes of trade and travel on water."

I believe that it is important to set forth the testimony which was presented to the trial court in order to demonstrate the conflict in such testimony upon the material issue and, further, to show that the trial court's finding against navigability has substantial support.

The only testimony related to traveling by boat upon the lake from New Mexico to Colorado consisted of that given by the plaintiff-appellant, Wreyford, and witnesses presented by him. Wreyford testified:

> "Q I think you stated that prior to the date of the accident, you had boated on Navajo Lake, is that correct?
>
> A Yes.
>
> Q Had you gone into Colorado?
>
> A Yes, I had been into Colorado earlier that year.
>
> Q Do you know any particular location, or what county you were in in Colorado?
>
> A Well, we went up the San Juan River and crossed into the State of Colorado where the old fenceline and state line is, and also the summer prior to that we had been up into Colorado water skiing on a small ski boat.
>
> Q On this—the first trip that you mentioned, what boat were you operating at that time?
>
> A The large houseboat that I have.
>
> Q Describe the dimensions of that boat for the court?
>
> A It's a fifty-two foot houseboat, twelve foot wide.

Q Were you able to navigate this without difficulty on the confines of the lake within Colorado?

A Yes.

Q Do you know how far you went into Colorado?

A Oh, I would say probable three to four miles, something like that.

Q Do you know if there were any docking facilities available?

A There's a ramp there. They do not have a marina. You can—at Arboles, you can buy gas, and in about any quantity you want, but they do not have their pumping facilities down to the lake, it has to be brought down in cans.

Q And any boats docked or stationed in Colorado travel to New Mexico, particularly to the marina at Navajo Dam?

A Yes, I have seen boats out there from up there, but to be able to identify a specific one, no sir, I couldn't.

Q How were you able to establish that they were boats from Colorado?

A Well, on one occasion, I had talked with an individual that had come down from Colorado.

Q Is there any special marking that Colorado boats have in the way of number of licencing [sic] or what not that you know of?

A Yes, they have a different numbering system, but I couldn't tell you exactly what it is. It's basically the same type of numbering.

Q Have you ever purchased any gasoline or any supplies while traveling from New Mexico to Colorado?

A Not myself, no sir."

One witness, Arnold, testified that he had boated upon the lake for several years. Upon being asked whether he had ever traveled to Colorado on the lake he answered: "Yes, sir, several times." He testified that he had traveled to Colorado on various types of boats at different times of the year.

Another witness, John Agee, testified that he had traveled by boat upon the lake into Colorado. Upon being asked how often he traveled into Colorado he said, "Oh, I have been going out there for several years, but I would say maybe once or twice a year at the most I was in Colorado."

Each of these witnesses testified that he had traveled by boat from New Mexico into Colorada upon the lake at different times. None of them, however, testified that the lake in its ordinary condition would support travel between the states, nor did he give any testimony from which such inference could properly be drawn by the court.

A Richard Dempsey, likewise called by the plaintiff, gave the following testimony:

"Q Mr. Dempsey, do you know, as a matter of fact, that Navajo Lake extends into the State of Colorado?

A Yes, it does.

Q Do you know that it is possible to navigate a vessel or a water craft from New Mexico into the State of Colorado on Navajo Lake?

A During high water, yes.

Q All right; have you observed boats from Colorado coming into the State of New Mexico?

A Yes, I have."

From this testimony the trial court could have inferred that the lake would not support travel between the states in its ordinary condition, but would support such travel during periods of high water.

A witness, Stanley Wells, testified that he had been boating on Navajo Lake since 1963 and further gave the following testimony:

"Q How often have you traveled into Colorado?

A Oh, we'd go anywhere from two or three to a dozen times a year.

Q During 1967, do you know what the water level was on Lake Navajo?

A I don't know the elevation. It was about it's highest point that it had been since its been there.

Q At any time since you have been boating on Lake Navajo, or what was formerly Lake Navajo, is there any time that you couldn't take a boat into Colorado?

A There was one time, it went into Colorado for a short period of time and the lake was dropped, and I believe that was in either 1964 or 1965, I am not sure.

Q But has the water level always since that time extended into Colorado?

A Yes, sir.

Q What was the water level in 1967, on July 3rd of that year?

A Well, it was at the highest—if I recall right, it was the highest point that it had ever been in its history.

Q During some periods of the month—of the year, does the water level on the lake go down?

A Yes, it does. I think, in fact, it was just recently going up, I think it's coming back up now.

Q And even in the low periods, are you able to take a boat and go into Colorado?

A Oh, yes."

From the Wells testimony the court could have found that the lake in its ordinary condition would support travel between the states of New Mexico and Colorado. The trial court, however, accepted the testimony given by Richard Dempsey, rejected Wells' testimony, and made Finding No. 4, which we have quoted.

The majority say that the evidence adduced at the trial relating to the question of navigability is undisputed. They quote the trial court's Finding No. 3 as follows:

"On the date of the accident, Navajo Lake was a body of water lying within two states, New Mexico and Colorado, and capable of being traveled upon by small boats between the two states."

This finding appears to be limited to the date of the accident.

Navigability involves the ordinary condition of the lake, and not its condition on a single day. This finding does not purport to be a determination that the lake in its *ordinary condition* will support commerce between New Mexico and Colorado, and does not support the theory advanced by appellants. The majority likewise say that Navajo Reservoir has been determined by the Commandant, United States Coast Guard, to be a part of navigable waters of the United States. The opinion of the Commandant was not submitted to the trial court, nor did it appear in this case until the filing of appellant's reply brief.

The majority say of the determination of the Commandant, "Although [it] is not conclusive of the issue of navigability, it is relevant evidence thereon." They then adopt the determination of the Commandant and reject the finding of the trial court. A novel appellate procedure has resulted. The Court of Appeals not only has become the fact finder, but also accepts evidence which was not submitted during the trial, and of which counsel were not accorded the right to question. Upon this evidence it determines the rights of the parties.

This holding of the majority that Navajo Lake is part of the navigable waters of the United States might well have far-reaching effect in that admiralty jurisdiction would be imposed not only upon actions sounding in tort but upon many types of contractual obligations, upon liens, various types of services, crimes committed upon vessels and the waters of the lake, and workmen's compensation matters involving employment at or in connection with boating upon the lake.

I, accordingly, register my dissent.

477 P.2d 602

HUBBARD BROADCASTING, INC., a corporation, Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE, a Municipal Corporation, and General Communications and Entertainment Co., Inc., a corporation, Defendants-Appellants.

No. 9079.

Supreme Court of New Mexico.

Dec. 7, 1970.

Civerolo, Hansen & Wolf, Albuquerque, for General Communications.

Frank M. Mims, Albuquerque, for City of Albuquerque.

Frank R. Coppler, Santa Fe, amicus curiae, for Municipal League of New Mexico.

Modrall, Seymour, Sperling, Roehl & Harris, Peter J. Broullire, III, Albuquerque, Covington & Burling, John W. Douglas, Quin Denvir, Washington, D. C., for appellee.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Bernalillo County, New Mexico, for a declaratory judgment that defendant City of Albuquerque did not have authority to grant franchises to the defendant General Communications and Entertainment Company, Inc., hereinafter referred to as "GenCoE," to use the city streets and other public properties for a cable television system. The case was tried to the court without a jury and the court declared that the ordinances granting the franchises were invalid. Subsequent to the entry of the judgment, Hubbard petitioned the court for further relief. The court thereon declared that the City did not have power to grant a permit, license or other authority to GenCoE to use the city streets or rights of way for cable television installations; enjoined the City from issuing the permit or license; and enjoined GenCoE from accepting the same. Defendants appeal both the original judgment and the order granting further relief. The parties will be designated as they appeared in the lower court.

Hubbard claimed standing to sue based upon competition, degradation of its signal transmitted on the cable system and, alternatively, loss of good will and "ghosting," which is a dual picture caused by the dif-

ference in speed of transmission between air and cable signals.

Defendants contend no standing to sue; no justiciable controversy; pre-emption by the Federal Communications Commission; the court had no jurisdiction; the ordinances were valid; and that Hubbard had no legal right or interest in the validity of the ordinances.

Judgment for Hubbard was entered on February 24, 1970. Shortly thereafter, the City passed another ordinance granting a permit or license to GenCoE to establish a CATV system, revocable at the will of the City. Defendants were ordered to show cause why the later ordinance No. 41–1970 should not be held invalid. The trial court held the permit or license invalid and enjoined the City from granting any type of authority to GenCoE to operate a CATV system in Albuquerque, and also enjoined GenCoE from accepting such a permit or license.

The amicus curiae brief, contending that CATV is a public utility, is noted with a great deal of interest; however, we do not decide whether a CATV system is or could be considered to be a public utility, due to the admission by defendants that CATV is not a public utility. Several jurisdictions have considered this question, notably, TV Pix, Inc. v. Taylor, 304 F.Supp. 459 (D.Nev. 1968); Staminski v. Romeo, 62 Misc.2d 1051, 310 N.Y.S.2d 169 (1970); Aberdeen Cable TV Service, Inc. v. City of Aberdeen, S.D., 176 N.W.2d 738 (1970).

The statute under which Hubbard claims standing to maintain the action is § 22–6–1, N.M.S.A., 1953 Comp., as follows:

> "In cases of actual controversy, the courts of record of the state of New Mexico shall have power, upon petition, declaration, complaint, or other appropriate pleadings, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of the final judgment or decree and be reviewable as such."

Does Hubbard have standing to maintain this action? This question is answered in the negative for the following reasons. Hubbard contends and admits that the main issues here are competition with a rival business, economic loss of revenue and resulting profits, loss of good will, and "ghosting." Such contentions are without merit and are answered by the recent case of Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970), wherein this court considered similar contentions as those presented by Hubbard. Although the Ruidoso case was a petition for review of an order of the Banking Commission, and was decided under a different statute § 48–22–34, N.M.S.A., 1953 Comp., (Repl. 1966), the same principles of law are applicable here.

> "One whose only injury will result from lawful competition suffers no legal wrong. * * *
>
> "The right to appellate review of a judgment or order exists only in one who is aggrieved or prejudiced thereby. * * Appeals are ordinarily not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct error injuriously affecting appellant. * * *
>
> "* * * The true test is whether appellant's legal rights have been invaded, not merely whether he has suffered [or may suffer in the future] any actual pecuniary loss or been deprived of any actual pecuniary benefit. * * *"

Ruidoso State Bank v. Brumlow, supra, and cases cited therein. See, Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902 (1954); New Orleans, Mobile and Texas Railroad Company v. Ellerman, 105 U.S. (15 Otto) 166, 26 L.Ed. 1015 (1882); Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L. Ed. 374 (1938); Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); Hardin v. Kentucky Utilities Co., 390 U.S.

1, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968); Kansas City Power & Light Company v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924 (1955). There being no legal right invaded, Hubbard has no standing to attack the ordinances. Alabama Power Co. v. Ickes, supra.

Nor does this case present a situation comparable to State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970), wherein the court decided that, because of the duties of the public officers involved, each was an interested party.

Hubbard contends that the City acted without statutory authority in enacting all ordinances with which we are here concerned and, therefore, such ordinances are invalid. Hubbard distinguishes Ruidoso State Bank v. Brumlow, supra, on the basis that it held there was no right to be free from "lawful competition," but here, it claims there is "unlawful" competition since the ordinances were invalid. Hubbard also argues that the Declaratory Judgments Act uses a more liberal standard for standing, namely, "any interested party," § 22-6-1, supra, as opposed to the Banking Act, which requires that a person must be "aggrieved and directly affected," § 48-22-34, supra.

Whether or not the City of Albuquerque acted ultra vires is a question quite apart and distinct from whether GenCoE is a lawful competitor. Cable television per se is not illegal or unfair competition. Cable Vision v. KUTV, 335 F.2d 348 (9th Cir.1964); Herald Publishing Co. v. Florida Antennavision, Inc., 173 So.2d 469 (Fla. App.1965).

In Alabama Power Co. v. Ickes, supra, the United States Supreme Court stated the distinction by the following example:

> "John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

In Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941), it was held that:

> "* * * [A] financial loss to the plaintiff objecting to a city ordinance was not alone ground for holding the ordinance and its enforcement invalid * * *."

One injured by competition authorized by a state instrumentality has no standing to maintain a suit for declaratory relief against such state instrumentality. Nantucket Boat Inc. v. Woods Hole, 345 Mass. 551, 188 N.E.2d 476 (1963); 22 Am.Jur.2d Declaratory Judgments, § 32 at 883.

The city is the sole judge as to what is best for the public health, welfare and safety of its inhabitants. Barber's Super Markets, Inc. v. City of Grants, 80 N.M. 533, 458 P.2d 785 (1969).

As to whether our Declaratory Judgments Act in its use of "any interested party" confers a more liberal test than the Banking Act in Ruidoso State Bank v. Brumlow, supra, we do not need to decide since, as stated in Hardin v. Kentucky Utilities Co., supra, the general rule is that economic injury from lawful competition cannot, in and of itself, confer standing to question the legality of any aspect of the competitor's operations. See also, Tomlin v. Town

of Las Cruces, 38 N.M. 247, 31 P.2d 258 (1934); Green v. Town of Gallup, supra; American Linen Supply of New Mexico v. City of Las Cruces, 73 N.M. 30, 385 P.2d 359 (1963); State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965); Barber's Super Markets, Inc. v. City of Grants, supra.

Hubbard urges that the recent decisions of the United States Supreme Court in Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), establish the proposition that the prospective future loss of profits from additional competition was a sufficient basis for standing to challenge governmental action authorizing such competition. In those cases, the Supreme Court determined that a particular provision of the statutes involved brought the complaining parties within "the zone of interests" protected by the statutes and conferred standing to sue. In Association of Data Processing Service Organization, Inc. v. Camp, supra, the plaintiff complained that it would be economically injured by national banks making their data processing services available to others. The Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U.S.C. § 1864, provided that no bank service corporation could engage in any activity other than bank service for banks. The Supreme Court found that this provision created a protectable zone of interest sufficient for standing purposes. To the same effect is Curran v. Laird, 136 U.S.App.D.C. 280, 420 F.2d 122 (1969), wherein the Circuit Court found standing if the statute reflected a purpose to protect the competitive interest. The ordinances before this court do not present a comparable situation.

Since we hold that Hubbard does not have standing to maintain the action, it must be dismissed. State ex rel. Overton v. New Mexico State Tax Com'n, 81 N.M. 28, 462 P.2d 613 (1970). The other points presented need not be discussed.

The cause is reversed and remanded to the trial court with instructions to reinstate the case on the docket and enter a new judgment dismissing the complaint with prejudice.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

477 P.2d 605

BOARD OF EDUCATION OF the VILLAGE OF CIMARRON, New Mexico, and J. Leslie Davis, W. C. Littrell, William D. Hickman, Lawrence Rosso, and Eloy Sanchez, members of its governing board, Relators,

v.

James A. MALONEY, Attorney General of the State of New Mexico, Respondent.

No. 9160.

Supreme Court of New Mexico.

Dec. 7, 1970.

Thomas A. Donnelly, Catron, Catron & Donnelly, Santa Fe, for relators.

James A. Maloney, Atty. Gen., Mark B. Thompson, III, Asst. Atty. Gen., Santa Fe, for respondent.

Kegel & McCulloh, Santa Fe, amicus curiae.

OPINION

TACKETT, Justice.

Relators, Board of Education of the Village of Cimarron, New Mexico, filed a petition for a writ of mandamus in the Supreme Court on November 12, 1970. An alternative writ was issued, directed to the respondent James A. Maloney, Attorney General, ordering him to approve the bond transcript submitted by relators or, in the alternative, to respond to the writ. The Attorney General filed a response.

Relators, on September 29, 1970, held a special school bond election for the purpose of voting on the question of whether Cimarron Municipal School District No. 3, Colfax County, New Mexico, should create a debt by issuing its general obligation bonds in the total sum of $97,000 for the purpose of erecting, furnishing, remodeling and making additions to school buildings, and purchasing and improving school grounds in the district.

At the time of the election, relators did not maintain separate ballot boxes during the balloting, so as to segregate the votes of qualified electors of the school district, who were the owners of real estate within the district, from the votes of those qualified electors who did not own real estate within the district. This "dual ballot box procedure" was provided for by § 11-6-38, N.M.S.A., 1953 Comp. (1970 Supp.).

The vote was in favor of the issuance of the school bonds. Relators submitted a complete transcript of the bond election proceedings to respondent, seeking his certification of approval of the bond issue as to form and legality. Respondent refused to approve the legality of the bond issue, for the reason that there was no showing that a majority of the then owners of real estate within the school district had voted in favor of creating the general obligation bond debt as required by Art. IX, § 11, New Mexico Constitution, and because the election was not conducted with dual ballot boxes as provided for by § 11-6-38, supra.

The issue before us is that part of Art. IX, § 11, Constitution of New Mexico, which provides inter alia that:

> "* * * only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question have voted in favor of creating such debt. * * *"

The Constitutions of several states, notably Arizona, Colorado, Louisiana and

Utah, had statutes similar to our constitutional provision that only allowed "owners of real estate" to vote on the question of creating debt through the issuance of general obligation bonds.

The Supreme Court of the United States has considered the very same question now before this court and has declared that a provision in a state constitution, which only allows owners of real estate to vote on the question of creating a debt through the issuance of bonds, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. City of Phoenix, Ariz. v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); Stewart v. Parish School Board of Parish of St. Charles, 310 F.Supp. 1172 (E.D.La.1970); Pike v. School District No. 11 in El Paso County, Colorado, Colo., 474 P.2d 162 (1970); Cypert v. Washington County School District, Utah, 473 P.2d 887 (1970).

This court is totally in agreement with the statement contained in the Utah case, supra, as follows:

> "Notwithstanding our emphatic disagreement with the majority in the Phoenix case [399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523], we realize that it is for the present to be recognized as the law; and that as such it renders those aspects of Section 3 of Article XIV of our State Constitution, and Sections 11–14–2 and 5, U.C.A.1953 [New Mexico Constitution Art. IX, § 11], inoperable insofar as they require that only property taxpayers [real property owners] be permitted to vote in such bond elections. We further observe that this should have no effect whatsoever in nullifying or limiting any other aspect of those provisions of the law. In other words, it is our opinion that the aspect of those provisions just referred to as having been rendered inoperable, are severable from the other aspects of the aforesaid provisions of our State Constitution and statutes, so that bond elections may be held and bonds may be issued by cities, towns, counties, school districts, or other authorized public entities at a proper election participated in by all qualified voters; and without the latter being limited to those paying property taxes [real property owners]."

In City of Phoenix v. Kolodziejski, supra, the majority opinion states:

> "In view of the fact that over the years many general obligation bonds have been issued on the good faith assumption that restriction of the franchise in bond elections was not prohibited by the Federal Constitution, it would be unjustifiably disruptive to give our decision in this case full retroactive effect. We therefore adopt a rule similar to that employed with respect to the applicability of the Cipriano decision [Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969)]: our decision in this case will apply only to authorizations for general obligation bonds which are not final as of June 23, 1970, the date of this decision. In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law. * * *"

Our applicable statute, § 77–15–10, N.M.S.A., 1953 Comp. (ch. 16, § 237, N.M.S.L. 1967), provides:

> "No action concerning any question placed on the ballot at a bond election shall be maintained in the district court unless the action is filed within ten [10] days after the publication of the certificate of results of the bond election by the superintendent of schools."

In the instant case, the election was held after June 23, 1970, the date of the decision in Phoenix v. Kolodziejski, supra. This is the controlling date and our decision here is retrospective only as to elections held after that date, or to elections

held prior to that date which were challenged within ten days of the publication of the certificate of results, the proceedings of which were still pending on June 23, 1970.

Mandamus is a proper remedy in the instant case. See, Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940); Board of Education of Gallup Municipal School District v. Robinson, 57 N.M. 445, 259 P.2d 1028 (1953); Board of Education of City of Aztec v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964). In the Sedillo case, supra, the court said:

> "We think the duties of the Attorney General are ministerial and subject to control by mandamus. * * *"

We agree.

The amicus curiae brief is noted.

The alternative writ of mandamus will be made permanent.

It is so ordered.

COMPTON, C. J., and WATSON, J., concur.

477 P.2d 608

Boston E. WITT, Special Assistant Attorney General, Petitioner-Appellant,

v.

Edward M. HARTMAN, Director, Department of Finance and Administration of the State of New Mexico, Respondent-Appellee.

No. 8991.

Supreme Court of New Mexico.

Dec. 7, 1970.

Standley, Witt & Quinn, Sante Fe, for petitioner-appellant.

James A. Maloney, Atty. Gen., Ray H. Shollenbarger, Jr., Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

WATSON, Justice.

This is an appeal from an order quashing an alternative writ of mandamus by

which respondent-appellee had been directed to approve a reimbursement voucher and issue warrants in payment of per diem and airplane fare covering petitioner-appellant's out-of-state travel, or to show cause why he had not done so.

Appellant contends that appellee has a clear ministerial duty (i. e., the duty involves no discretion) to approve the reimbursement voucher and issue the warrants by virtue of § 11–1–9(E), N.M.S.A., 1953 Comp., for if that section attempts to place any discretion in the governor or his delegate, it is unconstitutional in failing to set forth standards governing the exercise of such discretion. Art. III, § 1, New Mexico Constitution. He cites State ex rel. Lee v. Hartman, 69 N.M. 419, 367 P.2d 918 (1961); State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 925 (1961); and State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912), in support of his contentions.

Section 11–1–9, supra, so far as is pertinent, provides:

> "A. Claims by public officers and employees for reimbursement out of public funds for expenses of transportation, lodging or subsistence shall be paid only as hereinafter provided and in accordance with rules and regulations of the department of finance and administration conformable hereto.
>
> "* * * * * *
>
> "E. Public funds shall not be expended to reimburse public officers and employees for expenses of out-of-state travel without written authorization from the governor having been obtained before the travel is performed, except as otherwise specifically provided in the General Appropriations Act. The governor may delegate, in writing, the authority to approve out-of-state travel to any public officer or group of public officers. * *"

Pursuant to subsection A of § 11–1–9, supra, appellee adopted rules and regulations with which appellant did not comply. Appellant does not question the rules and regulations as unreasonable, if discretion is lawfully conferred by the statute.

The trouble with appellant's position is that if the statute is constitutional, then the discretion for appellee's action in refusing the voucher is warranted, since the reasonableness of rules and regulations is not questioned and was admittedly not complied with; but if the statute is unconstitutional, then appellant cannot by mandamus compel appellee to act, for there would be no applicable constitutional statutory authority. Appellant, as petitioner in a mandamus action, cannot question the constitutionality of the very act he relies upon in asking the court to compel performance. Youree v. Ellis, 58 N.M. 30, 265 P.2d 354 (1954); State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944); State ex rel. Synod of Ohio v. Joseph, 139 Ohio 229, 39 N.E.2d 515 (1942).

Appellant would have us find the statute constitutional, but hold that because of the lack of standards provided by the legislature relator has no discretion under it. In State v. Hartman, supra, the Department of Finance and Administration, without statutory authority, had reduced the budget of the State Oil and Gas Accounting Commission. We granted a writ of mandamus directing the department to approve the Commission's budget which it had reduced. There, the relevant portion of the statute (ch. 253, § 8, N.M.S.L.1957) read:

> "Expenditures may be made for the purpose indicated and in accordance with the annual budgets approved by the department of finance and administration."

We there held that the words which made the budget "subject to the approval" of the budget division did not permit the arbitrary reduction of it. We then said:

> "* * * The Respondent cannot refuse approval without some basis, and if the budget as submitted is within the amounts appropriated and the items are proper, he is given no discretion except to approve them. Compare State ex rel. S. Monroe & Son Co. v. Baker, 112 Ohio

St. 356, 147 N.E. 501." (69 N.M. at 427, 367 P.2d at 923.)

The question of the appropriateness of the writ of mandamus in State v. Hartman, supra, was not discussed. But we note that in that case the legislature authorized the expenditures, while here subsection E of § 11–1–9, supra, provides that public funds shall not be expended without the authorization.

Mandamus lies to compel the performance of a statutory duty only when it is clear and indisputable. State ex rel. Sun Co. v. Vigil, 74 N.M. 766, 398 P.2d 987 (1965); McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944); Wilson v. Gonzales, 44 N.M. 599, 106 P.2d 1093 (1940); State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090 (1935); and Regents of Agricultural College v. Vaughn, 12 N.M. 333, 78 P. 51 (1904). Appellant asks us to hold that a statute which states that public funds shall *not* be expended to reimburse public officers without written authorization from the governor or his designee means that where funds are budgeted and appropriated for a legitimate purpose the governor's designee has a clear and undisputed statutory duty to approve the voucher. But in construing a statute we must give the words used their ordinary meaning and read the entire act. Winston v. New Mexico State Police Board, 80 N.M. 310, 454 P.2d 967 (1969). We cannot overlook subsection A, supra, which provides for rules and regulations by the department, and the exceptions from gubernatorial authorization made for legislators, sheriffs, etc., and those paid by federal or contract funds (See (1), (2), and (3) of subsection E, supra). We find no legislative intent that respondent must approve all state vouchers where appropriated funds are available.

Mandamus lies "to compel the performance of an act which the law specifically enjoins as a duty resulting from an office." Section 22–12–4, N.M.S.A., 1953 Comp. Here, no statutory or legal duty is shown to have been cast upon the respondent by subsection E, supra, standing alone. Carson Reclamation District v. Vigil, 31 N.M. 402, 246 P. 907 (1926).

Even if the moneys for this purpose were made available in the appropriations act, and that act set the rate for payment, we find nothing therein *requiring* appellee to approve reimbursement vouchers; and that is what appellant would require him to do by this mandamus action.

We affirm the judgment of the district court in quashing the alternative writ.

It is so ordered.

COMPTON, C. J., and SISK, J., concur.

477 P.2d 807

Frank DAUGHTREY and Margie Daughtrey, his wife, and First National Bank in Albuquerque, Defendants-Appellants and Cross-Appellees,

v.

James O. CARPENTER and Orrion Perry, d/b/a Gas Appliance Service Co., Defendants-Cross-Claimants-Appellees,

Blueher Lumber Company and Dar Tile Company, Defendants-Appellees and Cross-Appellants.

No. 8967.

Supreme Court of New Mexico.

Dec. 14, 1970.

Stuart Hines, Clyde E. Sullivan, Jr., Albuquerque, for defendants-appellants.

McNeany, Rose & Sholer, Albuquerque, for James O. Carpenter.

McAtee, Marchiondo & Michael, Pat Chowning, Albuquerque, for Orrion Perry.

Oliver Burton Cohen, Albuquerque, for Blueher Lumber Co. and Dar Tile Co.

OPINION

WATSON, Justice.

The complaint in this action was filed by a subcontractor of Mock Homes, Inc. to foreclose a labor and material lien against the home of Frank and Margie Daughtrey. The Daughtreys purchased the premises so soon after its construction that the time for filing liens had not expired. At the time of their purchase they executed a mortgage to First National Bank in Albuquerque. The complaint joined other lien claimants against the property, some of whom filed cross-claims; and this appeal is by the home owners and the mortgagee from a judgment in favor of cross-claimants James O. Carpenter, Blueher Lumber Company, Dar Tile Company, and Orrion Perry. The claims of the plaintiff and the other defendants have either been settled or dismissed without appeal. This case is similar in background and proceeding to that described in Brito v. Carpenter, 81 N. M. 716, 472 P.2d 979 (1970).

Appellants' first claim of error is that the statute of limitations has run against appellees' claims because they did not timely commence proceedings on their cross-claims. Section 61–2–9, N.M.S.A., 1953 Comp., reads in part:

> "No lien provided for in this article binds any building, mining claim, improvement or structure for a longer period than one (1) year after the same has been filed, unless proceedings can be commenced in a proper court within that time to enforce the same * * *."

Here, although the cross-complaints of appellees Blueher, Dar Tile, and Perry were timely filed with the clerk of the court, appellants state they were not served with reasonable diligence as required by Rule 4(e) (5) of the Rules of Civil Procedure [§ 21–1–1(4) (e) (5), N.M.S.A., 1953 Comp.].

After the complaint was filed, and on December 12, 1966, the attorneys for appellants Daughtreys filed an Entry of Appearance in this case; and on January 9,

1967, the attorneys for appellant First National Bank filed a similar appearance. On January 3, 1967, an Answer, Counterclaim, and Cross-Claim was filed by appellee Blueher, and a similar pleading was filed on the same day by appellee Dar Tile. Both of these appellees had the same attorney; and when their pleadings were filed, they bore his certificate of service by mailing to opposing counsel of record, although the date of such mailing is not noted. Since there had been attorneys of record for the Daughtreys since December 12, 1966, we believe there was sufficient evidence for the trial court to find that service of these cross-claims on the Daughtreys was timely. Rules 5(a) and (b) of the Rules of Civil Procedure [§ 21–1–1(5) (a) and (5) (b), N.M.S.A., 1953 Comp.] do not require service of a summons with a cross-claim except on parties in default.

Appellant First National Bank had not appeared at the time of the filing of Blueher's and Dar Tile's pleading bearing their attorney's certificate. There is no evidence as to service of the cross-claims of Blueher and Dar Tile on the Bank. We need not decide, however, whether failure of service of the claim on the Bank mortgagee prevents the establishment of the lien or a determination of the relative priorities as against it, as these questions were not called to the attention of the trial court. State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969). Appellant Bank did submit a requested finding that appellees failed to serve cross-complaints on it prior to the trial, and it was not afforded 30 days within which to answer. Even this objection was not pressed prior to or during the trial in which it appeared generally. See Miera v. Sammons, 31 N. M. 599, 248 P. 1096 (1926).

An Answer, Cross-Claim and Cross-Complaint was filed by appellee Perry on March 3, 1967, which bore his attorney's certificate of mailing to opposing counsel on March 1, 1967. We believe this was sufficient evidence for the court to find timely service of these pleadings on both appellants who had counsel of record at that time and we affirm its ruling as to Perry as we do for Blueher and Dar Tile.

The case here on appeal was A23766 below and was involved in the consolidation and grouping described in Brito v. Carpenter, supra. Appellee Carpenter here was appellee Carpenter in Brito, and the recital of Carpenter's pleading in Brito is applicable here. In his "Responsive Pleading" filed in "No. 23258 et seq Consolidated" he did not mention this case, No. A23766. The same order of October 11, 1967, described in Brito, permitted an amendment to add under *Cause Number:* "A–23766"; under *Amount:* "$525.00"; and under *Date of Recording:* "May 13, 1966." Even if sufficient, this was untimely. Not until February 3, 1969, did appellee Carpenter, by an "Amended Answer, Cross-Claim, and Counterclaim," file an appropriate cross-claim in this action. As we held in Brito, neither of the amendments could relate back because no claim for relief was filed within the statutory period. Carpenter's failure to file suit within one year from the filing of his lien is fatal, regardless of any lack of diligence in service on appellants. We cannot affirm as to appellee Carpenter.

At the trial, appellants objected to the admission into evidence of appellee Blueher's claim of lien, because it was not properly verified by the person signing the claim, as required by § 61–2–6, N.M.S.A., 1953 Comp. On June 7, 1966, a verified claim of lien was filed with the county clerk for Blueher Lumber Co., Inc. It was signed and verified as of June 3, 1966, by Raymond Bennett, general manager of the company. The lien was on a printed form with the blanks filled in. After the printed word "CONDITION:" the words "Total amount unpaid." were typed. After this claim of lien had been recorded the original document was returned to Blueher's attorney, and the word "SUPPLEMENTAL" was typed above the printed words "MECHANIC'S CLAIM OF LIEN," and following the words "Total amount unpaid." the following was added: "/ materials furnished from 1/26/66 thru

3/10/66." A list of Mock Homes' properties was also attached, and thereafter the supplemental or amended claim was again signed and verified by the general manager as of June 15, 1966, and refiled with the county clerk on June 16, 1966. The supplemental or amended lien claim was admitted into evidence.

No contention is made that either the first or second lien claim was not timely filed. The contention is only that an alteration of the original instrument voids it. But the cross-claim of appellee Blueher was not based upon the original lien claim. The Supplemental Mechanic's Lien Claim is attached to the pleading and is the one relied upon. It appears to be timely filed, to contain the necessary recitals, and to be properly verified. The fact that Mr. Bennett may have verified his previous verification and reused a form which had previously been recorded would not be material. Hot Springs Plumbing and Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1933). Certainly no prejudice is shown to the owners. Crego Block Co. v. D. H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969). We find no error in admitting into evidence the supplemental or amended claim filed on June 16, 1966.

Appellants question the trial court's jurisdiction to enter a judgment on appellee Perry's claim because his "Answer, Cross-Claim and Cross-Complaint" does not allege the time and place when the materials were furnished or that they were incorporated and used in the property or made pursuant to a contract nor does it allege when the work was finished or that notice was given to the owner. In addition, it does not allege that the lien was timely filed or that Perry was a licensed contractor at the time the labor and materials were furnished.

Perry had five lien claims as a result of his subcontracts in the Mock Homes subdivision. These were all incorporated into a single pleading. It was filed in the consolidated action and in this cause. It asked foreclosure of five lien claims on the premises involved in this suit and the premises in four other suits. It referred to the matters involved in this cause as follows:

"Cause No.	Exhibit No.	Amount
* * *	* * *	* * *
A23766	3	$639.60
* * *	* * *	* * * "

Exhibit "3" is the claim of lien involving the Daughtreys' premises. A copy of it is attached to the pleading filed herein. It recites the name of the owner, the person by whom the claimant was employed, and to whom he furnished materials, and it describes the property and states the amount the claimants demand. In addition to this information, § 61–2–6, N.M.S.A., 1953 Comp., requires "a statement of the terms, time given and conditions of his contract." Under this recital in the printed form is typed "30 days net cash." The lien claim would comply with the requirements of the statute. Crego Block Co. v. D. H. Overmyer Co., supra; Allsop Lumber Co. v. Continental Casualty Co., 73 N.M. 64, 385 P.2d 625 (1963). The recitals in the exhibit are part of the pleading to which it is attached. Rule of Civil Procedure 10(c) [§ 21–1–1(10) (c), N.M.S.A., 1953 Comp.].

There are no special statutory requirements for the allegations in complaints to enforce a mechanic's lien. All of the matters indicated by appellants, which appellee Perry failed to allege, were established at the trial by his testimony and exhibits. Appellants objected only to an affidavit of the city building inspector concerning the completion of the gas appliance work. Even without this affidavit there was sufficient evidence of incorporation and use of the property. We will treat the complaint as amended to conform to the proof. Rule of Civil Procedure 15(b) [§ 21–1–1(15) (b), N.M.S.A. 1953 Comp.]; Home Plumbing and Contracting Company v. Pruitt, 70 N.M. 182, 372 P.2d 378 (1962).

Appellants cite Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d

200 (1966), as authority for raising the jurisdictional question on appeal for the first time: i. e., the failure of appellee Perry to allege that he was a duly licensed contractor as required by the second paragraphs of both § 67–16–14, N.M.S.A., 1953 Comp., or the more recent statute, § 67–35–33, N. M.S.A., 1953 Comp. (1969 Supp.). They point out that the proof that Perry was licensed was not submitted until the trial, twenty-one months after his cross-claim was filed and more than two years after his lien was filed, and that to permit an amendment to conform to the proof would be to enlarge the time for commencing the action which is limited to one year under § 61–2–9, supra. They cite 36 Am.Jur. Mechanics' Liens § 244, as follows:

> "Where a bill or petition to enforce a mechanic's lien is amended after the time limited by statute for commencing such suits, so as to state a new cause of action, *or for the first time any cause of action at all, the amendment amounts to the bringing of the suit, and the lien is barred.*" (Emphasis added by appellants.)

In Martinez v. Research Park, Inc., supra, there was neither pleading nor proof that the cross-claimant Marco had a license. We held that although the court's finding that he did have one could have been based on a stipulation between the parties such could not confer jurisdiction. There, we said:

> "* * * This is not a situation where a complaint will be deemed amended to conform to proof admitted in evidence. Such a license was neither offered nor admitted in evidence, and, unlike Canavan v. Canavan, 17 N.M. 503, 131 P. 493, the doctrine of aider by verdict is not applicable to cure the defect." (75 N.M. at 679, 410 P.2d at 205.)

Although Perry's license was not tendered into evidence, the undisputed testimony was that he had held a license for ten years and had it at the time he was doing the work for which he claimed his lien. In Canavan v. Canavan, 17 N.M. 503, 131 P. 493 (1913), the claim was that the court had no jurisdiction in a divorce action where the complaint failed to recite the necessary one year residence of the plaintiff in this state. There, the necessary residence was established by the testimony of the parties, and no objection was made below to either the complaint or to this evidence. Although pointing out that lack of residence would be jurisdictionally fatal, this court, in discussing that situation, said:

> "* * * And, speaking broadly, it presents a case where a litigant has litigated with his antagonist every fact material or relevant to the cause of action, and, having failed, he now seeks by the mere forms of law to defeat his antagonist and deprive her of the result of the litigation.
>
> "* * *
>
> "The fact of residence is not strictly a part of the cause of action between the parties for divorce. It bears no relation to the fact of marriage, or to the facts authorizing its dissolution. It is an arbitrary provision of law, founded upon wise considerations of public policy, which requires residence of the plaintiff for a given time before right of action arises. * * *
>
> "* * *
>
> "* * * But the omitted element of the cause of action may be brought into the record otherwise than by the complaint. In the case at bar, the omitted element, viz., the required residence of the plaintiff, was brought into the record by the proofs in the case, which are undisputed, and the fact is admitted by the defendant himself. The proofs are before us as a part of the record, from which we have a right to find, and we do find, that the required residence prior to the institution of the action existed. * * * So when the omitted fact is admitted in the evidence on an argument by the opposing party, he cannot complain of the defect in the appellate court. Bang v. McAvoy, 52 App.Div. 501, 65

N.Y.Supp. 467; Town of Schaghticoke v. Fitchburg R. Co., 53 App.Div. 16, 65 [Id.] 498." (17 N.M. 507 and 508, 131 P. 493–494.)

In Martinez v. Research Park, Inc., supra, and in Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961), we reversed because of failure of the contractor to allege that he had a license, but in both cases we instructed the trial court to grant leave to amend. Where the facts support the judgment for the licensed contractor, we have affirmed without remand even in absence of a finding. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968). Here, appellants made no objection to the evidence of the license and raised neither the jurisdiction nor the limitation question below. They requested no findings on either question. The requirement of the allegation of a contractor's license is similar to the requirement of one year's residence for a divorce. Both are matters of public policy; neither, otherwise, bears any relation to the cause of action. Where the record shows without dispute, that the claimant was licensed at the time he performed the work, an appellant who has failed to call the matter to the attention of the trial court cannot object to our treating an issue tried with consent of the parties as though it had been raised by the pleadings. Rule 15(b), supra; Canavan v. Canavan, supra; Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967). Furthermore, the intent of the legislature was to prohibit the bringing of suit by those unlicensed contractors who were acting illegally not to bar the remedy of lawful contractors because of a technical error in their pleadings. See Martinez v. Research Park, Inc., supra.

Appellants' final point is that the trial court abused its discretion in awarding attorney fees to the lien claimants. We disagree. On Blueher's claim of $2,133.35, a $400 attorney's fee was allowed. The sum of $200 was allowed as fees on both Dar Tile's claim of $294.00 and Perry's claim of $639.60. Such fees are allowed as costs and were reasonable under the circumstances. Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525 (Ct.App.1968). Section 61–2–13, N.M.S.A., 1953 Comp., also permits the court to allow additional attorney's fees for this appeal. Home Plumbing and Contracting Company v. Pruitt, supra.

Appellees Blueher and Dar Tile ask us to find that the trial court erred in not allowing interest at the rate of one percent per month on their claims. However, we cannot consider this question because their cross-appeal was not timely. The judgment herein was entered on May 13, 1969, and notice of appellants' appeal was served on these appellees on June 11, 1969. Not until October 22, 1969, was the cross-appeal of Blueher and Dar Tile filed bearing a certificate of service on opposing counsel on October 20, 1969. Our Rule 7(2) [§ 21–2–1(7) (2), N.M.S.A., 1953 Comp.] reads as follows:

> "2. If such notice [of the appeal] be served after, or within fifteen [15] days before, expiration of the time within which appeals may be allowed, the party so served may himself have an appeal or writ of error if he shall make application therefor within fifteen [15] days after such service."

By our Rule 5(5) [§ 21–2–1(5) (5), N.M.S.A., 1953 Comp.] we eliminated the necessity of the application for and the allowance of an appeal. Such terms now refer to the filing of notice of the appeal. Appellees Blueher and Dar Tile, having failed to file notice of cross-appeal within 15 days of the service upon them of the notice of appeal, cannot now be heard, because we find that the principal appeal as to them is without merit. Conley v. Davidson, 35 N.M. 173, 291 P. 489 (1930); Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Thus we affirm the judgment of the trial court, except as to that portion relating to the claim of appellee James O. Carpenter, and remand it to the trial court so that it may exercise its discretion either to allow or disallow a reasonable attorney fee for the services of appellees' Blueher, Dar

Tile, and Perry's counsel before this court. The judgment granted Carpenter is reversed with instructions to dismiss his cross-claim as not timely brought.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

477 P.2d 813

MOCK HOMES, INC., by William P. Stanley, Trustee in Bankruptcy, Defendant-Appellee and Cross-Appellee,

v.

Ernest J. WAKELY and Janet C. Wakely, his wife, and Sandia Savings & Loan Association, Defendants-Appellants,

v.

Orrion PERRY, d/b/a Gas Appliance and Service Company, Defendant-Appellee,

v.

DAR TILE COMPANY and Blueher Lumber Company, Defendants-Appellees and Cross-Appellants.

No. 9019.

Supreme Court of New Mexico.

Dec. 14, 1970.

Hines & Sullivan, Smith & Piper, Albuquerque, for defendants-appellants.

McAtee, Marchiondo & Michael, Pat Chowning, Albuquerque, for Orrion Perry.

Oliver Burton Cohen, Albuquerque, for Dar Tile Co. and Blueher Lumber Co.

OPINION

WATSON, Justice.

A complaint was filed with the District Court of Bernalillo County by Carroll-Loy Plumbing and Heating Company, Inc., alleging that it performed labor and furnished materials at the request of Mock Homes, Inc. on the home of Ernest J. and Janet C. Wakely for which it had not been paid. The complaint sets out the plaintiff's lien and joins the Wakelys, their mortgage holder, and other lien claimants as defendants. From the record before us it does not appear that a judgment has ever been entered on this complaint.

A judgment was entered in favor of lien-claimants Orrion Perry, Blueher Lumber Company, Inc., and Dar Tile Company, Inc. on their cross-claims; and the Wakelys and their mortgagee, Sandia Savings and Loan Association, have appealed from this judgment. Blueher and Dar Tile have cross-appealed. With the plaintiff's claim undetermined, this judgment appears to be one entered upon fewer than all of the claims and is not upon the express determination that there is no just reason for delay. Rule 54(b) [§ 21-1-1(54) (b), N.M.S.A.1953 Comp.]. It is not a final judgment from which an appeal

will lie to this court. Carpenter v. Merrett. (Decided December 7, 1970), 82 N.M. 185, 477 P.2d 819 (1970).

The appeal and cross-appeals are dismissed.

It is so ordered.

COMPTON, C. J., and McKENNA J., concur.

477 P.2d 814

Ted GROFF, Plaintiff-Appellee and Cross-Appellant,

v.

E. Franklin STRINGER and M. Abanna Stringer, his wife, and E. Florence Allen, a widow, Defendants-Appellants and Cross-Appellees.

No. 9049.

Supreme Court of New Mexico.
Dec. 14, 1970.

Ellis J. French, Albuquerque, for appellants.

Robinson & Stevens, Albuquerque, for appellee.

OPINION

TACKETT, Justice.

Plaintiff Groff in this action seeks to foreclose a claim of lien on the real property of defendants, Stringers and Allen, in Sandoval County, New Mexico. After trial without a jury, judgment was entered in favor of plaintiff. Defendants appeal and plaintiff cross-appeals. The parties will be referred to as they appeared in the lower court.

Groff filed a complaint against E. Franklin Stringer and M. Abanna Stringer, his wife, and E. Florence Allen, the mother of M. Abanna Stringer, alleging that, at the request of Stringers, Groff demolished and reconstructed a building into a residential dwelling upon the real property owned by Stringers and Allen, for which they owed Groff $8050. Groff filed a claim of lien and requested the court to

declare the lien valid and for an order decreeing foreclosure against the property. Stringers and Allen denied the allegations and counterclaimed, alleging breach of a written contract under which Groff agreed to move an Army barracks type building to the property of Stringers and Allen; that Groff did not move the building, but instead erected an inferior building that was unfit for habitation and, in fact, was a detriment to the property; that when they discovered faulty construction and other violations of the contract, they barred Groff and his employees from entering their property to prevent further damage; that as a result of the delay in completing construction and the faulty construction, they were damaged in the sum of $9200. After a hearing, the court made findings of fact and a conclusion of law awarding judgment to Groff in the sum of $1755.57, plus $575 attorney's fees and costs. The judgment also provided that the property be sold and the proceeds applied to the judgment, with the defendants liable for any deficiency. Allen's counterclaim was abandoned by her attorney and was dismissed by the court.

Briefly, the facts are that, after execution of the contract, Groff was unable to move the building as the New Mexico State Highway Department refused to grant a permit for transporting the large building (70x30 feet) over the highways from Albuquerque to near Cuba, New Mexico. This fact was known by Groff and Stringers, as they made a trip to Santa Fe to the Highway Department in an effort to obtain the permit. The parties thereupon entered into an oral contract for the demolition of a barracks building and re-erection on Stringers' property. Groff did the demolition and commenced erecting the building on Stringers' property during the month of August 1966, and, as of October 1966, he had not completely finished construction on the building, but was working on it when Stringers barred him and his employees from coming on the property. As a consequence, it was impossible for Groff to complete construction. A meeting was held between the parties and their attorneys in the Legal Aid Office in Albuquerque, at which time it developed that Groff desired to complete the construction; however, Stringers would not allow him to do so.

Stringers rely on three points for reversal of the lower court's decision, all of which substantially are challenges to the trial court's findings of fact and conclusion of law. We will review the evidence on each of the three points.

It is fundamental that, if there is substantial evidence in the record to support a finding, we are bound thereby. In deciding whether a finding has substantial support, we must view the evidence in the light most favorable to support the finding, and any evidence unfavorable to the finding will not be considered. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970); Kerr v. Schwartz, 82 N.M. 63, 475 P.2d 457 (1970).

Stringers' point I claims that Groff was not licensed under New Mexico law to perform the services described in his claim of lien. We note that in finding No. 4, the trial court found that, during the year 1966 and thereafter at all times material to this action, Groff was a duly licensed contractor under the laws of the State of New Mexico, licensed to perform the work described in his claim of lien and in the contract between the parties. The evidence is that Groff took an examination before the Contractor's License Board in Santa Fe, and was granted a license in 1965 for remodeling, framing and demolition work. It is clear that Groff did not construct a finished house, but that his activity was confined to the relocation and remodeling of an existing structure including framing. It is well established that where there is substantial evidence to support the findings of the trial court they will not be disturbed on appeal. See, Stewart v. Barnes, 80 N.

M. 102, 451 P.2d 1006 (1969); Forsyth v. Joseph, 80 N.M. 27, 450 P.2d 627 (1968).

In point II, Stringers claim that an in personam judgment cannot be enforced against them. Essentially, this contention is that the trial court erred in allowing a deficiency judgment (should one develop) against the Stringers. This contention is without merit, as the weight of authority is to the effect that, in an action to foreclose a mechanics' lien, a personal judgment may be rendered against a party to the action who is personally liable, in addition to a judgment foreclosing the lien. The right to such judgment is dependent on a contractual relation being shown between the plaintiff and defendant against whom the personal judgment is sought. Costanzo v. Stewart, 9 Ariz.App. 430, 453 P.2d 526 (1969). See, 53 Am.Jur.2d Mechanics' Liens, § 417 at 931. A contractual relationship existed between the parties.

In point III Stringers contend that the claim of lien Groff seeks to enforce is not valid, because the services performed by Groff did not benefit the property and, in fact, were a detriment to it. The trial court found that the work done by Groff reasonably benefited the entire property. Wilfred E. Kitsch testified that he thought the building was worth $1800, and that the value of the materials used in the construction was $1404.46. Witness Bryan testified that he would want $6.00 per square foot for the construction of a similar building near Cuba, and that the 70x30 foot structure was a "sound building."

It would appear that the trial court weighed the evidence, judged the credibility of the witnesses, and correctly concluded that the services performed by Groff benefited the property. The rule is well established that this Court does not weigh evidence or judge the credibility of witnesses, but views the evidence in a light most favorable to the judgment, disregarding all evidence to the contrary. Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967).

As to the above three points on which Stringers rely for reversal, the trial court will be affirmed, as there is substantial evidence in the record supporting the findings on these contentions.

Groff, in his cross appeal, challenges finding No. 12, which states that "the well constructed on the property is of no value." This court has repeatedly held that findings of fact having substantial support in the evidence will not be disturbed on appeal, and that substantial evidence is relevant evidence acceptable to a reasonable mind. Martinez v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970). Further, we are cognizant of the fact that we do not lightly overturn the judgment of the trial court and must search the record for substantial evidence to support its findings. Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970). But a finding of fact, not supported by substantial evidence, will not be sustained on appeal, and a judgment based on such finding is itself without support. Forrest Currell Lumber Company v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970).

The finding of the trial court, that the well constructed on the property is of no value, is not supported by substantial evidence. The substance of the testimony material to this finding is as follows. Groff testified that he paid Leon Messer $873.90 for the drilling of the well. The agreed price with Messer was $5.00 per foot if he furnished the pipe, and $3.50 if Groff furnished the pipe. The well was 246 feet deep. Groff furnished the pipe and valued it at $250. The witness Bryan testified that the type of casing used in the well furnished by Groff was satisfactory. The pump was not installed in the well due to the actions of Stringers.

The witness Donald F. Ames testified that he was general manager for Kartchner Pipe & Supply Company, a dealer in wholesale piping and materials, for over ten years. While on the stand, Ames was handed a piece of pipe from the well and he testified that the pipe was "in excellent

condition," and that "if everybody got a water well of this quality they would be doing real good." He testified that it was not uncommon for drilling contractors to utilize used pipe for drilling purposes. Groff testified that he had examined the hole; that he had looked down the pipe with a mirror and the pipe was perfectly smooth; that there were no jagged edges or broken joints, and that he could see water. Ames stated that wells are tested, not by dropping a tin can down the pipe attached to a string, but the usual procedure is for a bailer or a piece of pipe to be dropped down the well. Stringer testified that the only effort he made to test the well was when he unsuccessfully attempted to drop a tin can attached to a string down the well. Groff testified he had purchased a submersible pump to be used in the well. He ceased to do any work after October 22, 1966, at the insistence of Stringers.

It is clear from the foregoing evidence that Groff was prevented from completing and testing the well or installing the pump, because of the refusal of Stringers to permit him on the premises. The only evidence in the record, that the used pipe which was placed in the well was not satisfactory, came from a non-expert witness, who admitted that he had never tested the well, and that of Stringer who unsuccessfully attempted to test it with a tin can on a string.

In view of the value of the well casing and the value of the hole itself, which was only six to eight feet from the door of the house, it is impossible to state that the well is of no value.

The judgment is affirmed, except that it is remanded on the trial court's finding No. 12 as not having substantial support in the evidence. Further proceedings should be had on this point and a new judgment shall be entered to include the value of the well.

It is so ordered.

COMPTON, C. J., and SISK, J., concur.

477 P.2d 817

Lee GUTHRIE, Trustee for the Debenture Holders of Reese Mining and Manufacturing Co., Inc., Owners of all Properties Formerly Owned by Reese Mining and Manufacturing Co., Inc., Plaintiff-Appellee,

v.

U. S. LIME AND MINING CORPORATION, Defendant-Appellant.

No. 9045.

Supreme Court of New Mexico.

Dec. 14, 1970.

Robertson & Reynolds, Silver City, for appellant.

Sherman & Sherman, Deming, for appellee.

OPINION

McKENNA, Justice.

The appellant U. S. Lime and Mining Corporation, the defendant below, seeks to set aside a default judgment granted to the appellee pursuant to its motion under Rule 60(b) (§ 21-1-1(60) (b), N.M.S.A. 1953). The court after hearing the evidence found that the defendant failed to establish inadvertence or excusable neglect or that it had a good and valid defense to the cause of action and denied the motion provided a certain credit was given to the appellant on the amount of the judgment.

For its argument, the appellant says the district court abused its discretionary power in refusing to set aside the default judgment for the reasons that (1) there was never any valid service of process on the appellant; (2) the appellant presented meritorious defenses which it should be permitted to raise on trial; and (3) there was no showing by the appellee of any intervening equities.

As to the first point, the record, and supplement thereto, show by a return of service that the initial pleadings, the complaint, the order to show cause and the temporary restraining order were served in person on an officer and the agent for service of the appellant, within Grant County, New Mexico, on June 16, 1969. Furthermore, the record also shows that on June 26, 1969, an attorney appeared on behalf of the appellant for the hearing on the order to show cause, approved the order entered by the court on behalf of the appellant and was then personally given a copy of the first amended complaint by the appellee's attorney. There is no merit to point one of the appellant.

As to the remaining two points, we are faced with the specific findings of the district court that the appellant failed to establish inadvertence or excusable neglect or that it had good and valid defenses to the action. These findings were made after each side had full opportunity to present its evidence. We note that court in its order then refused to set the judgment aside provided the appellant was granted a credit against the judgment in the amount of $1,110.22. All of this, particularly the allowance of the credit, indicates that the court inquired fully into the merits of the motion, and did not in a perfunctory manner refuse the relief requested by the motion.

Despite the presence or absence of intervening equities, the basic rule is stated in Conejos County Lumber Co. v. Citizens Savings & Loan Ass'n, 80 N.M. 612, 614, 459 P.2d 138, 140 (1969), wherein we said:

> "Appellant argues that the denial of the motion was an abuse of discretion. Our rules provide for the setting aside of a default judgment for good cause shown. Secs. 21-1-1(55) and (60), N. M.S.A.1953. This is a matter addressed to the sound discretion of the trial judge, whose ruling will not be reversed except for abuse of that discretion. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965); Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962). Discretion, in this sense, is abused only when the trial judge has acted arbitrarily or unreasonably. * * *"

On the record, we cannot say that the trial court acted arbitrarily or unreasonably or was unaware of the general policy that disputes should be tried on their merits rather than settled by default judgment. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965); Weisberg v. Garcia, 75 N.M. 367, 370, 404 P.2d 565 (1965). Nor does the record contain any requested findings or conclusions of the appellant. Conejos County Lumber Co. v. Citizens Savings

& Loan Ass'n, supra, 80 N.M. at 614, 459 P.2d 138. We find no basis here for interfering with the trial court's discretion in refusing to set side the default judgment. The order of the court denying the motion to set aside the default judgment is affirmed. It is so ordered.

TACKETT and WATSON, JJ., concur.

477 P.2d 819

James O. CARPENTER, d/b/a James O. Carpenter, Painting Contractor, Plaintiff-Appellee,

v.

John H. MERRETT, Edith M. Merrett, his wife, First National Bank In Albuquerque and First National City Bank, Defendants-Appellants and Cross-Appellees,

v.

KIMBROUGH-CARPENTER, INC. and Orrion Perry, d/b/a Gas Appliance Service Company, Cross-Claimants-Appellees,

Blueher Lumber Company, Inc. and Dar Tile Company, Cross-Claimants-Appellees and Cross-Appellants.

No. 8981.

Supreme Court of New Mexico.

Dec. 7, 1970.

Rehearings Denied Dec. 28, 1970.

Hines & Sullivan, Albuquerque, for defendants-appellants and cross-appellees.

McNeany, Rose & Sholer, Albuquerque, for James O. Carpenter.

Perry S. Key, Albuquerque, for Kimbrough-Carpenter.

McAtee, Marchiondo & Michael, Pat Chowning, Albuquerque, for Orrion Perry.

Oliver Burton Cohen, Albuquerque, for Blueher Lumber and Dar Tile.

OPINION

WATSON, Justice.

This is one case in a series which resulted from the bankruptcy of Mock Homes, Inc., general contractor, after the sale of the residence property and before the time for filing labor and materialmen's liens had expired. See Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979 (1970). The trial of this case, No. A-23377 below, was on the issues raised by the complaints and cross-complaints and involved the validity and

priority of the parties' interests in Lot 31, Block 7 of Desert Terrace, Unit No. 2. Appellants here are the home owners and the mortgage holders; appellees are the lien claimants.

On his complaint, appellee James O. Carpenter received a separate judgment entered on April 29, 1969, which provided that his lien be foreclosed against appellant's interests and "be coequal in priority to that of any other mechanic's lien claimant whose claim may hereafter be adjudicated as valid and subsisting by the court in this cause." Notice of Appeal was filed on May 28, 1969. Except for Orrion Perry d/b/a Gas Appliance Service Company, the other appellees received separate judgments on their cross-claims. Kimbrough-Carpenter, Inc.'s judgment is dated May 7, 1969; Notice of Appeal was filed June 6, 1969. Blueher Lumber Company and Dar Tile Company received separate judgments on September 23, 1969, to which separate Notices of Appeal were filed on October 6, 1969. Although a Notice of Appeal was filed on August 25, 1969, as to Orrion Perry, no judgment appears to have been entered with respect to his interest.

Our Rule 54(b) [§ 21-1-1(54) (b), N.M. S.A., 1953 Comp.] reads as follows:

> "When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

None of the separate judgments entered herein contain any express determination that there is no just reason for delay nor any express direction for their entry. None of the judgments herein appear as a final judgment. A sale of property and proration among *all* valid liens is indicated in the judgments. But the record before us indicates no final judgment adjudicating Perry's lien. Where further action of the court is necessary to complete the relief contemplated the judgment is interlocutory only. Bateman v. Gitts, 17 N.M. 619, 133 P. 969 (1913). In such cases under our Rule 54(b) supra, we lack jurisdiction to consider the appeal. Voisen v. Kantor, 81 N.M. 560, 469 P.2d 709 (1970); Aetna Casualty & Surety Company v. Miles, 80 N.M. 237, 453 P.2d 757 (1969). Compare Mutual Building & Loan Ass'n of Santa Fe v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

The appeal here is dismissed.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

477 P.2d 820

Arthur TRUJILLO and Trina Trujillo, his wife, Plaintiffs-Appellants,

v.

Doyle COLLINS and Sarah Collins, his wife, Defendants-Appellees.

No. 9064.

Supreme Court of New Mexico.
Nov. 16, 1970.
Rehearing Denied Dec. 28, 1970.

Rodey, Dickason, Sloan, Akin & Robb, John P. Salazar, Albuquerque, for appellants.

Clyde E. Sullivan, Jr., Julius H. Darsey, Albuquerque, for appellees.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Bernalillo County, New Mexico, to determine the rights of the parties to a certain house and lot purchased by plaintiffs Trujillos from defendants Collinses. The case was tried to the court without a jury. Judgment was entered in favor of defendants Collinses. Plaintiffs Trujillos appeal. The parties will be designated as "Trujillo" and "Collins."

On July 20, 1964, the parties entered into a real estate contract, on a printed form which is in common use in Bernalillo County. Paragraph 8 thereof provided:

> "It is mutually agreed that time is the essence of this contract. Should the Purchaser fail to make any of the said payments at the respective times herein specified, or fail or refuse to repay any sums advanced by the Owner under the provisions of the foregoing paragraph, or fail or refuse to pay said taxes, assessments or other charges against said real estate and continue in default for Thirty (30) days after written demand for such payments, or payment of taxes or payment of assessments or other charges against said real estate, or repayment of sums advanced under provisions of the foregoing paragraph has been mailed to the Purchaser addressed to them at 9720 Indian School Rd., N. E., Albuquerque, New Mexico, then the Owner may, at his option, either declare the whole amount remaining unpaid to be then due, and proceed to enforce the payment of the same; or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises, and all rights of the Purchaser in the premises herein described shall thereupon cease and terminate and they shall thereafter be deemed a tenant holding over after the expiration of their term without permission. An affidavit made by said Owner or his agent showing such default and forfeiture and recorded in the County Clerk's office shall be conclusive proof, in favor of any subsequent bonafide purchaser or encumbrancer for value, of such default and forfeiture; and the Purchaser hereby irrevocably authorizes the Owner or his agent to thus declare and record such default and forfeiture, and agrees to be bound by such declarations as their free act and deed."

The contract was for the sale and purchase of a house and lot situate at 9720 Indian School Road, N. E., Albuquerque, New Mexico. A certain amount was paid down and the balance was to be paid in monthly installments. The contract, warranty deed and special warranty deed were placed in escrow with a local bank. Trujillo became in default under the contract. A default notice letter dated July 25, 1968, which complied with the terms of paragraph 8 of the contract, was mailed to Trujillo and was returned marked "Unclaimed." Subsequently, Trujillo became aware of the default notice letter, contacted Collins' attorney and brought the payments up to date. There were further defaults and Trujillo was again contacted. The payments were brought up to date, with the exception of the last payment which was made by a check that was returned marked "Insufficient Funds." The papers were removed from escrow and Trujillo was again contacted. The payments were brought up to date and were accepted by Collins' agent, with the understanding that the papers would be replaced with the escrow agent, which was never done. Trujillo, being in default again, was notified to vacate the premises within three days. No new default notice was given to Trujillo. Subsequent to the filing of the present action, the special warranty deed was recorded on May 26, 1969.

There are two issues in the present case: (1) Was all of Trujillo's interest under the real estate contract forfeited by the default notice letter of July 25, 1968? (2) Did the negotiations between the parties, subsequent to the default notice letter of July 25, 1968, and the subsequent acceptance of payments under the contract, result in a waiver and estoppel by Collins? The first question is answered in the negative and the second in the affirmative for the following reasons.

On September 5, 1968, the attorney for Collins wrote Trujillo the following letter:

> "* * * The Special Warranty Deed has not been recorded as yet, *because I hate to see you lose your house*, but if you do not contact this office immediately the deed will be recorded putting title back in the Collins and all your *interest will be forfeited*." (Emphasis added.)

This letter surely indicates that forfeiture had not occurred on August 27, 1968, and the trial court erred in concluding that there was a forfeiture.

Trujillo contends that the course of dealings between the parties precludes the conclusion that there was a forfeiture on August 27, 1968. With this we agree, as this court held in Nelms v. Miller, 56 N.M. 132, 241 P.2d 333 (1952):

> "'"* * * [W]here both the parties to a contract of sale [such as in the instant case] have taken considerable latitude in its performance, without manifesting any intention to hold each other to a strict and literal performance, neither party can abruptly rescind for noncompliance without fair warning of an intention to insist upon a literal compliance with the contract in the future. * * *"'"

See also, DeVilliers v. Balcomb, 79 N.M. 572, 446 P.2d 220 (1968); Petitt v. F. V. H. Collins Co., 112 Mont. 12, 113 P.2d 340 (1941).

> "* * * [T]he right of forfeiture is waived by continuing negotiations, or, where an indefinite extension of time has been granted. * * *"

Nelms v. Miller, supra, and cases therein cited.

We, therefore, hold that the doctrine of estoppel, as set forth in Yates v. Ferguson, 81 N.M. 613, 471 P.2d 183 (1970), is applicable in the instant case. See, Kingston v. Walters, 16 N.M. 59, 113 P. 594 (1911); 28 Am.Jur.2d Estoppel and Waiver, § 28 at 629.

The judgment is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is so ordered.

COMPTON, C. J., and SISK, J., concur.

477 P.2d 823

James Franklin MOORE, II, a/k/a James Franklin Moore, Jr., Plaintiff-Appellant and Cross-Appellee,

v.

Richard G. BEAN, Executor of the Last Will and Testament of Frank Moore, Deceased, Texas Scottish Rite Hospital For Crippled Children, a corporation, Defendants-Appellees,

v.

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, a corporation, Defendant-Appellee and Cross-Appellant,

State of Texas, Intervenor-Appellee.

No. 9053.

Supreme Court of New Mexico.

Nov. 9, 1970.

Rehearing Denied Dec. 22, 1970.

James F. Moore, II, pro se.

Richard G. Bean, Roswell, pro se.

Atwood, Malone, Mann & Cooter, Rufus E. Thompson, Roswell, for Texas Scottish Rite Hospital.

Walker, Choate & Walker, Dallas, Tex., for Texas Scottish Rite Hospital.

Frazier, Cusack & Schnedar, Roswell, for Shriners Hospitals for Crippled Children.

Marvin Sentell, Asst. Atty. Gen. for State of Texas, Austin, Tex., for Intervenor State of Texas.

OPINION

WATSON, Justice.

James Franklin Moore, appellant's father, died on April 23, 1969. By his will dated January 31, 1969, he bequeathed $10.00 to appellant and the residue of his estate to the "Shriners' Hospital for Crippled Children, in Dallas Texas." There being no hospital by that precise name in Dallas, appellant brought suit to establish a lapsed gift. In appellant's amended complaint, appellee Texas Scottish Rite Hospital for Crippled Children, which is located in Dallas, Texas, was made a defendant, and there was an intervention by Shriners Hospitals for Crippled Children, Inc., a Colorado non-profit corporation, hereinafter referred to as "Shriners Hospitals," which operates 19 hospitals for crippled children and three hospitals for burned children (but none in Texas). Both the Colorado Shriners corporation and the Texas Scottish Rite Hospital claimed the residue.

From a judgment in favor of the Texas Scottish Rite Hospital, plaintiff Moore appeals, and the Shriners Hospitals cross appeal.

The pertinent findings of the trial court are as follows:

"7. The Texas Scottish Rite Hospital for Crippled Children is located in Dallas, Texas, originally established and constructed by the Shriners of Dallas' Hella Temple and chartered as a charitable corporation under the laws of the State of Texas on September 15, 1921, as the 'Hella Temple Children's Hospital' for the treatment of crippled children.

"8. 'Shriners' are members of the Masonic order known as the Ancient Arabic Order of Nobles of the Mystic Shrine, but a Mason is not eligible for membership therein until he has received either the 32° from the Masonic order known as the 'Scottish Rite' or the similar degree from the Masonic order known as the 'York Rite.'

"9. The Testator first joined the Dallas Masonic Lodge No. 760 in 1922 at a time when he resided in Dallas. He thereafter moved from Dallas to Roswell, New Mexico, in 1932, but returned to Dallas to join the Dallas Scottish Rite Consistory, wherein the 32° was conferred upon him on November 7, 1935. He joined the Hella Temple of the Shrine in Dallas on November 8, 1935.

"10. Although the Testator continued to reside in Roswell from 1932 until his death, he remained a member of all three Dallas Masonic orders and did not transfer his Masonic affiliations at any time during his lifetime. It did not appear that the Testator was ever active in Masonry.

"11. Subsequent to the founding of the Shriners' hospital for crippled children in Dallas in 1921, the Shriners of Dallas' Hella Temple became unable to pay the costs incurred by them in its construction, as well as the operating and maintenance costs thereof, and so, on May 1, 1926, relinquished all interest and control therein to the 'Scottish Rite.' The name of the hospital and charitable corporation originally chartered as the 'Hella Temple Children's Hospital' was then changed to the 'Texas Scottish Rite Hospital for Crippled Children.' This same hospital has continued its charitable assistance to crippled children, without interruption, since its doors were opened in 1921.

"12. Throughout the years there has been a very close relationship between the Shriners of Dallas' Hella Temple and the hospital known officially today as the 'Texas Scottish Rite Hospital for Crippled Children.'

"13. It was the Testator's intent to bequeath and devise the residuary por-

tion of his estate to a 'hospital', for 'crippled children' in 'Dallas, Texas', and the hospital so named by him was one thought of by him as supported by the 'Shriners.'

"14. There was cause for confusion as to whether or not the hospital known officially today as the 'Texas Scottish Rite Hospital for Crippled Children' was supported by the Shriners.

"15. The Testator used the word 'Shriners'' in his Last Will and Testament as descriptive of what he thought to be the Masonic affiliation of the hospital for crippled children in Dallas, Texas and not as part of that hospital's official name.

"16. The Testator intended the residuary portion of his estate to go to the hospital in Dallas known officially today as the 'Texas Scottish Rite Hospital for Crippled Children.'

"17. The testator had a general charitable intent and purpose in the disposition of his estate.

"18. The Testator intended the residuary portion of his estate to go to a Masonic hospital assisting crippled children in Dallas, Texas.

"19. The Texas Scottish Rite Hospital for Crippled Children is the only Masonic hospital for crippled children in Dallas, Texas."

We first consider the contentions of the Shriners Hospitals. They attack findings 13, 15, 16, 17, and 18, claiming that there is no evidence in the record of what the testator thought or of his intent. Shriners Hospitals also point out that finding 14 does not state that the testator was confused, and that neither finding 7 nor finding 11 states that the testator knew the facts therein set forth. Furthermore, Shriners Hospitals object to the trial court's refusal to give its requested finding 10 and their conclusions to the effect that the testator intended to will the residue to them or to an institution connected with them. Their refused finding 10 reads as follows:

"That the Texas Scottish Rite Hospital for Crippled Children has given wide publicity to its activities, and its distinction from the Shriners Hospitals for Crippled Children; that it solicited contributions from all members of the Dallas Scottish Rite Bodies, including the decedent, mailing with such solicitations checks payable to the Texas Scottish Rite Hospital for Crippled Children, or payable to a prominent person with a letter asking that members of the Scottish Rite join him in supporting said Defendant by making a contribution, but no contribution was ever received from Frank Moore."

Appellee Texas Scottish Rite Hospital states that the requested instruction was properly refused, as the only evidence as to testator's failure to contribute to their hospital was from records subsequent to 1962, and that, in addition, the finding was not of an ultimate fact but states only evidentiary facts contrary to Rule 52(B) (a) (2) [§ 21–1–1(52) (B) (a) (2), N.M. S.A., 1953 Comp.]. McCleskey v. N. C. Ribble Company, 80 N.M. 345, 455 P.2d 849 (Ct.App.1969); Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968). This requested finding fails to relate the facts stated therein to the testator's intent. It is a recital of facts rather than a conclusion of fact. See International Minerals & Chemical Corp. v. New Mexico Public Service Comm., 81 N.M. 280, 466 P.2d 557 (1970). As we understand it, cross-appellant Shriners Hospitals' objection to the court's findings 7, 11, and 14 is of the same nature, i. e., they are mere recitals of fact rather than conclusions of fact.

[redacted] Where determinative findings are supported by substantial evidence, refusal of requested findings to the contrary is not error. International Minerals & Chemical Corp. v. New Mexico Public Service Comm., supra; see Board of Education, School District 16 v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969); Maryland Casualty Company v. Foster, 76 N.M. 310, 414 P.2d 672 (1966); Save-Rite Drug Stores,

Inc. v. Stamm, 58 N.M. 357, 271 P.2d 396 (1954).

The determinative issue on this appeal, however, is whether the evidence is sufficient to identify the object of the testator's bounty. See 4 Page on Wills § 32.2 (Bowe-Parker Rev. 1961). The Shriners Hospitals have not objected to the extrinsic evidence offered to prove the identity of this object; they simply contend that the evidence points to them as the beneficiary. The extrinsic evidence here is undisputed. It consists of the testator's background and the relevant circumstances which would reflect on his outlook at the time his will was drawn in order to explain the words he used in that document. The trial court, from this evidence, could draw reasonable inferences as to the testator's intent. We must review the evidence by resolving all reasonable inferences in support of the judgment and disregard evidence and inferences to the contrary. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970); Totah Drilling Company v. Abraham, 64 N.M. 380, 328 P.2d 1083 (1958). As between the appellee and cross-appellant, we are convinced that the evidence, together with the reasonable inferences therefrom, is sufficient to sustain the trial court's findings 13, 15, 16, 17, and 18, and to justify rejection of the Shriners Hospitals' tendered finding 10 and their conclusions to the contrary. This also disposes of the Shriners Hospitals' contention that the words, "in Dallas, Texas," are mere surplusage. We discuss this further below in considering appellant Moore's position.

First, appellant Moore contends that neither group can receive the bequest because neither is chartered in New Mexico, nor has New Mexico removed the common law prohibition against corporations receiving testamentary gifts. This contention cannot be considered, however, as it was not raised below. Supreme Court Rule 20(1) [§ 21-2-1(20) (1), N.M.S.A., 1953 Comp.]; DeVilliers v. Balcomb, 79 N.M. 572, 446 P.2d 220 (1968); Maryland Casualty Company v. Foster, supra. But appellant Moore's principal contention is that the residuary clause of the will must fail because the beneficiary cannot be identified; that from the face of the will and from all of the evidence introduced, the uncertainty cannot be resolved, and that to find the testator intended to make, or thought he was making, the bequest to the appellee, is pure speculation.

The name by which the residuary beneficiary is identified in the will is nearly identical with that of cross-appellant Shriners Hospitals for Crippled Children, except possibly for "Inc.," and the fact that testator used "hospital" in the singular instead of plural. The will, however, adds "in Dallas, Texas," and we must consider all of the words within the four corners of the will. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963). It is conceivable that under different circumstances the court might have found that it was not the testator's intent to provide for a beneficiary in Dallas, Texas, even though those words were used in the will. Testators have been known to make mistakes in addresses. Wachovia Bank & Trust Co. v. Plumtree School for Boys, 229 N.C. 738, 51 S.E.2d 477 (1949). On the other hand, beneficiaries are sometimes identified by the address or location indicated in the will. 4 Page on Wills, supra, § 34.39; Kovar v. Kortan, 3 Ohio Misc. 63, 209 N.E.2d 762 (1965). Here the trial court determined the mistake was in the name rather than the location, and we believe such was a logical and permissible deduction from the facts and was supported by substantial evidence. Tapia v. Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967); Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940).

Cross-appellant Shriners Hospitals points out that appellee hospital is only available to residents of Texas, while it and its affiliates are available to crippled children of all states. It asks, "Why would the testator, after residing in New Mexico for 37 years, wish to provide for Texas Chil-

dren only?" Once the identity of the beneficiary has been established, as it has been in this case, no ambiguity remains, and even though the testator may have intended that the bequest benefit children of all states, it is improper at this point to speculate as to what the testator would have done had he known of this limitation on appellee's activities, for such would amount to rewriting the will for him. In re France's Estate, 64 Wash.2d 703, 393 P.2d 940 (1964); See also Gregg v. Gardner, supra; Lamphear v. Alch, 58 N.M. 796, 277 P.2d 299 (1954).

Appellant Moore relies upon American Cancer Soc., Mo. Div. v. Damon Runyon Memorial Fund, 409 S.W.2d 222 (Mo.App. 1966), where a bequest in joint wills was left to the "Damon Runyon Memorial Fund for Cancer Research, St. Joseph, Missouri Chapter," and there was none in St. Joseph. The local county chapter of the American Cancer Society claimed the bequest, but the appellate court felt that the testators' complete familiarity with that organization made it inconceivable that they could have named the other organization while meaning the American Cancer Society, and that it was just as unlikely that their bequest, which they intended to make locally, was to be sent to the Damon Runyon organization which had only a New York office. The appellate court held that to find, from the evidence there submitted, a testator's intent to give to either of the organizations would be speculation and conjecture, and that the legacy must lapse.

In the present case the evidence seems almost conclusive that the testator intended the gift to go to either the appellee or appellant, Shriners Hospitals. The better rule is that even though the name and description seem to fit another claimant with greater exactness, nevertheless the gift would go to the claimant with whom the testator was the most familiar or in whom he was most interested. Northern Trust Co. v. Perry, 105 Vt. 524, 168 A. 710 (1933). See also Annot., 94 A.L.R. 7 (1935).

When the testator's intent is uncertain, this rule should be applied. Gregg v. Gardner, supra. Here, however, as we have held above, the court resolved the testator's intent from the extrinsic evidence, so that it cannot be said that testator's intent was uncertain. Thus appellant Moore's argument is inapplicable in this case.

No error having been established, the judgment of the trial court must be affirmed.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

477 P.2d 827

PAN AMERICAN PETROLEUM CORPORATION, a corporation, Plaintiff-Appellee,

v.

EL PASO NATURAL GAS COMPANY, a corporation, Defendant-Appellant.

No. 8989.

Supreme Court of New Mexico.

Dec. 14, 1970.

Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, Hardie, Grambling, Sims & Galatzan, El Paso, Tex., for defendant-appellant.

Atwood, Malone, Mann & Cooter, Bob F. Turner, Roswell, Harry O. Hickman, R. H. Landt, Fort Worth, Tex., for plaintiff-appellee.

OPINION

SISK, Justice.

Defendant El Paso Natural Gas Company appeals from a declaratory judgment in favor of plaintiff Pan American Petroleum Corporation, which judgment found and concluded that natural gas had been "manufactured" and "materially changed" in El Paso's gas processing plants. The parties will be referred to as El Paso and Pan American.

Between 1948 and 1963, El Paso, as buyer, and Pan American, as seller, entered into a series of gas purchase agreements, each of which provided:

> "In the event that any tax now in force and levied or assessed on or against the gas delivered hereunder up to the point of delivery is increased, or in the event that any new or additional tax is hereafter levied or assessed by the State of New Mexico, in respect to or applicable to the gas to be delivered by Seller to Buyer under this agreement, the amount of such increase or new or additional tax shall be divided between and borne ¾ by Buyer and ¼ by Seller. * * *"

Prior to 1963 Pan American claimed and received the benefit of an exemption from a two percent privilege tax on the gross receipts of producers of natural resources, including oil and natural gas, under the Emergency School Tax Act. The Legislature in 1935, by the then § 72–16–4, N.M.S.A.1953, provided in its material part:

> "* * * Any person engaging or continuing in any of the businesses taxed by this [Paragraph] (A) who shall sell such minerals, timber or other natural resource products to a person engaged in the business of refining, smelting, reducing, compounding, manufacturing or otherwise preparing for sale or use as manufactured or partly manufactured products, such minerals, timber, or other natural resource products, so that the char-

acter or condition thereof is materially changed, in mills or plants located in this state, and taxable under [Paragraph] (B) of this [section], shall not be required to include in the amount of tax imposed by this section any gross receipts derived from such sales of minerals, timber or other natural resource products to such persons; * * *"

This exemption was applicable only if the natural gas was "manufactured or partly manufactured" so that its character or condition was "materially changed."

An exemption using the identical language, so far as here material, was included in 1959 in the then § 72–21–4, N.M.S.A.1953, of the Oil and Gas Emergency School Tax Act. Pan American continued to claim and receive the benefit of the exemption. In 1963 the Legislature entirely eliminated the exemption, and by amendment to § 72–21–4, supra, imposed a tax at a rate of 2.55%.

El Paso alleges that the processing to which it submits natural gas bought from Pan American does not constitute the production of a "manufactured" and "materially changed" product as originally contemplated by the repealed exemption provisions, and therefore Pan American was never entitled to the exemption it had claimed prior to the enactment of the 1963 acts, supra. Extending this reasoning, El Paso states that the tax of 2.55% imposed in 1963 merely increased the old tax by .55% and therefore it is only obligated to pay ¾ of that increase, because that is the only "new or additional" tax levy within the terms of the gas purchase agreements.

The position of Pan American, and the decision of the trial court, is that El Paso is contractually obligated to make reimbursement of ¾ of the total tax of 2.55%, because such processing results in "manufactured or partly manufactured" products, the character or condition of which was "materially changed," the now eliminated exemptions were properly claimed, and the 1963 tax was "new or additional."

To facilitate the lower court's determination of the issue as related to "manufacturing" and "material change," the parties stipulated the facts concerning the processing of natural gas in El Paso's plants, which were incorporated in the court's findings of fact. Therefore, it must be determined if, as a matter of law, the lower court was correct in its findings and conclusions, as based on the facts before it.

El Paso buys large quantities of natural gas from Pan American. When purchased, this gas is not marketable in its raw form because of certain constituents which are either harmful to the gas transmission lines of El Paso, or possibly injurious to its ultimate consumers. Through elaborate processing, these elements are removed. In addition, certain liquid by-products are derived from this processing technique which constitute valuable commodities in themselves. These liquid by-products make up ⅕ of the total value of all of the products sold by El Paso which are derived from its processing of the raw natural gas purchased by it from such suppliers as Pan American. Yet, El Paso contends that it buys its product as natural gas, and eventually sells that product as natural gas, without materially affecting it in such a way as to constitute manufacturing.

Whether properly called a finding of ultimate fact or a conclusion of law, the most critical determination of the trial court was:

"47. The defendant, at all times material to this action, has been engaged in the business of refining, reducing, compounding, manufacturing, or otherwise preparing natural gas for sale or use as a manufactured or partly manufactured product, so that the character or condition thereof is materially changed in its gas processing plants located in the State of New Mexico. It was necessary that the gas before being transported in the pipelines of the defendant, be processed so that the liquids therein could be re-

moved so that the gas could be delivered to the consuming public in a safe condition and so that water or other impurities in the gas be removed to prevent the corrosion of plaintiff's pipelines and to render same satisfactory for sale to the consuming public."

Apparently there is no directly applicable case law concerning the nature of the processing of natural gas, and it is of little help to compare the vast number of cases which consider innumerable disparate products and conclude that a particular product is, or is not "manufactured" under the particular facts or the particular law of that particular case. El Paso cites cases wherein the pasteurization of milk, the preparation of sea shells for ornamentation, and the processing of chickens were not held to constitute manufacturing as that word was used in its there context. See Rieck-McJunkin Dairy Co. v. Pittsburgh School District, 362 Pa. 13, 66 A.2d 295 (1949); Hartranft v. Wiegmann, 121 U.S. 609, 7 S.Ct. 1240, 30 L.Ed. 1012 (1887); East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917 (1956). In turn, Pan American cites cases involving railroad tie construction, oil refining, and sea food processing which it believes support its allegation that the processing of natural gas under the here applicable tax statutes is also manufacturing. See Iden v. Bureau of Revenue, 43 N.M. 205, 89 P.2d 519 (1939); Appeal of Atlantic Refining Co., 398 Pa. 30, 156 A.2d 855 (1959); Bornstein Sea Food, Inc. v. State, 60 Wash.2d 169, 373 P.2d 483 (1962). However, none of these cases is directly applicable, and it is not possible to decide this case on the basis of which case or line of cases are more analogous to the stipulated facts of our case. As stated in 55 C.J.S. Manufactures § 3, page 680:

"* * * In determining what constitutes manufacture there is no hard and fast rule which can be applied generally. Each case must be decided under its own facts, having regard for the sense in which the term may be used in the particular instance, and the intent or purpose to be accomplished. * * *"

■■ We must approach the problem by examining the specific tax statutes involved, to determine whether the Legislature intended to include or exclude the processing of natural gas when it originally exempted "manufactured" products from this tax. Phrased differently, did the 1963 Legislature change or expand the meaning of "manufacturer," or merely specifically define that word to have the same meaning as under the previous statutes? A statute is to be interpreted as the Legislature understood it at the time it was passed. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957); State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953).

Pan American argues, and El Paso agrees, that in granting the tax exemptions involved here, the Legislature intended to provide incentive for the construction and operation of industrial facilities in New Mexico. In construing these statutes, this legislative purpose should be considered. P. Lorrilard Co. v. Ross, 183 Ky. 217, 209 S.W. 39 (1919). By 1963 the Legislature determined to eliminate those exemptions and to impose a 2.55% privilege tax. Yet, aside from eliminating the exemption, the language of the 1963 acts is substantially similar to that of the previous acts, and there is no reason to believe that the acts are an entirely new creation of the Legislature, unfounded upon their predecessors.

The tax provisions involved in this case repeatedly refer to "oil and natural gas." In treating these two products together, it seems unlikely that at the same time the Legislature should choose to treat the taxation of the processing of these hydrocarbons in a different manner, without specifying such an intent. The Oil and Gas Emergency School Tax Act, supra, prior to the 1963 amendment, applied to "oil, natural gas or liquid hydrocarbons," which Act included a restatement of the tax ex-

emption originally contained in the Emergency School Tax Act, supra. The 1963 Oil and Gas Manufacturers Privilege Tax Act, in § 72-23-2, N.M.S.A.1953 (Supp. 1969), expressed the definition of "manufacturer" as follows:

"B. 'Manufacturer' means a person who:

"(1) Refines or processes oil, natural gas or liquid hydrocarbon, individually or any combination thereof; or

"(2) Extracts by-products from oil, natural gas or liquid hydrocarbon, individually or any combination thereof; * * *"

Clearly, under this definition, El Paso's natural gas processing operation does constitute "manufacturing." We cannot accept the argument that this definition is one which has been newly imposed by the Legislature and that under the earlier acts an entirely different meaning, which would exclude natural gas processing from the definition of "manufacturing," was intended. The purpose of the 1963 Oil and Gas Manufacturers Privilege Tax Act, which included the codification of the definition of "manufacturer," disavows any such implication of intent to create a new definition of that word, stating in § 72-23-3, N. M.S.A. 1953 (Supp. 1969):

"The purpose of this act * * * is to eliminate interrelated and interdependent provisions of taxation upon producers and manufacturers of oil, natural gas and liquid hydrocarbon, and to effect efficient administration and collection procedures by amending the Oil and Gas Emergency School Tax Act * * * and by eliminating the application of the provisions of the Emergency School Tax Act * * * as they apply to manufacturers of oil, natural gas or liquid hydrocarbon, and substituting therefor this Oil and Gas Manufacturers Privilege Tax Act * * *

"The legislature hereby declares its express intent that this amendment and substitution shall not constitute a new or an additional tax upon either the producer or manufacturer of oil, natural gas or liquid hydrocarbon as contemplated in gas purchase contracts commonly used in the natural gas industry; Provided, however, that in the event of any conflict between the provisions of the Emergency School Tax Act * * * and this Oil and Gas Manufacturers Privilege Tax Act, the provisions of only one [1] of these laws shall apply."

The purpose and intent expressed by this statute is that of clarification; elimination of confusion, inconsistency, or conflict; increased efficiency; and clearly shows that only one tax shall be imposed. The reference to no "new or additional" tax on the producer or manufacturer as contemplated by commonly used gas purchase contracts, in view of the nature of the act, can only have effect upon the Oil and Gas Emergency School Tax Act, supra, as amended in 1963, which was being supplemented. The Legislature pointed out explicitly the effects which this Oil and Gas Manufacturers Privilege Tax Act was to have on the act it was supplementing, in an effort to eliminate any confusion which might arise from the continued existence of two acts applicable to the same or similar areas.

We therefore believe that the above-quoted statutory definition of "manufacturer" was an expression of consistency with, or clarification of, existing law in this area of taxation, and not an entirely new statement of legislative intent, and that, when considered with the stipulation of facts summarized above, the trial court's Finding of Fact No. 47, quoted above, was factually and legally correct.

El Paso concedes that the increase from two percent to 2.55% was an "additional tax," ¾ of which it is now obligated to pay under the terms of the gas purchase agreements. Yet they argue that all of the remainder of the tax had always been erroneously exempted and therefore cannot be construed as an increased, new, or addi-

tional tax contemplated by their long-existing contractual agreements. Having determined that Pan American was entitled to the exemptions claimed under previous acts, the net result was that Pan American paid no taxes until the 1963 acts imposed the tax of 2.55% with no exemption provisions. Therefore, we must agree with the trial court that there then arose a tax of 2.55%, ¾ of which El Paso had contracted to pay, because Pan American is now paying a tax of 2.55% which tax it was neither paying nor was obligated to pay at the time the gas purchase agreements were entered into.

In its second point, El Paso asks us to review our determination in Pan American Petroleum Corporation v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966), where we held that the Courts of the State of New Mexico have jurisdiction over the subject matter of this action. We have done so, and we reaffirm our prior decision.

The judgment is affirmed. It is so ordered.

TACKETT and McKENNA, JJ., concur.

477 P.2d 833

Esther APODACA and Albert Gonzales, Petitioners,

v.

James M. SCARBOROUGH, Respondent.

No. 9176.

Supreme Court of New Mexico.

Dec. 7, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

477 P.2d 833

The STATE of New Mexico, ex rel. VALENCIA COUNTY CLERK, Lucy Keys Brubaker, Clerk, Petitioner,

v.

The Honorable Paul F. LARRAZOLO, District Judge, Second Judicial District, Valencia County, New Mexico, Respondent.

No. 9169.

Supreme Court of New Mexico.

Dec. 9, 1970.

Original Prohibition Proceeding

Ordered that the alternative writ of prohibition issued herein on November 23, 1970, be and the same is hereby made permanent, and all material impounded pursuant to the orders of the District Court in and for the County of Valencia, in cause No. 16056, shall remain impounded subject to the further orders of the District Court in the election contest proceedings which have been initiated in Valencia County District Court Cause No. 16089.

477 P.2d 833

Louis MADRID, Petitioner,

v.

Hon. D. A. MACPHERSON, Jr., Respondent.

No. 9179.

Supreme Court of New Mexico.

Dec. 21, 1970.

Original Prohibition Proceeding

Ordered that the alternative writ of prohibition issued herein on December 11, 1970 be and the same is hereby made permanent.

477 P.2d 833

STATE of New Mexico, ex rel. Lance T. GORDON, Petitioner,

v.

Hon. Edwin L. SWOPE, District Judge, Second Judicial District, State of New Mexico, Respondent.

No. 9185.

Supreme Court of New Mexico.

Dec. 22, 1970.

Original Prohibition Proceeding

Ordered that petition for writ of prohibition be and the same is hereby denied.

477 P.2d 833

William J. SHEFF, Petitioner,

v.

DISTRICT COURT, Ninth Judicial District, It's Clerk, Judges and the District Attorney, in and for Roosevelt County, New Mexico, Respondents.

No. 9137.

Supreme Court of New Mexico.

Dec. 23, 1970.

Original Mandamus Proceeding

Ordered that the detainer heretofore issued by the Sheriff of Roosevelt County be and the same is hereby vacated and set aside.

Further ordered that the writ of mandamus heretofore issued in this cause on the 16th day of October, 1970, be and the same is hereby quashed.

477 P.2d 1015

STATE of New Mexico, Plaintiff-Appellee,

v.

Glen Thomas KING, Defendant-Appellant.

No. 527.

Court of Appeals of New Mexico.

Dec. 4, 1970.

C. Gene Samberson, Heidel, Swarthout & Samberson, Lovington, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant's motion for post-conviction relief under Rule 93 [§ 21-1-1 (93) N.M. S.A.1953 (Supp.1969)] was denied without a hearing and he appeals.

We affirm.

Defendant asserts that he was not advised of his right to remain silent; that he was at no time afforded counsel; that he signed a statement without assistance of counsel; and that the district attorney's office advised him as to what to do when he entered his plea.

These assertions are not sustained by the record. The record shows that he was offered counsel if he could not afford to hire his own lawyer, that he told the court he did not want a lawyer, and then after questioning by the court concerning his understanding of the possible penalty, his right to a jury trial, defendant denied any promise or threats, and denied making any statements that made him think he ought to plead guilty, he then proceeded to plead guilty.

Defendant does not claim that his guilty plea was involuntary. Absent such a claim, and with the affirmative showing of the questioning by the court prior to the plea, the claims state no basis for relief. State v. Elledge, 81 N.M. 18, 462 P.2d 152 (Ct. App.1969).

Defendant claims that failure to appoint counsel to assist in the "motion under rule 93" was error. We disagree. Defendant was not entitled to appointed counsel on motion for post-conviction relief where the files and records conclusively showed that he was not entitled to relief.

State of New Mexico v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct.App.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

477 P.2d 1016

Bill H. WOOD, Plaintiff-Appellant,

v.

M. C. GANDY, dba Gandy Pumping Service and the Northern Assurance Company of America, Defendants-Appellees.

No. 531.

Court of Appeals of New Mexico.

Dec. 4, 1970.

L. George Schubert, Hobbs, for plaintiff-appellant.

Ray C. Cowan, Girand, Cowan & Richards, Hobbs, for defendants-appellees.

OPINION

SPIESS, Chief Judge.

This appeal is brought by plaintiff, Bill H. Wood, from a judgment denying his claim for workmen's compensation. Questions presented relate to the exclusion of evidence and the sufficiency of the evidence to support the findings of the trial court. We affirm the judgment.

Plaintiff, an employee of defendant, M. C. Gandy, operated a hot oil unit which was used to test the tubing in oil wells. The unit consisted of pumps, a tank and other equipment mounted on a truck. Plaintiff was sent with the unit to test a particular well known as Coastal State Well No. 1. He heated the material in the tank which

consisted of oil, brine, and an unidentified chemical, and proceeded to the well which was to be tested.

As plaintiff prepared the unit for service at the well, he noticed an odor of gas; he then collapsed. Plaintiff testified that he could crawl on his hands and knees, but that he could not stand erect. He alleged, and undertook to prove, that he suffered an injury arising out of an accident which occurred in the course of his employment. Specifically, his contention is that he suffered injuries caused by inhaling hydrogen sulfide gas which was emitted from the tank. The trial court made the following findings of fact:

"1. That the plaintiff was employed as a hot-oil unit operator by defendant M. C. Gandy, d/b/a Gandy Pumping Service, on September 22, 1968 on a job in Lea County, New Mexico.

2. That the plaintiff did not suffer an injury to his lungs and respiratory system arising out of an accident which occurred in the course of his employment while working for defendant M. C. Gandy, d/b/a Gandy Pumping Service, on or about September 22, 1968, as alleged in his Complaint.

3. That the plaintiff did not suffer a compensable injury while employed by M. C. Gandy, d/b/a Gandy Pumping Service, on or about September 22, 1968.

4. That the plaintiff was not injured by accident arising out of and in the course of his employment with defendant M. C. Gandy, d/b/a Gandy Pumping Service, on or about September 22, 1968.

5. That the plaintiff's alleged disability is not a natural and direct result of an accident arising out of his employment with M. C. Gandy, d/b/a Gandy Pumping Service, on or about September 22, 1968.

6. That Plaintiff's disability, if any, is the result of a cerebral vascular accident, or stroke, due to his hypertension rather than an accidental injury arising out of his employment with deefendant [sic] M. C. Gandy, d/b/a Gandy Pumping Service, on or about September 22, 1968."

Judgment was accordingly entered denying the plaintiff's claim.

We are called upon to determine (1) whether the trial court committed reversible error in not permitting a chemist to testify as to the effects of hydrogen sulfide on the human body, and (2) whether the findings of the trial court have substantial support in the evidence.

One of plaintiff's witnesses, a chemist, testified that hydrogen sulfide would have formed in the tank, and upon heating it together with other, lighter gases "would be driven off". The chemist further testified that hydrogen sulfide was a toxic gas, was "extremely hazardous and poisonous." This witness was not permitted to testify as to the effects of the particular gas on the human body upon the grounds that the witness had not been qualified as a medical expert.

A Dr. Lovin, called by plaintiff, testified that he was familiar with the qualities of hydrogen sulfide and that it was toxic to the body. He said with reference to the gas:

"I know it [hydrogen sulfide] is toxic to the body. * * *"

This particular witness also testified, in substance, that plaintiff's condition was probably caused by inhaling the gas emitted from the tank.

The testimony of a Dr. Smith was likewise presented by plaintiff. He stated:

"It was my impression that this patient had hypertension, and was being treated, and that he had a toxic labyrinthitis, most

likely associated with sinusitis, and toxic reaction from exposure to the gas."

The fact that hydrogen sulfide gas is toxic to the human body was shown by medical testimony. Further, the fact was uncontradicted. Consequently, if the exclusion of the evidence of the chemist on this point was error, which we do not decide, it was nonetheless harmless, and would not support a reversal of the judgment. Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Palatine Ins. Co. v. Santa Fe Mercantile Co., 13 N.M. 241, 82 P. 363 (1905); Bolen v. Rio Rancho Estates, Inc., 81 N.M. 307, 466 P.2d 873 (Ct.App.1970).

Appellant next questions the sufficiency of the evidence to support the findings of fact of the trial court.

It is well settled in this jurisdiction that facts found by the trial court are the facts upon which the case rests upon appeal, and are binding upon this court unless set aside as not supported by substantial evidence. Martinez v. Sears, Roebuck and Co., 81 N.M. 371, 467 P.2d 37 (Ct.App.1970), cert. denied April 14, 1970; Lopez v. Schultz & Lindsay Construction Company, 79 N.M. 485, 444 P.2d 996 (Ct.App.1968), cert. denied 79 N.M. 448, 444 P.2d 775; Taylor v. McBee, 78 N.M. 503, 433 P.2d 88 (Ct.App. 1967), cert. denied November 1, 1967.

In considering claimant's assertion that the evidence does not substantially support material findings of fact, this court must view the evidence, together with all reasonable inferences to be deducible therefrom, in the light most favorable to the successful party; all evidence to the contrary must be disregarded. Lucero v. Los Alamos Constructors, Inc., 79 N.M. 789, 450 P.2d 198 (Ct.App.1969); Corzine v. Sears, Roebuck and Company, 80 N.M. 418, 456 P.2d 892 (Ct.App.1969), cert. denied 80 N.M. 388, 456 P.2d 221 (1969).

Where there is a conflict in the evidence, the weight to be given to the testimony and credibility of the witnesses is for the trier of facts and not for this court. Irvin v. Rainbo Baking Company, 76 N.M. 213, 413 P.2d 693 (1966); Mares v. City of Clovis, 79 N.M. 759, 449 P.2d 667 (Ct.App.1968). The record discloses that the following testimony of Dr. Strole was introduced by defendant.

"Q Doctor, based upon the history that he gave you, and the examination you have described, do you have an opinion of the reasonable medical probability as to whether or not Mr. Wood, on September 23, 1968, had a cerebral vascular accident, or stroke due to pre-existing hypertension, rather than toxic involvement from gas?

A My opinion is this fellow had a probable cerebral vascular accident.

Q Doctor, based upon the history given you by Mr. Wood, and the examination you have testified to, do you have an opinion as a reasonable medical probability, as to the causal connection between his present complaints, or findings, or his complaints and findings at the time you examined him, both objective and subjective, and the gas inhalation accident he described occurring on or about September 23, 1968, in Lea County, New Mexico, while employed by Gandy Pumping Service?

A Do I have an opinion?

Q Yes, sir, as to the reasonable probability as to the causal connection between his present complaints and findings, and the incident he described as happening?

A I feel that the man has had a probable cerebral vascular accident due to his hypertension that he has had."

The findings challenged by plaintiff have substantial support and will not be disturbed. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d

642 (1968); Renfro v. San Juan Hospital, Inc., 75 N.M. 235, 403 P.2d 681 (1965).

Judgment is accordingly affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

477 P.2d 1019

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Lee BEACHUM, Defendant-Appellant.

No. 494.

Court of Appeals of New Mexico.

Nov. 6, 1970.

Rehearing Denied Nov. 25, 1970.

Second Rehearing Denied Dec. 23, 1970.

Turner W. Branch, Albuquerque, N. M., for appellant.

James A. Maloney, Atty. Gen., Santa Fe, N. M., John A. Darden, Asst. Atty. Gen., for appellee.

OPINION

SPIESS, Chief Judge.

Following a verdict of guilty based on the charge of robbery while armed with a deadly weapon, defendant was sentenced to the Penitentiary of New Mexico for a term of not less than ten nor more than fifty years and he now appeals.

Questions presented relate to (1) the admissibility of certain real evidence; (2) the sufficiency of the evidence to support a conclusion of guilt, and (3) the propriety of the sentence imposed by the court.

We will, briefly, state the evidence pertinent to the questions presented. A robbery was committed in an Albuquerque store by two men, both were masked and one was armed with and displayed a pistol. The pistol was described by a store employee as "a small gun, light black." Witnesses to the robbery could only describe the coats the robbers were wearing and could not identify the robbers. One robber wore a coat with a fur collar and the other was wearing a "greenish" jacket. A number of items were stolen from the store by the robbers, including money, checks, and two moneybags (one containing cash register tapes, the other unused money orders).

Following the robbery the Sheriff's office was immediately notified, and this office in turn notified two officers who were working together at the time in the general vicinity of the store. The officers so notified proceeded in an automobile toward the store, and, as they were stopped at a stop sign, a Studebaker car, occupied by two persons, was driven at a slow rate of speed past the squad car. One of the officers saw the driver of the Studebaker and identified him as the defendant, Beachum. The officers turned their vehicle and followed the Studebaker car which then gained speed and turned into a driveway, where it came to a stop. The officers followed the Studebaker into the driveway and stopped a distance of some twenty feet from it. One of the officers testified:

> "At the time we pulled in behind them, about twenty feet or so, the car come [sic] to a stop, the doors flew open and both subjects came out and the driver goes east and the passenger goes around the car and goes in a south direction."

The following testimony relating to the defendant, and given by the officer, we think is also pertinent:

> "Q. Which way did he go when he ran east?
>
> A. He went east from the car.
>
> Q. Did you attempt to apprehend him?
>
> A. Yes, I did.
>
> Q. You were unsuccessful?
>
> A. Yes.
>
> Q. Is the place he ran an open field?
>
> A. No, he had to jump over a six-foot fence.
>
> Q. Is that where he lost you?
>
> A. Yes.
>
> Q. Now, did you try to shoot him; did you take a shot at him?
>
> A. Yes. I hollered twice that we were detectives and he did not stop and I fired at him."

Within a short time a third officer apprehended the defendant and placed him under arrest. The officers examined the interior of the Studebaker car and searched the passenger. A number of checks were found upon the person of the passenger which were identified as property of the store which had been taken during the robbery. Items which were found in the Studebaker car included: two bags, one containing cash register tapes, the other blank money orders; a .22 caliber revolver with bullets; and a green jacket. These items, together with a photograph of the Studebaker car, were identified at the trial and admitted in evidence over defendant's objection.

Defendant first contends that the "TRIAL COURT ERRED IN ALLOWING DEMONSTRATIVE EVIDENCE TO BE EXHIBITED IN FRONT OF JURY OVER DEFENDANT'S OBJECTION WHEN THE SAME WAS NEVER RELATED TO THE CRIME OR CONNECTED TO THE DEFENDANT."

Defendant argues that he "* * * was denied a fair trial by having such inflammatory evidence as a gun before the senses of the jury when such evidence was not shown to be relevant or connected to the defendant."

The objection relates to several items, which we have mentioned, and which were found in the car, together with checks found on the person of the passenger, and a photograph of the car. This contention, in essence, as we understand it, is that the items were not admissible into evidence; consequently, permitting them, and in particular the pistol, to be exhibited to the jury, was reversible error.

The moneybags and contents, together with the checks and the jacket, bear a relationship to the crime and to one of the perpetrators. A store employee identified the moneybags, and contents, and the checks as property of the store which had been taken by the robbers. The green jacket was found in the car with the other items and, as shown, the testimony was to the effect that one of the robbers was wearing a "greenish" jacket.

The fact that a short time following the robbery the pistol was found with items which had been stolen by the robbers could, in our opinion, reasonably lead to the conclusion that the pistol found was the one used in committing the robbery. The description of the pistol as given by a witness in a general way would fit the one found in the car.

Although these items were not on the person of the defendant when he was apprehended they were in the automobile which he was driving and which he and his companion abandoned. The checks, as we have stated, were on the person of the passenger. The items were adequately connected with the defendant and the crime and admissible in evidence. *c. f.* Cole v. State, 450 S.W.2d 661 (Tex.Crim. App.1970); Ives v. Commonwealth, 184 Va. 877, 36 S.E.2d 904 (1946); State v. Vicory, 51 N.E.2d 290 (Ct.App.Ohio 1943).

It is our view that in the fact situation presented here defendant's argument should be directed to the weight rather than the admissibility of the evidence. How closely these items were connected with the defendant and the crime and what weight was to be accorded this evidence was for the jury to determine.

> "* * * Because of the wide variety of facts that may have circumstantial probative value, the courts are liberal in admitting evidence of facts which appear to bear some degree of relevancy to the matters in issue. Much discretion is left to the trial court, and its rulings will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact."

1 Wharton, Criminal Evidence, § 151 (12th ed. 1955). We hold that in these circumstances an abuse of discretion on the part of the trial judge is not shown by his admitting these items in evidence, and permitting them, including the pistol, to be displayed to the jury.

We have considered authorities cited by defendant, including State v. Kidd, 24 N. M. 572, 175 P. 772 (1917); and State v. McKnight, 21 N.M. 14, 153 P. 76 (1915). These cases do not compel a conclusion other than that here expressed.

In passing this point we do not overlook defendant's objection to the admissibility of the photograph of the Studebaker car. It does appear from the record that the photograph fairly represents the Studebaker car in which the several items which we have discussed were found by the officers. The admissibility of the photograph was addressed to the sound discretion of the trial court. State v. Sedillo, 76

N.M. 273, 414 P.2d 500 (1966); State v. Armstrong, 61 N.M. 258, 298 P.2d 941 (1956). We find no abuse of discretion on the part of the trial court in admitting the photograph.

Defendant's challenge to the sufficiency of the evidence to support the verdict is without merit. He argues that he was "* * * convicted on circumstantial evidence, however, this evidence was not of such nature that it pointed exclusively to the guilt of the defendant, nor was it of such a nature so as to be inconsistent with defendant's innocence."

It is fundamental that where circumstances alone are relied upon they must point unerringly to the defendant, and be incompatible with, and exclude every reasonable hypothesis other than his guilt. State v. Ford, 80 N.M. 649, 459 P.2d 353 (Ct.App.1969); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct.App.1969).

It appears undisputed that articles which had been stolen from the store by the robbers were found a short time following the robbery in the front seat of the automobile which was being driven by defendant. This evidence, although another person accompanied defendant in the car, would support a conclusion that defendant was in exclusive possession of the property. See State v. Flores, 76 N.M. 134, 412 P.2d 560 (1966).

It may be conceded that recently stolen property found in the exclusive possession of a defendant will not alone support a conclusion of guilt. In State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963), the court said in considering a jury instruction:

> "* * * a determination by the jury, that the defendant had in his possession the fruits of the crime, does not justify a finding of guilt unless there is evidence of other circumstances connecting the defendant with the offense."

In the instant case, the defendant, after being followed into the driveway by the officers, abandoned the car he was driving and fled, indicating a consciousness of guilt and that defendant was seeking to escape trial and punishment for the robbery. See State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); and State v. Rodriguez, 23 N.M. 156, 167 P. 426 (1917). It further appears from the record that defendant was apprehended by the police only minutes after the robbery, and only a short distance from the scene of the crime. The clothing found in the automobile from which defendant fled fit the description of clothing worn by the robbers, according to eye witnesses. It, therefore, appears that there was a sufficient circumstance of guilt in addition to the possession of the stolen property to support the verdict. People v. Wells, 187 Cal.App.2d 324, 9 Cal. Rptr. 384 (1960).

In our opinion, the obvious and most reasonable inference to be drawn from the established facts is that defendant was a participant in the robbery. Viewing the evidence in its most favorable aspect in support of the verdict, State v. Ford, supra, we think it substantially supports the conclusion of guilt, and the facts and circumstances are irreconcilable and inconsistent with any reasonable theory of innocence.

Defendant finally contends that the sentence imposed upon defendant was excessive "* * * considering the evidence and relative guilt of the defendant." This contention is not sustainable. Defendant was convicted of robbery while armed with a deadly weapon in violation of § 40A-16-2, N.M.S.A.1953 (Repl.1964) which provides:

> "Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence."
>
> * * * * * *
>
> "Whoever commits robbery while armed with a deadly weapon is guilty of a second degree felony."

Punishment imposed for a second degree felony is provided by § 40A-29-3, subd. B, N.M.S.A.1953 (Repl.1964) as follows:

> "Where the defendant has been convicted of a crime constituting a second de-

gree felony, the judge shall sentence such person to be imprisoned in the penitentiary for the term of not less than ten [10] years nor more than fifty [50] years, * * *"

The trial court is without authority to fix a lesser sentence than that provided by statute. State v. Romero, 73 N.M. 109, 385 P.2d 967 (1963). Defendant does not contend, nor would the record support a contention that the trial court abused its discretion in not deferring the imposition of sentence, or suspending the same in whole or in part.

The judgment and sentence of the trial court should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

478 P.2d 537

STATE of New Mexico, Plaintiff-Appellee,

v.

Charles Anthony FRENCH, Defendant-Appellant.

No. 9070.

Supreme Court of New Mexico.
Dec. 21, 1970.

John F. Schaber, Deming, for defendant-appellant.

James A. Maloney, Atty. Gen., Justin Reid, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

McKENNA, Justice.

The appellant filed motions under Rule 93 (§ 21-1-1(93), N.M.S.A.1953) in the District Court of Luna County, to vacate the judgments and sentences entered in criminal causes Nos. 2543 and 2544, in each of which the defendant, appellant herein, was convicted of second-degree murder upon his pleas of guilty. After hearing before the court, judgment was entered in both of said causes denying appellant's motions, from which he now appeals.

The first argument advanced by the appellant is that the defendant's counsel was incompetent. In support of that proposition, it is claimed that the record shows that (a) counsel was interested only in having the defendant enter guilty pleas; (b) that the defendant was never advised of his rights of appeal; (c) that counsel did not advise the defendant that the judge who resentenced him could be precluded from sitting

because the judge was the district attorney during the original criminal proceedings.

As to (a), the record shows that the defendant was represented by not one, but two attorneys; that he waived counsel at preliminary hearing; that his attorneys conferred with him extensively during all stages of the proceedings, including the resentencing. See French v. Cox, 74 N.M. 593, 595, 596, 396 P.2d 423 (1964). One indication of the concern of counsel was their inquiry into the defendant's sanity and the securing of a mental examination by competent physicians. We find no support for the general accusation that the attorneys desired only to discharge their duties by having the defendant plead guilty.

As to the second claim, (b), that he was never advised of his rights to appeal, this claim does not amount to an assertion that the appellant ever desired an appeal or was denied one. State v. Montoya, 81 N.M. 233, 465 P.2d 290, 291 (Ct.App. 1970) holds:

> "* * * In this appeal, Montoya's counsel states that Montoya claims his trial counsel did not advise him of the right to appeal. If this is the claim it provides no basis for post-conviction relief. It is not a claim that he was denied the right to an appeal. State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct.App. 1967)."

Compare State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App.1969).

No compelling authority has been cited that the failure to advise of the right to appeal a conviction and sentence on a guilty plea, standing by itself, establishes incompetency of counsel. The appellant cites only Dillane v. United States, 121 U.S.App.D.C. 354, 350 F.2d 732 (1965), and Carlisle v. United States, 122 U.S.App.D.C. 240, 352 F. 2d 716 (1965), as supportive of a rule that failure to inform of the right to appeal constitutes inadequate counsel, but the Dillane case, supra, recognizes, 350 F.2d at 733, that the question has "elicited varying responses." See, for instance, Dodd v. United States, 321 F.2d 240, 246 (9th Cir.1963). We adhere to Chavez v. State, 80 N.M. 560, 458 P.2d 812 (Ct.App.1969), and Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct.App. 1970), wherein our Court of Appeals required the defendant to show a benefit he would have received from an appeal or prejudice suffered from lack of advice as to his rights.

As to (c), the third claim, that counsel failed to advise the defendant that he could object to the resentencing by the judge who was the district attorney who prosecuted him, Art. VI, § 18, of our Constitution provides:

> "No justice, judge or magistrate of any court shall, *except by consent of all parties,* sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest." (Emphasis ours).

The record is abundantly clear that the defendant was aware that the Judge had been the prosecuting attorney; this was pointed out to him by the judge; his attorneys had discussed this with him prior to the resentencing, and the defendant specifically consented to the judge acting in the matter with full knowledge. Consent having been given by all parties, Art. VI, § 18, supra, was complied with and the circumstances above narrated preclude (c) as a basis for the claim of incompetent counsel.

The second point for reversal is that the defendant was induced to enter pleas of guilty by coercion, threats and a promise of leniency. Essentially, the evidence presented is the testimony by the defendant that his pleas were not voluntary; that counsel told him that if he didn't plead guilty to second-degree, he would die in the gas chamber for first-degree, and the testimony of the then district attorney that he told the lawyers "if they wanted to plead guilty to second-degree murder there would be an information charging second-degree murder."

The court specifically found that there was insufficient proof to support the allegation that the pleas were involuntary. The court chose to believe the testimony of the defendant's counsel and district attorney which was sufficiently substantial to support the findings that the defendant was represented by experienced, competent counsel at the time of voluntarily entering pleas of guilty with full understanding of the consequences. See French v. Cox, supra, 74 N.M. at 595, 596, 396 P.2d 423.

The situation here is not one where the pleas were induced by fear, threats or coercion, or promise of leniency, but is more aptly characterized as one of a choice presented to the defendant between two alternatives and a voluntary choice of a plea to a lesser charge. Very recently, in North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (decided November 23, 1970), the Supreme Court of the United States made that distinction and reiterated the standard for determining the validity of guilty pleas:

"We held in Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* [390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)] established no new test for determining the validity of guilty pleas. *The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.* See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 515, 7 L.Ed.2d 473 (1962); Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927). That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." (Emphasis ours.)

The order denying the defendant's motion for relief is affirmed. It is so ordered.

TACKETT and WATSON, JJ., concur.

478 P.2d 539

Angela SCHANUEL, nee Marbie, Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Defendant-Appellee.

No. 9059.

Supreme Court of New Mexico.
Dec. 21, 1970.

[redacted]

[redacted]

[redacted]

McDevitt & McDevitt, Gallup, for plaintiff-appellant.

E. E. Klecan, James T. Roach, Albuquerque, for defendant-appellee.

OPINION

WATSON, Justice.

On July 20, 1962, plaintiff-appellant purchased an insurance policy from State Farm Mutual Automobile Insurance Company, defendant-appellee. The policy covered her 1962 Volkswagon, and she alone was named as insured. The policy recited and defined several forms of coverage, but the title page, under "DECLARATION," noted only the following coverages: "A" (Bodily Injury Liability), "B" (Property Damage Liability), "C" (Medical Payments), "D" (Comprehensive), "G$50" (Deductible Collision), and "H" (Emergency Road Service).

In April, 1964, plaintiff-appellant purchased additional coverage under the policy which was evidenced by a "rider," Exhibit "B" to her complaint. Under "EXCEPTIONS AND ENDORSEMENTS" of this rider, the following appeared:

"Persons Insured – Coverages	S	Persons Insured – Coverages	S
"MARBLE, ANGELA	10000	MARBLE, LUND	10000"

There was also a blank space for Coverage "T" which was not utilized. Coverage "T" concerned total disability. Coverages "S" and "T" were set forth in the policy under "Insuring Agreement IV—Automobile Death Indemnity, Specific Disability and Total Disability Insurance." Coverage "S" provided for payment of the amount set forth above in the event of the death of each insured resulting from an automobile accident, and it also provided for the payment of certain scheduled amounts for dismemberment and loss of sight resulting from an automobile accident. If death resulted, the payment for it was to be reduced by any payments made for dismemberment or loss of sight.

At the time of the purchase of the additional coverage, Lund Marble, appellant's son, was 25 years of age, a student, and self-supporting. He married on March 10, 1965, and lived with his wife until, as a result of an automobile accident, he died on March 25, 1965. The appellee insurance company paid the proceeds of the policy to decedent's widow by a check made payable to "The Estate of Lund Marble." It was endorsed "The Estate of Lund Marble Jr. by Deanna J. Marble (wife) for deposit for Stacy Leigh Marble." Appellant, who had paid all of the premiums on the insurance policy, brought this action claiming the payment should have been made to her as the surviving insured.

Summary Judgment was granted the insurance carrier, and the sole question involved in this appeal is whether the trial court correctly construed the insurance policy in determining that the proceeds as a result of Lund's death were correctly paid or should have been paid to appellant.

Each party to the action asked and obtained the answer to the interrogatories from the other as to which provisions of the policy were relied upon for payment under their respective contentions. The appellant stated she relied upon:

> "All paragraphs applicable to coverage 'S' under Insuring Agreement IV (Pages 6–7), and all conditions, definitions, etc., applicable thereto as contained by reference in said Insuring Agreement or as a part of said policy, but particularly Paragraph Twelve of the Insuring Agreement IV (Page 7), Paragraph Nine of policy conditions (Page 9), sub-paragraph entitled 'Insured', under paragraph entitled 'Definitions' (Page 7)."

Paragraph 12 and the definition of "insured," both of which were under the same general heading as Coverage "S," i. e., "Insuring Agreement IV," read as follows:

> "12. Payment of Claim; Autopsy—Coverage S. Payment hereunder shall be made to the insured or, if the insured be a minor or incompetent person, to a parent or guardian; and if the insured is deceased, such payment shall be made to his surviving spouse if a resident of his household at the time of the accident, otherwise to the insured's estate. Any payment so made shall, to the extent thereof, constitute a complete discharge of the company's obligations hereunder and the company shall not be required to see to the application of the money so paid.
>
> "The company shall have the right and opportunity to make an autopsy where it is not forbidden by law."
>
> "Insured—means under coverages S and T the persons designated as such in the exceptions of the declarations."

Paragraph 9 was under the heading "POLICY CONDITIONS—APPLICABLE TO ALL COVERAGES UNLESS OTHERWISE NOTED"; it read as follows:

> "9. Joint and Several Interests. If two or more insureds are named in the declarations, this policy shall apply to them jointly and severally, but the inclusion of more than one insured shall not operate to increase the limits of the company's liability."

Appellant points out to us no other applicable provisions of the policy but contends that if the policy is ambiguous it must be construed in favor of the insured, and that it should be construed as of the date of the issuance of the policy and not as of the date of death.

Appellee's answer as to what provisions of the policy it relied upon for refusing to pay plaintiff said:

> "The basis for denying plaintiff's claim is that there are no sections in the insurance policy which specifically state that the plaintiff is to receive the proceeds of the policy in question. Specifically, defendant relies upon the entire coverage 'S' Section. Specifically, the definition of insured on Page 7 and Paragraph 12 of the Insuring Agreement 4, on Page 7 and Exhibit B of the Complaint. *In denying this claim, defendant will rely upon all of the provisions which the plaintiff alleges support her contention.*" (Emphasis added by the court.)

We have described the provisions of the rider, Exhibit "B" of the complaint. There, both the appellant and her son were listed as persons insured under Coverage "S" for $10,000.00.

Appellant filed an affidavit in which she stated that appellee's agent told her when she purchased the Coverage "S" rider that it would provide her indemnity in the amount of $10,000.00 in the event her son was killed and would provide her son the same in the event of her death, and that she relied upon this. She makes no point

of this, however, except as it would reflect upon the intent of the parties in the event the provisions of the policy are deemed ambiguous. She cites Morton v. Great American Insurance Company, 77 N.M. 35, 419 P.2d 239 (1966), and Knotts v. Safeco Insurance Company of America, 78 N.M. 395, 432 P.2d 106 (1967).

In Morton, we said:

> "While a policy of insurance, like any other contract, must be construed so as to give effect to the intention of the parties, where language of a policy is susceptible of more than one construction, the test is not what the insurer intended the words of the policy to mean, but what a reasonable person in the position of the insured would understand them to mean. (Citing Cases.)" [77 N.M. at 38, 419 P.2d at 241.]

There, we held that a substantial conflict of authorities in the interpretation of similar policies was some evidence that the term was not unambiguous. In the case before us, neither party has shown us an authority interpreting the contract provisions here involved. We must decide whether the language of the policy is susceptible of more than one construction. See Nunn v. Nunn, 81 N.M. 746, 473 P.2d 360 (1970).

There is only one provision in the policy stating to whom payments under Coverage "S" will be made. This is paragraph 12, quoted above. There is only one provision in paragraph 12 for such payment in the event the insured is deceased. It states that if the insured is deceased, payment is to be made to his surviving spouse if a resident of his household at the time of the accident; otherwise, to the insured's estate. This seems clear. It can hardly be construed as requiring payment to the surviving insured. Standing alone this is susceptible of only one construction. But does paragraph 9 change this construction so that a reasonable person in the position of the insured would otherwise construe the payment provision? We think not.

Of paragraph 9 appellant states that "jointly and severally" means "either one of the persons (insureds) individually or both of them together." But paragraph 9 also states: "but the inclusion of more than one insured shall not operate to increase the limits of the company's liability."

Appellant does not contend that if one amount is to be paid it should be paid to both insureds or divided between the surviving insured and the decedent's estate. Requiring payment to "either one of the persons individually" would not require payment to the survivor of the two but is consistent with requiring payment to the decedent's estate or designee, for his several or individual rights are not necessarily terminated on his death. Only in the event of a joint tenancy would the survivor be entitled to the proceeds, and paragraph 9 does not say that two or more insureds will be joint tenants.

Where the policy, under paragraph 12, provides for payment on death to the widow or estate, it would be a strained construction to say that, when read with the joint and several clause in paragraph 9, it means payment to the surviving insured or renders the provisions of paragraph 12 ambiguous. We do not resort to strained construction to establish the existence of an ambiguity. Anaya v. Foundation Reserve Insurance Company, 76 N.M. 334, 414 P.2d 848 (1966); Gray v. International Service Insurance Company, 73 N.M. 158, 386 P.2d 249 (1963).

An insurance contract should be construed as any other contract to give effect to the intent of the parties at the time the contract was made. Lonsdale v. Union Insurance Company, 167 Neb. 56, 91 N.W.2d 245 (1958). It was appellant's duty to read the policy. Western Farm Bureau Mutual Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968); Porter v. Butte Farmers Mu-

tual Insurance Company, 68 N.M. 175, 360 P.2d 372 (1961). A person in her position could only have understood from the policy that upon the death of her son the proceeds would be paid to either his spouse or his estate. There is no provision for payment to appellant. She should have known even prior to Lund's marriage that in any event she would recover only as a beneficiary of his estate.

Appellant cites Voss v. Connecticut Mutual Life Ins. Co., 119 Mich. 161, 77 N.W. 697 (1899), and states that it is established in law and reason that the nomination of a beneficiary is effective as of the date of the issue of the policy, and that the rights created become vested. Even if this were so, under the terms of the policy here had Lund died prior to his marriage appellant had only an expectancy from her son's estate. Her claim here is not based on this expectancy but as a surviving insured. The policy is the measure of the rights of those under it, and their rights are construed within the four corners of the contract. Spicer v. New York Life Ins. Co., 263 F. 764 (N.D. Ala. 1920), affirmed 268 F. 500 (5th Cir.), cert. denied 255 U.S. 572, 41 S.Ct. 376, 65 L.Ed. 792.

Ownership of the policy is not determinative in itself of ownership of the proceeds, Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967); nor could the proceeds of a death claim of one jointly insured policyholder be deemed as held in joint tenancy. Since one insured must die before the proceeds are available, there could never be unity of ownership. See Equitable Life Assurance Soc. of United States v. Weightman, 61 Okl. 106, 160 P. 629 (1916), and Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931).

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and SISK, J., concur.

478 P.2d 543

STATE of New Mexico ex rel. STATE LABOR COMMISSIONER of New Mexico, Plaintiff-Appellee,

v.

GOODWILL INDUSTRIES, Defendant-Appellant.

No. 9083.

Supreme Court of New Mexico.

Dec. 28, 1970.

Hernandez, Atkinson, Kitts, Kelsey & Hanna, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SISK, Justice.

Defendant, Goodwill Industries, appeals from a judgment ordering the payment of $204.55 to Delfino Ulibarri, represented by the plaintiff, State Labor Commissioner, which sum represents the difference paid to Ulibarri by Goodwill Industries as an employee and the minimum wage required by law. We will refer to the interested parties as Goodwill, Ulibarri, and Commissioner. Goodwill alleges error by the trial court in holding that an employer-employee relationship, controlled by applicable minimum wage standards, existed between it and Ulibarri, and denies that it was required to obtain an exemption certificate from the Commissioner pursuant to our Minimum Wage Act, §§ 59–3–20 through 59–3–26, N.M.S.A. 1953 (Supp.1969).

Goodwill contends that Ulibarri was not an employee but was a "rehabilitation client" hired by it, a non-profit charitable corporation, in furtherance of its primary function of rehabilitation of handicapped persons. It alleges that Ulibarri was a chronic alcoholic and that his employment was primarily for purposes of rehabilitative therapy.

The effect of the trial court's findings and conclusions was that, during the period in dispute, there existed between Goodwill and Ulibarri a relationship of employer and employee, and that Ulibarri was not a rehabilitative client and Goodwill was therefore not entitled to the exemption from the Minimum Wage Act provided for by § 59–3–22.1, supra, for certain classifications of employees whose earning or productive capacity is impaired by physical or mental handicap.

We affirm. We must examine the evidence in the light most favorable to support the trial court's findings and conclusions, and must indulge in all reasonable inferences in favor of the successful party, and if the court's findings and resulting conclusions are supported by substantial evidence they will not be disturbed on appeal. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970); Payne v. Tuozzoli, 80 N. M. 214, 453 P.2d 384 (1969).

Ulibarri had previously worked for Goodwill as a truck driver from December 12, 1966 to June 14, 1967, admittedly as a regular employee and not as a rehabilita-

tive client. He was laid off following an arrest for drunken and reckless driving; he was rehired from June 29, 1967 until October 11, 1967, during which time he performed janitorial work and occasionally drove a small truck. Ulibarri testified that he was not informed and was unaware that he was rehired in a rehabilitative-client capacity. Mr. Lynn, Director of Goodwill, testified that they did hire non-handicapped persons to fill vacancies in order to maintain industrial progress, and that Ulibarri had been referred originally to Goodwill by the New Mexico State Employment Agency, a source of referral for other nonhandicapped persons hired by Goodwill. Also, Mr. Giese, Director of Vocational Rehabilitation for Goodwill, testified that he was not sufficiently aware of Ulibarri's drinking problem to be able to classify him as an alcoholic. The fact that Ulibarri drove a truck for Goodwill even after he was rehired is further indication that his re-employment was more from necessity for his services for the benefit of Goodwill than as a part of a rehabilitative program for a chronic alcoholic. Nor is there any evidence in the record which would define the words "handicapped workers" as used in the exemption statutes in such a manner as to unmistakably include Ulibarri.

In seeking to subject Goodwill to minimum wage standards in this particular case, the Commissioner cites the humanitarian purposes of such legislation, while Goodwill counters with the humanitarian aspects of its own charitable and non-profit endeavors. However, case law in this area is well established and exemptions from minimum wage requirements are to be strictly and narrowly construed. A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 65 S.Ct. 807, 89 L.Ed. 1095 (1945); Shultz v. Circulation Sales, Inc., 301 F.Supp. 937 (Ed.Mo.1969). Once the Commissioner established that services were performed by Ulibarri for which he did not receive the compensation required by § 59–3–22 of the Minimum Wage Act, supra, the burden shifted to Goodwill to present sufficient evidence to negate the reasonableness of inferences to be drawn from the plaintiff's case. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); Foster v. Irwin, 258 F.Supp. 709 (E.D.La.1966).

We hold that there was substantial evidence to support the trial court's ruling that an employer-employee relationship existed between Goodwill and Ulibarri during the disputed period.

The second point of contention concerns the application of § 59–3–22.1, supra, which permits employers to obtain a certificate of exemption from the minimum wage requirements for certain employees. No such certificate was obtained by Goodwill pertaining to Ulibarri, and the Commissioner asserted and the trial court held, that, absent such certificate, Goodwill was required to pay Ulibarri the applicable minimum wage. We agree. The Minimum Wage Act, supra, is susceptible of no other construction. Goodwill maintains that because the Commissioner failed to promulgate regulations providing the procedures for obtaining such certificates of exemption, it was not required by law to make any inquiry concerning such a certificate or any effort to obtain such certificate. We disagree. The burden of proof in establishing an exemption from minimum wage laws is on the person claiming such an exemption, and Goodwill failed to produce any evidence that it sought to obtain such a certificate, or even that it made any inquiry to the Commissioner with regard to Ulibarri's employment. See Tripple "AAA" Company v. Wirtz, 378 F.2d 884 (10th Cir. 1967); Wessling v. Carroll Gas Co., 266 F.Supp. 795 (N.D.Iowa 1967).

The judgment of the trial court must be affirmed.

It is so ordered.

TACKETT and McKENNA, JJ., concur.

478 P.2d 546

SOUTHWESTERN PORTLAND CEMENT,
a corporation, Plaintiff-Appellee,

v.

A. E. BEAVERS, B. C. Glasgow and P. G. Adams, d/b/a Plains Sand and Gravel, Defendants-Appellants.

No. 9071.

Supreme Court of New Mexico.

Dec. 28, 1970.

Walker, Hart & Laflin, Oliver H. Miles, Clovis, for defendants-appellants.

Richard M. Snell, Clovis, for plaintiff-appellee.

OPINION

McKENNA, Justice.

Appellee Southwestern Portland Cement brought this suit to collect payment on an account in the amount of $1,647.00, plus costs and attorney fees, against appellants Beavers and Glasgow, doing business as Plains Sand and Gravel, and defendant Adams. Judgment was entered against all three jointly and severally for the sum sued for, plus costs and attorney fees of $549.31. Only Beavers and Glasgow appealed.

In February of 1968, the appellants formed a partnership known as Plains Sand and Gravel to provide concrete for a construction project at Cannon Air Force Base. The general contractor for the project was Wilkerson-Webb. Defendant Adams had no proprietary interest in the partnership. In March, 1968, the partnership entered into an oral agreement with Adams to use his ready-mix concrete batching plant and delivery trucks to mix and deliver concrete to the project. The partnership made arrangements with appellee Southwestern to furnish bulk cement to Adams at his plant. The method of payment for the delivered concrete was for Wilkerson-Webb to issue their check payable jointly to Plains Sand and Gravel and to Southwestern.

On March 20, 1968, and again on April 30, 1968, Southwestern delivered cement to Adams' plant for the partnership account. Adams received these deliveries at his plant and signed truck tickets for the cement on behalf of Plains Sand and Gravel for the Cannon Air Force job. These two deliveries of cement were paid for by Wilkerson-Webb's joint check in the amount of $1,052.70.

On July 10, 13 and 16, Adams ordered cement from Southwestern telling it that the order was for Plains Sand and Gravel. Similarly, Adams received the three deliveries at his plant, signed truck tickets for receipt of the cement on behalf of Plains Sand and Gravel for the Cannon Air Force job.

It was established during trial that prior to the last three deliveries by Southwestern, Adams' equipment broke down and he was unable to deliver the concrete to the job site and Plains Sand and Gravel made other arrangements with another firm to deliver the concrete. However, the appellants did not inform Southwestern of this prior to the last three deliveries. After the last of the three deliveries, Southwestern contacted Wilkerson-Webb to "confirm" the amount of concrete usage on the job and to "reconfirm" the guarantee of payment. It was then informed that only a negligible amount of concrete was supplied by Plains Sand and Gravel for the job, and Wilkerson-Webb refused to issue a joint check for the delivered cement. Thereupon, Southwestern called one of the appellant partners who denied that Adams had authority to order the cement.

Southwestern then sued Beavers, Glasgow and Adams for the last three loads delivered.

The testimony was conflicting as to whether Adams or one of the appellants placed the first two orders. Adams said he did; Beavers said his partner did. The court found that Adams placed the first two orders as well as the last three. This finding is of no consequence, however, because there is no finding that the first two calls were relied upon by appellee in any way.

The findings of fact pertinent to this appeal are:

"8. In March, 1968, Plains Sand & Gravel entered into a sub-contract to

supply concrete on a construction project at Cannon Air Force Base, New Mexico, and then made an oral contract with Adams whereby Adams was to use his ready-mix concrete batching plant and delivery trucks to mix and deliver concrete on said project, with Plains Sand & Gravel furnishing the cement and aggregate. Plains Sand & Gravel made arrangements with plaintiff to furnish bulk cement to Adams for use on said project, and deliveries were made by plaintiff to Adams under this arrangement in March and April, 1968, and paid for by the prime contractor on the project in behalf of Plains Sand & Gravel."

This finding was uncontested; the court, however, proceeded further and found:

"9. Plains Sand & Gravel authorized Adams to order cement from plaintiff for use on said project, and Adams ordered the cement which was delivered to him by plaintiff in March and April, 1968. Adams' authority to so order cement was not cancelled until after July, 1968. This course of dealing gave Adams apparent authority to place other orders for cement from plaintiff on behalf of Plains Sand & Gravel.

"* * *

"11. On July 10 and 13, 1968, Adams ordered additional loads of bulk cement from plaintiff on the Plains Sand & Gravel account, without specific authority from Plains Sand & Gravel. * * *"

The court concluded:

"2. Plains Sand & Gravel as principal is estopped to deny the authority of Adams as its agent to order the cement involved in this action, having clothed Adams with apparent authority to order same, and plaintiff having acted on said apparent authority in good faith and to its detriment."

For reversal, the appellants argue that there was no substantial evidence to support the finding that Adams had apparent authority from the course of dealing to order the last three loads of cement and Southwestern was negligent by not inquiring into the scope of Adams' authority and this negligence precluded appellee from any recovery. Although the trial court may have given some weight to finding 9, even though there is no finding of any reliance by appellant on any orders from Adams, we do not find this fatal to its judgment if uncontested finding 8 is alone sufficient to uphold the judgment. Board of Education, School District 16, etc. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Obviously, the course of dealing was not lengthy, and was limited, in terms of time span and deliveries, but this must be viewed in light of the limited business relationship which was involved—it was for only one project at Cannon Air Force Base. It is equally obvious that the component acts in the course of dealing were identical and reflected a common pattern. See Ulen v. Knecttle, 50 Wyo. 94, 58 P.2d 446, 111 A.L.R. 565 (1936). Each of the deliveries made to Adams by Wilkerson-Webb was for the account of Plains Sand and Gravel for use on the particular project in accordance with the pre-arranged procedure. Each delivery was made to the same location; each was receipted for by Adams for the partnership. If Southwestern had not been paid for the first two loads, it would have been warned or alerted—at least the law would so view it (Malia v. Giles, 100 Utah 562, 114 P.2d 208 [1941])—but having been paid for the first two loads by the very procedure agreed upon, Southwestern could reasonably construe this as ratification of the previous course of business. We cannot say that under these circumstances Southwestern acted in bad faith or without reasonable prudence in delivering the last three shipments. As between Southwestern and the partners, it is the latter's conduct which fails to meet the test of reasonable prudence, for not only did they have the responsibility for the relationship, they neglected to notify Southwestern that they had made different arrangements for delivery of the concrete when Adams' equipment broke down. If they had done this,

Southwestern's delivery of the last three shipments would have been at its peril.

An agent's scope of authority embraces not only his actual authority but also that apparently delegated. A settled course of conduct does serve to create apparent authority in the agent binding upon the principal where the acts are not timely disavowed and a third party is thereby induced to rely on the ostensible authority of the agent and does so in good faith and with reasonable prudence. The doctrine is based upon an estoppel: the principal will not be permitted to establish that the agent's authority was less than what was apparent from the course of dealing for when one of two innocent parties must suffer, the loss must fall upon the party who created the enabling circumstances. Raulie v. Jackson-Horne Grocery, 48 N.M. 556, 561, 154 P.2d 231 (1944); South Second Livestock Auction, Inc. v. Roberts, 69 N.M. 155, 364 P.2d 859 (1961); 3 Am.Jur. 2d, Agency, 475, 478, 479, §§ 73, 75, 76; 2 C.J.S. Agency § 96d(3), p. 1213.

In Record v. Wagner, 100 N.H. 419, 128 A.2d 921 (1957), the defendant hired one Berry to operate his farms. Berry requested the plaintiff to bale hay. At Berry's direction, the plaintiff made out his bill to the defendant; Berry gave it to the defendant who paid it. The next year the plaintfif was again asked to bale hay the same as last year. The plaintiff gave his bill to Berry who then gave it to the defendant for payment, but the defendant refused to pay it, alleging that Berry's authority had been terminated prior to the work having been done. The court found that the defendant gave no notice to the plaintiff, and that the plaintiff saw no change in the operation of the farm, and ruled that the defendant so conducted the farm as to give the plaintiff the right to believe that Berry was authorized to hire him to bale the hay. The court's reasoning, 128 A.2d at 923, was:

"* * * By paying the 1953 bill, the defendant recognized Berry's authority to hire the plaintiff on the former's credit. Berry then resided on the defendant's farm, and was properly found the defendant's agent at that time, whether he was in fact hired by the defendant individually, or by some other member of the 'cooperative' which could be found to have been a partnership. In 1954, Berry continued to reside on the main farm, and to all appearances was operating it in the same manner and in the same capacity. If in fact he had ceased to occupy the farm as agent, but did so as a tenant, the defendant made no effort to notify the plaintiff of the change in Berry's status.

"It could be found that in the exercise of reasonable diligence the plaintiff was justified as a result of the defendant's conduct in believing that Berry had authority to pledge the defendant's credit in 1954 for the same services which the defendant recognized as a proper charge against himself in 1953. * * * The important fact is that the defendant permitted the outward appearances of Berry's authority to remain unchanged in 1954 from what they were in 1953, and by not notifying the plaintiff of the termination of the agency permitted the plaintiff to be misled. Having done so, he rather than the plaintiff should bear the loss. * * *"

See Roberson v. Bondurant, 41 N.M. 638, 73 P.2d 321 (1937).

The appellants cite Baldwin Piano Co. v. Wade & Co., 30 N.M. 285, 232 P. 523 (1924), as a similar situation supportive of their position, but close analysis will reveal that it is not similar. The piano company furnished pianos to Wright on consignment. Wright ran a music store. He rented a building from Wade to store the pianos. When Wright did not pay the rent, Wade sued the piano company for the rent claiming that Wright had authority as an agent to rent the building. At 287, 232 P. at 524, we decided that Wright had no

actual or implied authority to rent the building stating:

"Nor is it shown to be customary for persons receiving pianos on consignment to rent store buildings for the owner of the same. Nor is any such course of business between these parties shown to have been previously carried on and ratified by appellant. Nor can the power result from estoppel of appellant, for it is not shown to have done any act upon which appellees, as reasonably prudent men, might rely and take a position to their detriment. * * *"

The appellants argue that Southwestern did not act with reasonable diligence and was negligent in failing to inquire into Adams' authority as evidenced by Southwestern's statement that after the delivery of the last three shipments, it did contact Wilkerson-Webb to check into the cement usage at the Air Force Base and to reconfirm the guarantee of payment. No particular conclusion of law was submitted by the appellants to the court that this after-the-fact inquiry constituted negligence or failure to exercise reasonable prudence or diligence on the part of Southwestern but we will consider the argument included as a matter of law in the appellants requested conclusion of law that Adams had no apparent authority to order the July shipments of cement.

The inquiry made by Southwestern was primarily directed to whether Wilkerson-Webb would pay for the cement by joint check as it did in the past, rather than the apparent authority of Adams to order the cement on behalf of the appellants. While payment by joint check of Wilkerson-Webb was the arranged procedure for payment, however, at the time of the last shipment there had been no departure from the course of dealing that would serve to alert Southwestern. As observed earlier, payment for the first two shipments served to confirm the course of dealing. There was no evidence presented by the appellants that the total amount of the last three shipments was so inordinate as to cause suspicion, nor was evidence of any other alerting factor introduced, and arrangements made by the partnership did not require Southwestern to first check with Wilkerson-Webb before delivering cement.

Standing by itself, under the circumstances presented, we do not believe that the inquiry made *after* the cement was delivered constitutes as a matter of law negligence or failure to exercise reasonable diligence. It is the appellants who should bear the loss since they are responsible for a course of business with the necessary apparent authority and are now estopped to deny that authority, the appellant having reasonably relied upon it. Furthermore, balancing the positions of both sides, the appellants fall short for they could have easily averted their loss by advising Southwestern that they had made other arrangements for the concrete because of Adams' equipment failure. Record v. Wagner, supra.

The appellants claim that Southwestern *did not know* who placed the first orders for cement and accordingly it could not rely on a settled "course of conduct" as to the last three shipments. Southwestern's evidence did not cover this point specifically, but we believe it immaterial. The district court's uncontested finding No. 8, supra, is that the partnership made arrangements with Southwestern to furnish cement to Adams on behalf of the partnership for use on the project and deliveries were made to Adams in accordance with the agreed procedure for which payment was made and received. We think this sufficient to establish a course of dealing for which appellants should be held responsible. The primary test for determining the scope of apparent authority is not the acts of the agent but the principal's conduct. Malia v. Giles, supra, 114 P.2d at 211; 2 C.J.S. Agency § 96e(2), 1214. Finding 8 alone is sufficient to sustain the judgment.

The appellee asks for reasonable attorney fees here for defending this appeal, but our statute (§ 18-1-37, N.M.S.A., 1953)

does not clearly establish that right and the request is denied.

The judgment is affirmed and it is so ordered.

WATSON and SISK, JJ., concur.

478 P.2d 551

Maxine O. LAHR, Plaintiff-Appellant,

v.

Melvin A. LAHR, Defendant-Appellee.

No. 9011.

Supreme Court of New Mexico.

Dec. 28, 1970.

Nordhaus & Moses, James F. Beckley, Albuquerque, for plaintiff-appellant.

Turner W. Branch, Bill Chappell, Jr., Albuquerque, for defendant-appellee.

OPINION

SISK, Justice.

Plaintiff appeals from the trial court's division of community property in an action where both parties sought a divorce and an equitable division of such property. Plaintiff alleges lack of substantial evidence to support the trial court's refusal to reimburse her for expenditures allegedly made from her separate property for the benefit of the community estate, and also alleges that there was no substantial evidence to support the values established by the trial court as to two pieces of community real estate.

In determining whether findings of fact are supported by substantial evidence we resolve all disputed facts and indulge in all reasonable inferences in favor of the successful party and disregard inferences to the contrary. Samora v. Bradford, 81 N. M. 205, 465 P.2d 88 (1970); Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970). We presume the correctness of the judgment of the trial court who had the advantage of evaluating the demeanor of the parties and of the witnesses. Farmers and Stockmens Bank of Clayton v. Morrow, 81 N.M. 678, 472 P.2d 643 (1970); Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91 (1941).

In her first point plaintiff contends only that there is no substantial evidence to support the trial court's refusal to find, as requested by her, that she should be reimbursed from the community estate for certain expenditures made from her separate funds, and states that such refusal is tantamount to making a contradictory finding. Although plaintiff introduced an itemized list of funds alleged to have been expended from her separate property for community purposes, there is substantial evidence to the contrary. The testimony of the plaintiff and of the defendant was conflicting, with the defendant asserting that most of such expenditures were from funds given by him to her, and he further indicated that his disbursements to her over the years offset any expenditures she may have made on behalf of the community. Nor were the cancelled checks unequivocally tied to community use. There was evidence from the defendant, and even in some instances from the testimony of the plaintiff, of the alternative possibilities that such funds were used for the maintenance of the plaintiff's separate property or for the benefit of various of her relatives. Having such conflicting evidence before it on the issue of use of certain of the plaintiff's funds for community or non-community purposes, we hold that there is substantial evidence to support the trial court's refusal to adopt plaintiff's requested findings.

Plaintiff's second point asserts that the trial court erred in establishing the value of two pieces of community real estate, which it included in its division between plaintiff and defendant, and which we will refer to as the Princeton property and the Silver property. Plaintiff objects that the written report of an appraiser, Mr. Eckert, was inadmissible hearsay because it contained the conclusions of an out-of-court declarant offered to prove the truth of the matter asserted; and that the deposition testimony of an accountant, Mr. Cassell, was in effect inadmissible as opinion testimony, and as incompetent testimony timely objected to as hearsay.

Actually, no contention is made that the accountant was qualified as an expert appraiser, or even that he made an independent appraisal. Nor is it contended that the expert appraiser's valuations by themselves were admissible, he never having been subjected to examination or cross-examination as to the values he placed on these properties.

But with regard to the Princeton property, there is other evidence from which the trial court could have arrived at its valuation. Plaintiff acknowledges that an owner of property may always testify as to its value, and as to the value of the Princeton property the defendant made it very clear from his own testimony that he did not think it was worth more than $20,000. This testimony alone constitutes substantial evidence to support the trial court's valuation at that figure. Nor should this opinion of value be held inadmissible as a self-serving statement of the defendant. At the time of his testimony neither he nor the plaintiff could have been certain which property the court would award to which party. We hold that the trial court did not abuse its discretion and did not err in establishing the value of the Princeton property at $20,000.

As to the Silver property, however, the facts are different. The defendant did not testify as to his own personal opinion of

valuation. The accountant testified that the valuation of $32,500 used in the proposal prepared by him and adopted by the court was taken directly from the Eckert appraisal. Defendant argues that this amount was also the value placed on the property by him. The accountant in his deposition does indicate that the proposal which included this valuation was an offer made by the defendant. But the defendant himself was not questioned as to his opinion of the value of this property, and hearsay objections to the admission of the accountant's deposition testimony and the appraiser's report were timely and properly made.

Defendant argues that even after excluding the conclusions of the accountant and the hearsay real estate appraisals of the expert appraiser, the accountant's deposition statements as to what are claimed to be the defendant's personal opinion as to value were properly admitted. We must disagree. Even if these values were those of the defendant as well as of the appraiser, the accountant's deposition testimony remains hearsay because it is the testimony of a witness as to out-of-court statements of a declarant who was not a witness as to that specific subject matter. Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942).

The only admissible evidence as to the value of the Silver property, then, was the $27,000 valuation of the plaintiff. Was the trial court therefore required to accept this valuation in making its allocation of the community property? We hold that it was. The applicable rules when considering uncontradicted testimony have been well settled in New Mexico since Medler v. Henry, 44 N.M. 275, 101 P.2d 398 (1940), where this court said:

> "From the New Mexico cases discussed, we believe the rule in this jurisdiction to be that the testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts; but it cannot be said that the trier of facts has acted arbitrarily in disregarding such testimony, although not directly contradicted, whenever any of the following matters appear from the record:
>
> "(a) That the witness is impeached by direct evidence of his lack of veracity or of his bad moral character, or by some other legal method of impeachment.
>
> "(b) That the testimony is equivocal or contains inherent improbabilities.
>
> "(c) That there are suspicious circumstances surrounding the transaction testified to.
>
> "(d) That legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony."

Subsequent cases following these rules include Aragon v. Boyd, 80 N.M. 14, 450 P. 2d 614 (1969), and Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

There is nothing in the record in our case from which we can say that the plaintiff was impeached, and in fact, on this issue concerning her personal opinion of the value of the Silver property, she was not cross-examined. Nor can we fairly say from the record that her testimony was equivocal or contained inherent improbabilities, that suspicious circumstances surrounded her testimony as to this valuation, or that legitimate inferences could be drawn which cast doubt on the truth or accuracy of her testimony. She, as an owner, was entitled to give her opinion as to the value of the property. She did so, and there is nothing to indicate, just as in the case of the defendant's opinion as to the valuation of the Princeton property, that it was not her honest and best opinion of the actual value of the property. This being the only admissible evidence of such value, it was reversible error, under the above-cited authorities, not to accept such valuation in making the allocation of the community property.

The judgment is affirmed except as to the valuation of the Silver property. Accordingly, the cause is remanded with instructions to value such property at $27,000 and to modify or amend the judgment as to the allocations of community property contained therein.

It is so ordered.

COMPTON, C. J., and McKENNA, J., concur.

478 P.2d 554

J. F. HAIR, Plaintiff-Appellant and Cross-Appellee,

v.

Victor MOTTO, Jr., Mayor of the City of Bloomfield, and Robert W. Cassady, Clerk of the City of Bloomfield, Defendants-Appellees and Cross-Appellants.

No. 8965.

Supreme Court of New Mexico.
Dec. 31, 1970.

Marvin Baggett, Jr., Farmington, for plaintiff-appellant and cross-appellee.

Joseph F. Burns, Aztec, for defendants-appellees and cross-appellants.

OPINION

WATSON, Justice.

On May 6, 1969, an election was held in the City of Bloomfield, New Mexico, for the purpose of voting on general obligation bonds for three municipal improvements. The canvass of the voting showed that the water system bonds passed 116 to 112; the sewer system bonds passed 114 to 112;

and the swimming pool bonds failed 89 to 133.

On June 5, 1969, an "Application for Recount" was filed against the mayor and clerk of the City. The plaintiff-appellant here alleged that he was a resident, a qualified elector, a property owner and a property taxpayer of the City who was qualified to vote and who did vote in the election, and that nine votes were illegal because the voters, although otherwise qualified, were either not property owners or had not paid a property tax during the year preceding the election as required by N.M.Const. art. IX, § 12, and by paragraph B of § 14-29-2 and paragraph A of § 14-29-6, N.M.S.A., 1953 Comp. (Repl. Vol. 4). This appeal is from the judgment finding the votes legal and dismissing the action.

The pertinent constitutional provision, art. IX, § 12, supra, reads as follows:

> "* * * No such debt shall be created unless * * * submitted to a vote of such *qualified electors thereof as have paid a property tax therein during the preceding year* * * *. For the purpose, only, of voting on the creation of the debt, *any person owning property within the corporate limits of the city, town or village who has paid a property tax therein during the preceding year* and who is otherwise qualified to vote in the county where such city, town or village is situated shall be a qualified elector." (Emphasis added.)

Both of the statutes, §§ 14-29-2, supra, and § 14-29-6, supra, required the payment of a property tax on property located within the municipality during the year preceding the election.

The trial court found with respect to the nine challenged votes as follows:

> "4. That James T. Stiffler and his wife, Charlotte Roe Stiffler; and Dale William Muns and his wife, Mrs. Dale William Muns; and Wayne D. McKinley, were all purchasers of and in possession of real property within the City of Bloomfield by way of escrow contracts. That the deeds to the respective properties had not been transferred to the respective purchasers. That the properties were carried on the tax rolls in the names of the respective contract vendors 'in care of' the respective purchasers.
>
> "* * *
>
> "6. That Mr. & Mrs. Bert R. Buchanan purchased real property by deed within the City of Bloomfield on December 6, 1968. They assumed the outstanding mortgage on the property and made monthly payments to the mortgage company, from December 6, 1968 to the time of election. Part of the monthly payments was for the purpose of paying the property tax assessed against the property. The mortgage company paid the ad valorem tax on the property for 1968 on November 22, 1968. The property was carried on the tax rolls in the name of Mr. & Mrs. Bert Buchanan at the time of the election.
>
> "7. Mr. & Mrs. Edward C. Wagoner owned property within the City of Bloomfield. By operation of the Soldier's exemption as provided by law the property owned by the Wagoners was exempt from taxation and thus they had not paid a property tax within the twelve (12) months preceding the election."

It was admitted that those persons named in finding 4 paid the taxes, so the question presented there is whether they were "persons owning property" within the meaning of art. IX, § 12, supra. The question presented by findings 6 and 7 is whether each voter there named was a person "who has paid a property tax during the preceding year," as required by art. IX, § 12, supra, and §§ 14-29-2, supra, and 14-29-6, supra.

Very recently, in Board of Education of Village of Cimarron v. Maloney (decided December 7, 1970), 82 N.M. 167, 477 P.2d 605 (1970), we held that property ownership was an unconstitutional requirement for eligibility to vote in a special school

district general obligation bond election as being in violation of the U.S.Const. amend. XIV. This holding resulted from the decision in City of Phoenix, Ariz. v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970). There, the United States Supreme Court determined that no retroactive effect was to be given the decision except where the authorization was not final as of June 23, 1970 (the date of its opinion), and said:

> "* * * In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision *unless a challenge on the grounds sustained by this decision* has been or is brought within the period specified by state law. * * *" (Emphasis added.)

There, the challenge was by a non-property owner whose right to vote was sustained. Here, the challenge is by a property-owning taxpayer challenging the right to vote of those alleged to be non-property owners or non-taxpayers. No constitutional question was raised below or is present in this appeal. Although we must conclude that our holding in Board of Education v. Maloney, supra, is not applicable here, we cannot entirely close our eyes to the reasoning of the Supreme Court in City of Phoenix, Ariz. v. Kolodziejski, supra. There, the court relied upon Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), in determining that the differences between the interests of property owners and the interests of non-property owners in municipal projects was not sufficiently substantial to justify excluding the latter from the franchise to vote. (The holding in Cipriano, decided June 16, 1969, may be applicable to this case, although that decision also was to be applied prospectively.)

The facts here are undisputed. First, is the vendee in a real estate contract a "person owning property" within the statutory and constitutional requirements? Neither our Constitution nor our statutes require the ownership or the payment of taxes on real property as distinguished from personal property; nor do they point out the extent of title or ownership that is required. Section 72-1-1, N.M.S.A., 1953 Comp., provides:

> "All property, real, personal and intangible shall be subject to taxation, except as in the Constitution and existing law otherwise provided. * * *"

This would even include a lessee's property interest. Kirtland Heights v. Board of County Commissioners, 64 N.M. 179, 326 P.2d 672 (1958). Section 72-1-3, N.M.S.A., 1953 (1969 Supp.), specifically provides for the taxation of the equitable interest of the vendee of state lands. The separate assessment of undivided interests in land, except severed mineral interests, is not required. Kaye v. Cooper Grocery Company, 63 N.M. 36, 312 P.2d 798 (1957). We can only conclude that both the vendors and the vendees on the real estate contracts were "persons owning property." Fugate v. Mayor and City Council of Town of Buffalo, 348 P.2d 76, 97 A.L.R.2d 243 (Wyo.1959).

The second question is whether the persons identified in findings 6 and 7 paid a property tax in the year preceding the election. As to the Buchanans (Finding 6) who paid a portion of the 1968 taxes as a part of their monthly payment to the mortgagee who paid their tax, we believe our holding in Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925), is controlling. There, we held that a husband and wife were both entitled to vote "who has paid a property tax therein upon such community property during the year preceding the election, either *with his or her own hand, or by an agent,* * * *." (Emphasis added.) Although the agency relationship may not have existed until after the payment of the taxes, it did exist prior to the end of 1968. The Buchanans, as distinguished from either their sellers or their mortgagee, were interested in the election. They were the persons "primarily affected by the results. [They are] the one[s]

who must pay the additional taxes and bear the burden of the lien thus created." Junker v. Glendale Union High School District, 73 Ariz. 20, 236 P.2d 1010 (1951); Barcon v. School District No. 40, 103 Ariz. 311, 441 P.2d 540 (1968).

In Fugate v. Mayor and City Council, supra, it is noted that courts generally hold that the right to vote should be construed liberally. We could hardly dispute this rule in view of the recent Supreme Court pronouncements above mentioned. We recognized the same rule, however, as early as State ex rel. Read v. Crist, 25 N.M. 175, 179 P. 629 (1919).

Although the trial court found (No. 7) that Mr. and Mrs. Wagoner had not paid a property tax because of the operation of the soldiers' exemption (N.M.Const. art. VIII, § 5), it nevertheless concluded that they were eligible to vote. Since the court did not conclude that the requirements of art. IX, § 12, supra, or § 14–29–2, supra, or § 14–29–6, supra, were unconstitutional, it was implicit in the entry of its judgment that their failure to pay any tax because of the soldiers' exemption was nevertheless compliance with these requirements. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968). We agree with this conclusion.

The provision in art. IX, § 12, supra, limiting the voting on municipal indebtedness to those who have paid a property tax during the preceding year was in the original Constitution of this State. The solidiers' exemption was first authorized by an amendment to the Constitution in 1921. It has been amended several times since. Unlike the exemption provisions of the California and Arizona constitutions, it is not self-executing. Dillard v. New Mexico State Tax Commission, 53 N.M. 12, 201 P.2d 345 (1948).

Had the constitutional amendment itself granted the exemption on the property, as does N.M.Const. art. VIII, § 3 (to government bodies and charities), we might well conclude that it was a total exclusion of the property and could not be construed as payment of the tax. Morgan v. Board of Sup'rs, 67 Ariz. 133, 192 P.2d 236 (1948). This distinction in the types of exemptions is pointed out in State ex rel. Attorney General v. State Tax Commission, 40 N.M. 299, 58 P.2d 1204 (1936).

In Wylie Bros. C. C. v. Albuquerque-Bernalillo C. A. C. B., 80 N.M. 633, 459 P.2d 159 (1969), we said:

> "* * * A constitution is a practical instrument adapted to common wants and designed for common use, and it is made and adopted by the people themselves. It must be construed as if intended to stand for a great length of time. Since it is an instrument of progress, its meaning should not be too narrowly or literally interpreted, but rather it should be given a meaning which will be consistent with new or changed conditions as they arise. If words are used therein that have both a restricted and a general meaning, the general must prevail, unless the context clearly indicates that the restricted meaning was intended. Flaska v. State [51 N.M. 13, 177 P.2d 174 (1946)]."

In Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946), we pointed out that the provisions of the soldiers' exemption amendment to the Constitution must be taken to mean what was meant in the minds of the voters when the provision was adopted. We reviewed the history and conditions existing at the time of the adoption and pointed out that, while other states had adopted bonuses for giving material assistance to their veterans, New Mexico chose to permit the legislature to grant an exemption not exceeding $2,000. We there said that the general, rather than the restricted, meaning of words should be used in interpreting the amendment unless the context clearly indicates that the limited sense was intended.

We cannot believe that the people of this state, by their expression of gratitude in 1921 to the veterans, intended to deprive those veterans who accepted this gesture of their franchise to vote on county and

municipal projects, or that they intended that veterans who owned property of less than $2,000 would have to pay for their vote by giving up part of their exemption.

In addition, the exemption is more in the nature of a gratuity or bonus to the veteran or his widow as owners of the property rather than an exclusion of the property itself from taxation. Unlike the property exemption granted by art. VIII, § 3, supra, the veteran's property is placed on the assessment rolls. Sections 72–2–3 and 72–1–13, N.M.S.A., 1953 Comp. (1969 Supp.), and § 72–1–14, N.M.S.A., 1953 Comp. If the assessment exceeds the exemption and the tax on the excess is not paid, or if the exemption is not claimed or allowed, the lien for the tax is against the entire property. Sections 72–5–12 and 72–1–14 through 72–1–20, N.M.S.A., 1953 Comp.

The soldiers' exemption is actually the payment or forgiveness of that portion of the tax the legislature may determine within the constitutional limitation. If the veteran claims his exemption, he, in effect, consents to this payment by the state of his taxes. Neither art. IX, § 12, supra, nor §§ 14–29–2 or 14–29–6, supra, require that the payment be made personally. Baca v. Village of Belen, supra.

In Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923), the question was whether the 1921 amendment authorizing the soldiers' exemption was in conflict with N.M. Const. art. IV, § 32, which prohibited the extinguishment of any obligation to the State "except by payment thereof into the proper treasury." We held that the exemption amendment modified the original constitutional provision. The same amendment would also modify the provisions of art. IX, § 12, supra. In Asplund, we said:

> "* * * [B]ut the amendment is the later expression of the people's will, and must take precedence over the earlier section, in so far as they are in conflict, and we must give to the term under consideration its usual meaning as above defined—the meaning which the people of the state must have had in mind in modifying their fundamental law to the end that, through their Legislature, they might give some substantial recognition of the service and sacrifice of those of their citizens who, in the time of danger, bravely risked life and limb in support of our free institutions." (29 N.M. at 134, 219 P. at 788.)

We conclude that without consideration of the constitutionality of the voting requirements of either art. IX, § 12, supra, or the statutes implementing it the Wagoners, by virtue of claiming the soldiers' exemption, became taxpayers within the requirements of the Constitution and these statutes, and that the trial court was correct in so concluding.

Having found the other issues in favor of the appellee, the judgment is affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

478 P.2d 559

Lea R. MENZI, Petitioner,

v.

Honorable Robert W. REIDY, District Judge, Second Judicial District Court, State of New Mexico, Respondent.

No. 9187.

Supreme Court of New Mexico.

Jan. 6, 1971.

Original Mandamus Proceeding

Ordered that the writ of mandamus heretofore issued in this cause on December 23, 1970, be and the same is hereby quashed.

478 P.2d 559

Boyd L. O'DELL, Petitioner,

v.

Grace E. GARRETT, Individually, and as Executrix of the Estate of James M. McAllister, Deceased, and Velma Commelaere, and Citizens State Bank of Springer, New Mexico, Respondents.

No. 9177.

Supreme Court of New Mexico.

Dec. 23, 1970.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 557, 82 N.M. 240, 478 P.2d 568 be and the same is hereby returned to the Clerk of the Court of Appeals.

478 P.2d 559

STATE ex rel. Jeanniene SCHMITT, Petitioner,

v.

The DISTRICT COURT OF the SECOND JUDICIAL DISTRICT sitting WITHIN AND FOR the COUNTY OF BERNALILLO, D. A. MacPherson, Jr., Judge, Division IV, Respondent.

No. 9184.

Supreme Court of New Mexico.

Jan. 6, 1971.

Original Prohibition Proceeding

Ordered that the alternative writ of prohibition heretofore issued in this cause on December 22, 1970, be and the same is hereby quashed.

478 P.2d 560

ALBUQUERQUE NATIONAL BANK, Trustee under Trust Indenture, dated February 17, 1958, Protestant-Appellant,

v.

COMMISSIONER OF REVENUE, State of New Mexico, Appellee.

No. 513.

Court of Appeals of New Mexico.

Dec. 4, 1970.

John P. Dwyer, Albuquerque, for protestant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Richard J. Smith, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

N. M. Laws 1968 (S.S.), ch. 2, authorized a county income surtax on "individual" residents. It is hereinafter referred to as the surtax statute. The issue is whether "individual" includes a trustee under a trust indenture.

The authority under Section 1 of the surtax statute is:

> "* * * to impose a county income surtax up to a maximum of fifty percent of the income tax imposed by the Income Tax Act upon all individual residents in the county, provided that the county income surtax shall not apply to corporations."

In 1968, pursuant to this authorization, a surtax of 43% of income tax paid under the Income Tax Act [§§ 72-15A-1 to 72-15A-44, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1969)], was proposed to and approved by the voters of Bernalillo County. The Bank, as trustee under a trust indenture, failed to pay the surtax. It took the position that in its capacity as trustee it was not an "individual" under the surtax statute. The Commissioner disagreed with the Bank's contention and ruled that the Bank, as trustee, was liable for the surtax. A direct appeal was taken to this court. Section 72-13-39, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1969).

The surtax statute does not define "individual." Our approach, then, must be to try to ascertain the intent of the Legislature in using the word "individual" since the fundamental rule of statutory construction is to give effect to the legislative intent. State v. Chavez, 77 N.M. 79, 419 P. 2d 456 (1966); see concurring opinion in New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct.App.1969).

The Income Tax Act defines "individual." Section 72-15A-2(f), N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1969). This definition would include the Bank, as trustee. The Commissioner asserts the Legislature intended to apply the definition of "individual" in the Income Tax Act when it used "individual" in the surtax statute. The Commissioner takes two general approaches in support of his contention.

First, the Commissioner points out that the Legislature has enacted a comprehensive taxing scheme. The Income Tax Act,

which defines "individual," is a part of this scheme. He contends the surtax statute is a detail of the legislative plan to tax income, pointing out that the surtax statute contains internal references to the Income Tax Act. He asserts the overall taxing plan, the surtax statute as a detail of that plan and the internal references to the Income Tax Act in the surtax statute show a legislative intent to apply the definition of "individual" in the Income Tax Act to the surtax statute.

The most we can say for this argument is that it leaves considerable doubt as to the legislative intent. There is doubt as to the surtax statute being a part of a comprehensive taxing plan since it is in effect a "one-shot" tax. The authorization for this tax is limited to the 1968 calendar year and fiscal years commencing in 1968. There is doubt that the surtax statute is a detail of a state income tax since the State is not a recipient of the surtax; it goes to local school boards. There are references to the Income Tax Act in the surtax statute. These references: (1) place a maximum on the surtax by reference to income tax imposed by the Income Tax Act, and (2) provide for collection of the surtax in the same manner and at the same time the state income tax is collected. Doubt exists that these references show a legislative intent to apply the definition of "individual" in the Income Tax Act to the surtax statute since the Legislature defined "resident" in both the Income Tax Act and the surtax statute, but defined "individual" only in the Income Tax Act. Since the Legislature took the trouble to define one of the terms used, why didn't they define their other terms—such as "individual"?

With these doubts, it is as reasonable to conclude that the lack of definition of "individual" in the surtax statute is as much a drafting oversight as it is to conclude that there was an intent that the definition in the Income Tax Act should apply to the surtax statute.

Second, the Commissioner invokes various rules of statutory construction to arrive at the legislative intent. Only one of these rules requires discussion. The others are not discussed since they are argued on the mistaken assumption that we are concerned here with an exemption from taxation. This is a mistaken assumption because the issue here is whether the surtax statute, by authorizing the imposition of a surtax upon "individual" residents, has authorized a surtax upon the Bank, acting as a trustee.

The rule of construction requiring discussion is "pari materia." Generally speaking, this phrase means "of the same matter" or "on the same subject." Black's Law Dictionary (4th Ed.1951). This rule of construction may be used in ascertaining legislative intent. State v. Chavez, supra. The rule is used to construe different sections of the same legislative enactment, New Mexico Glycerin Co. v. Gallegos, 48 N.M. 65, 145 P.2d 995 (1944), and to construe separate laws enacted in the same legislative session, State v. Chavez, supra; Vermejo Club v. French, 43 N.M. 45, 85 P.2d 90 (1938). That is not the situation here; the Income Tax Act and the surtax statute were enacted at different legislative sessions.

However, the New Mexico Supreme Court has utilized the rule in construing statutes enacted at different legislative sessions. In re Gossett's Estate, 46 N.M. 344, 129 P.2d 56 (1942), involved a general statute on descent and distribution enacted in 1899 and a pretermission statute enacted in 1901. The opinion states: "* * * The subject of all these statutes is the descent of the property of decedents. They are in pari materia and should be construed together * * *." Because of *Gossett*, supra, we proceed on the basis that the rule of pari materia may be applied in constructing statutes enacted at different legislative sessions.

Applying the rule to the two statutes involved here, the question is to what extent are they in pari materia? Both apply to taxation, to income taxation, to the amount of the tax and to its collection. Because

both of the statutes apply to the same subject to this extent, the rule supports the Commissioner's argument. It is plausible, under the rule of pari materia, that the legislative intent was to apply the definition of "individual" in the Income Tax Act to the use of "individual" in the surtax statute. Yet, doubt as to this intent remains because in enacting the surtax statute the Legislature defined "resident" but did not define "individual."

At this point, however, we will assume that by applying the rule of pari materia we have a basis for determining legislative intent. This is a rule of general application. Application of the general rule is prevented by a specific rule applicable to statutes which impose taxes. New Mexico Electric Service Co. v. Jones, supra, states: "Where an ambiguity or doubt exists as to the meaning or applicability of a tax statute, it should be construed most strongly against the taxing authority and in favor of those taxed. * * *" Field Enterprises Educational Corp. v. Commissioner of Revenue, 82 N.M. 24, 474 P.2d 510 (Ct. App.1970), states: "* * * Any doubtful meaning or intent of a tax statute must be resolved against the State and in favor of the taxpayer. * * *"

Doubt exists as to the legislative intent to apply the definition of "individual" in the Income Tax Act to the use of "individual" in the surtax statute. Accordingly, the definition of "individual" contended for by the Commissioner will not be applied.

Up to this point we have done no more than reject the contention that the definition of "individual" in the Income Tax Act should be applied to the surtax statute. We must still determine the meaning of "individual" as used in the surtax statute. The applicable rule has two aspects: (1) legislative intent is to be determined primarily by the language in the Act, and (2) the words used are to be given their ordinary meaning unless a different intent is clearly indicated. Winston v. New Mexico State Police Board, 80 N.M. 310, 454 P.2d 967 (1969). This rule has been applied in determining the meaning of a tax statute. Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970).

We have previously pointed out that the surtax statute defines "resident." Section 1 of the surtax statute states:

> " 'Resident' means an individual who is domiciled in the county during any part of the taxable year; but any person who on or before the last day of the taxable year changed his place of abode to a place without the county with the bona fide intention of continuing actually to abide permanently without the county shall be considered a nonresident for purposes of this act."

We note that "individual" and "person" appear to be used in the same sense. Definitions of these two words in Webster's Third New International Dictionary, Unabridged (1966), show they may mean, respectively, a "single being" and an "individual human being." However, "individual" may also mean "a single group of beings or things." "Person" may also mean a legal entity that is recognized by law. Compare Gonzales v. Oil, Chemical and Atomic Workers Intern. Union, 77 N. M. 61, 419 P.2d 257 (1966). To determine the meaning to be attributed to them we look to the context in which they are used. They are used in connection with "domicile," "abode," "abide"; words which ordinarily mean dwelling, home, the residence of an individual or family. In this context, "individual" in the surtax statute means an individual human being, it does not include the Bank, acting as trustee.

The ruling of the Commissioner is reversed since it is incorrect as a matter of law. The case is remanded to the Commissioner with instructions that further proceedings be consistent with this opinion.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

478 P.2d 563

STATE of New Mexico, Plaintiff-Appellee,

v.

Lonnie Joe RILEY, Defendant-Appellant.

No. 550.

Court of Appeals of New Mexico.
Dec. 11, 1970.

C. N. Morris, Silver City, for defendant-appellant.

James A. Maloney, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was charged and convicted of unlawfully giving away a narcotic drug—marijuana. Section 54–7–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). Defendant asserts two grounds for reversal. The second point is determinative of this appeal.

We reverse.

Section 54–7–14, supra, states:

> "*Unlawful sale or delivery—Possession with intent to sell unlawfully.*—Whoever shall have in his possession a narcotic drug with intent unlawfully to sell and deliver such drug, or any part thereof, or whoever unlawfully sells, furnishes, gives away, or delivers any narcotic drug in violation of the provisions of this act, shall be punished as hereinafter provided."

Section 54–5–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2) states:

> "*Possessing, planting, producing or disposing of cannabis indica prohibited—Exception.*—It shall be unlawful for any person, association, or corporation within this state to possess, plant, cultivate, produce, sell, barter or give away any cannibis [cannabis] indica, also known as hashis [hashish] and marijuana, be it known by whatever name, or preparation or derivative thereof; Provided nothing in this act [54–5–14, 54–5–15] shall be held to apply to the possession, sale, gift, barter or trade of cannabis indica by licensed physicians or licensed pharmacists upon the written prescription of regular licensed physicians, when the same is intended for medicinal or scientific purposes only."

Defendant contends he should have been charged under § 54–5–14, supra. He relies on State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936), and states that since both § 54–5–14, supra, and § 54–7–14, supra, condemn the same offense and since one is a special statute and the other a general statute, that he should have been charged under the special statute. We agree.

In State v. Blevins, supra, our Supreme Court, in discussing prosecutions under special and general statutes stated:

> "* * * Does the state have a choice in the matter of initiating prosecutions for the sale of chattel property of the kind and description named in the special

statute, section 35–2405? We conclude that it does not. In 59 C.J. 1056, at section 623 under the subject 'Statutes,' the rule is stated as follows: 'Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage. It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' "

The principle was followed in State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966), when the court quoted with approval from State v. Blevins, supra, the following:

"'* * * the state had no alternative in the matter but to prosecute the appellant under the special statute, * * *'"

Subsequently, the *Blevins* principle was quoted with approval in State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966); however *Chavez* held that since the penalty provision of § 54–7–14, supra, was amended by Chapter 146, Laws of 1961, and there being no amendment to § 54–5–14, supra, that the last expression of the Legislature would control and prosecution under § 54–7–14, supra, would be proper.

The foregoing statutes were enacted by the Laws of 1935. See dissent in State v. Chavez, supra, for amendments prior to 1969. Subsequently the penalty provisions of those sections (§ 54–7–15, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1969), § 54–5–15, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp. 1969)) and were amended by the Laws of 1969, ch. 236.

Section 54–7–14, supra, deals with "a narcotic drug" in general and comprehensive terms while § 54–5–14, supra, deals with "any cannibis [cannabis] indica, also known as hashis [hashish] and marijuana" in a minute and definite way. The same proof is required for a conviction of unlawfully giving away marijuana under either statute. Both statutes are violated with the single act of unlawfully giving away marijuana. See dissenting opinion of Justice Moise concurred in by Justice Carmody of State v. Chavez, supra. The State has no alternative but to prosecute under the special statute.

Even if we use the rationale of State v. Chavez, supra, we come to the same conclusion. The penalty provisions of both § 54–7–14, supra and § 54–5–14, supra, were amended by the Laws of 1969, ch. 236. Under *Chavez* this would mean that the Legislature having spoken as to both § 54–5–14, supra, and § 54–7–14, supra, the special statute would be operative. State v. Blevins, supra.

Defendant has been prosecuted, convicted and sentenced under inapplicable statutes. The conviction and sentence is reversed. The cause is remanded with instructions to vacate the conviction, judgment and sentence, and dismiss the charge under which defendant was prosecuted.

It is so ordered.

SPIESS, C. J., concurs.

WOOD, J., specially concurs.

OMAN, J., not participating.

WOOD, Judge (specially concurring).

I agree with the result and with most of the reasoning in the majority opinion. I recognize that the remarks made in this special concurrence are not necessary to a decision in this case. Yet, I feel the remarks are appropriate because of the uncertainty that has existed in the last few years as to the proper statute under which marijuana prosecutions should be filed.

The problem of uncertainty as to the applicable marijuana statute bottoms on a constitutional provision. That provision is equal protection of the law. If the State enacts two laws prohibiting the same act and provides a different penalty in each act, the result is that the prosecuting authority is in a position to choose which of the two laws he will charge a defendant with violating. If the prosecutor is in the position to choose, then we have a constitutional violation because in that situation there is unequal protection of the law. State v. Chavez, supra.

For years New Mexico has had both general and special legislative acts prohibiting certain actions in connection with marijuana. Because of these two provisions, and because constitutionally the State is not free to pick the statute under which it will proceed, the need for certainty as to the applicable statute was apparent. An answer providing certainty was given as long ago as 1936 when our Supreme Court held that where both the general and special act applied to the conduct under consideration, the special act was the applicable act. State v. Blevins, supra.

However, beginning with Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), continuing with State v. Chavez, supra, and continuing through the 1969 amendments (Laws 1969, ch. 236) to both the general and special acts, we have had uncertainty compounded. *Aragon* would allow the State to pick and choose the applicable statute. *Chavez* repudiated *Aragon* but found the general act to control on the basis that the penalty to the general act was the last amendment and, therefore, the last expression of legislative intent. The 1969 amendments showed the *Chavez* approach to be an impractical guide to certainty since it amended the penalty sections of *both* the general and special acts. The 1969 amendments did even more. Section 3 of those amendments (Law 1969, ch. 236, § 3), pertaining to "illegal use," makes illegal use of a narcotic drug (which by definition includes marijuana) a felony in Paragraph A. But in Paragraph B, illegal use of marijuana is a misdemeanor. Because of these inconsistencies, I see no way to arrive at a legislative intent of any kind in the 1969 amendments.

With no guide within the 1969 amendments as to legislative intent, we return then to the rule of State v. Blevins, supra; that is the rule the majority applies and in which I concur. In doing so, however, the majority leaves open the possibility that the method used by the majority in State v. Chavez, supra, in arriving at legislative intent, may still be considered a valid approach to determining legislative intent. It opens up this possibility when it says: "Even if we use the rationale of State v. Chavez, supra, we come to the same conclusion."

In State v. Chavez, supra, the majority of our Supreme Court found the general and special acts to be in pari materia and since the *penalty* of the general statute had been last amended, held that the legislature "impliedly intended" the general act to control. Instead of seeing such a legislative intent, I see a logical hiatus in the reasoning of the majority. The legislature obviously intended to amend the penalty of the general act. It stated that *if* you violate the general act, you must suffer a greater penalty. How, however, can the amendment to the *penalty* section of the general statute be construed to include an

intent that the general act controls over the special act?

Further, the reasoning of the majority in State v. Chavez, supra, is completely answered in the dissenting opinion in that case. The majority opinion in this case follows the dissent in State v. Chavez, supra, when it declares the determinative precedent to be State v. Blevins, supra.

Thus, my points are:

1. The result in State v. Chavez, supra, is wrong; the reasoning in State v. Chavez, supra, is wrong; the dissent in State v. Chavez, supra, is correct.

2. The majority opinion in this case follows the dissent in State v. Chavez, supra.

3. The opinion in this case should make it clear that the reasoning of the majority in State v. Chavez, supra, is not a guide to solution of future problems involving the general versus the special statute on marijuana.

478 P.2d 566

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert E. CHAVEZ, Defendant-Appellant.

No. 510.

Court of Appeals of New Mexico.

Dec. 18, 1970.

Wycliffe V. Butler, Butler & Colberg, Albuquerque, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, John A. Darden, Asst. Atty. Gen., for appellee.

OPINION

OMAN, Judge.

Defendant's conviction of armed robbery was affirmed in State v. Chavez, 80 N.M.

786, 461 P.2d 919 (Ct.App.1969). He is here now on appeal from an order denying his motion for post-conviction relief without an evidentiary hearing thereon having been granted. We affirm.

His contention is the admission into evidence at his trial of testimony concerning a polygraph examination, and the examiner's opinion as to the results of the same, violated his constitutional rights against self-incrimination. He argues he was not given the Miranda warnings, and did not intelligently and voluntarily waive his right against self-incrimination after having full and complete knowledge of all the facts. He must fail in this argument because:

[redacted] First, the voluntary submission by him to the examination, which was conducted at his request, without first being given the Miranda warnings and without knowing all that would be asked of him, his responses thereto, and the results of the examination, is not to be equated with self-incrimination, nor is the examiner's interpretation of the results of such examination to be equated with an interpretation from one language into another of self-incriminating statements. We reject his argument that the interpretation of the results of the test by the examiner is comparable to an interpretation by a linguist of statements from one language into another. The capacity for accuracy in interpretations from one language to another is universally understood and accepted. Whereas, the reliability of polygraph examinations is so doubtful "* * * that the procedure has not gained general acceptance in the particular field in which it belongs * * *", and evidence relative to such examinations and their results is not admissible over objection. State v. Chavez, supra. This doubt as to reliability goes to the validity of both the observable results of such examinations and the interpretation of these results by the examiner. State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); Henderson v. State, 94 Okl.Crim. 45, 230 P.2d 495, 23 A.L.R.2d 1292 (1951).

[redacted] Secondly, the waiver here involved was not accomplished until the testimony as to the examination and its results, and the interpretation of these results by the examiner in the form of an opinion, were offered into evidence without objection. Prior thereto defendant had sought the test and had freely and voluntarily agreed that the results thereof, and their interpretation by the examiner, would be admissible as evidence. Then, with full knowledge that all evidence as to the test, including the results and interpretation thereof by the examiner, could still be kept from the jury by objecting thereto, no objection was made. State v. Chavez, supra. Defendant thereupon waived all rights he had to the introduction into evidence of the matters he now claims were self-incriminating. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct.App.1969); People v. Hicks, 44 Ill. App.2d 550, 256 N.E.2d 823 (1970); Commonwealth v. Nash, 436 Pa. 519, 261 A.2d 314 (1970); People v. Jefferson, 18 Mich. App. 9, 170 N.W.2d 476 (1969).

None of the authorities relied upon by defendant require or even suggest, under facts such as are here present, a result different from that we reach.

The order denying the motion should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

478 P.2d 568

Boyd L. O'DELL, Plaintiff-Appellant,

v.

Grace E. GARRETT, individually and as Executrix of the Estate of James M. McCallister, Deceased, and Velma Bommelaere, and Citizens State Bank of Springer, New Mexico, Defendants-Appellees.

No. 557.

Court of Appeals of New Mexico.
Nov. 20, 1970.

Certiorari Denied Dec. 23, 1970.

Joseph D. Beaty, Albuquerque, for plaintiff-appellant.

W. R. Kegel, Kegel & McCulloh, Santiago E. Campos, Santa Fe, Daniel W. Caldwell, Springer, for defendants-appellees.

OPINION

SPIESS, Chief Judge.

This action was brought by Boyd L. O'Dell, appellant, in conversion against Grace E. Garrett, individually, and as Executrix of the Estate of James M. McCallister, Deceased, Velma Bommelaere, and Citizens State Bank of Springer, New Mexico.

Involved were a number of United States Savings Bonds, Series "H", which appellant claimed to own as a result of a gift (inter vivos) made to him by James M. McCallister during his lifetime, and which allegedly were converted by defendants (appellees).

The trial court entered orders dismissing the complaint, with prejudice, against Grace E. Garrett, individually, and the Citizens State Bank of Springer, and later it entered summary judgment in favor of Grace E. Garrett as Executrix of the Estate of James M. McCallister, Deceased, and Velma Bommelaere. The appeal is from the orders of dismissal and the summary judgment. We affirm.

Relevant and undisputed facts disclose that appellant received a letter from James M. McCallister, signed by him and addressed to the Citizens State Bank of Springer, New Mexico. Material portions of the letter are:

> "Please open my safety deposit box No. 33 for which the bearer, Boyd Odell, has the key, and in the presence of an officer of your bank, assist him to remove the "H" Bonds that are in the names of J. M. McCallister or Sadie M. Odell.
>
> "These bonds are a gift to Boyd Odell in appreciation of his forty-eight years of love and care of my daughter, Sadie."

Appellant delivered the letter to an officer of the bank and requested that he be permitted access to the safety deposit box for the purpose of removing the bonds. The request was denied by the bank and the bonds remained in the box. Thereafter, James M. McCallister, accompanied by

appellees Velma Bommelaere and Grace E. Garrett withdrew the bonds, cashed them and deposited proceeds to bank accounts in the names of James M. McCallister or Mrs. Grace Garrett. It is appellant's position:

> "* * * that a valid inter vivos gift of the Series H United States savings bonds had been made by J. M. McCallister, deceased, and thereafter any interference of any nature with the bonds and with appellant's possession and/or use of the bonds would have been wrongful as against the Plaintiff and would have amounted to conversion of personal property."

A number of issues were presented. However, the decisive question is whether these United States Savings Bonds could be the subject of a gift inter vivos.

Bonds of the kind involved were issued pursuant to Congressional authority. 31 U.S.C. § 757c(c) authorizes the Secretary of the Treasury to issue such bonds. 31 U.S.C. § 757c(a) provides:

> "The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)–(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

The Treasury Regulations provide that bonds cannot be transferred but can be surrendered and re-issued. Estate of Curry v. United States, 409 F.2d 671 (6th Cir. 1969). See regulations appearing as an appendix to the opinion in *Estate of Curry*. Further, 31 C.F.R. § 315.15, provides, in part:

> "Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in these regulations, and then only in the manner and to the extent so provided."

These regulations are accorded the force of law. Yiatchos v. Yiatchos, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964).

It is our conclusion that the bonds of the kind involved could not be the subject of a gift inter vivos. This conclusion, in our view, is supported by the weight of authority. *c. f.* Annot. 40 A.L.R.2d 788 (1955).

In Estate of Curry v. United States, *supra*, the court, in considering a claimed gift inter vivos of United States savings bonds, which were of a kind subject to the same regulations as those involved here, said:

> "In passing upon the question of whether title to these bonds could be transferred by manual delivery to the donee as a gift inter vivos, without surrender of the bonds and reissuance in the sole name of the donee, it is of controlling importance to determine the nature of the ownership created in Series E bonds and whether federal or State law controls. In 1953 this Court held in Guldager v. United States, 204 F.2d 487 (6th Cir.) that an estate created by Series E bonds registered in a co-ownership form did not come into existence under the law of the State where the owners resided but was created by federal contract and controlled by federal law."

In conclusion, the Court further said:

> "We reaffirm the holding of this Court in Guldager v. United States, supra, 204 F.2d 487, that an estate created in Series E bonds is a matter of contract between the United States and the purchaser of the bonds. The bonds are non-transferable. A valid gift inter vivos cannot be accomplished by manual delivery to a donee unless the bonds also are surrendered and reissued in the name of the donee in accordance with the Treasury Regulations * * *."

In concluding that the bonds could not be the subject of a gift inter vivos, we have not overlooked cases which have upheld such gifts notwithstanding the prohi-

bition against transfer. See Annot. 40 A. L.R.2d 788 (1955).

It follows that since neither title, nor right to possession of the bonds were in appellant, his action in conversion was not maintainable. Wray v. Pennington, 62 N.M. 203, 307 P.2d 536 (1957).

The action of the trial court in entering the orders of dismissal and the summary judgment is affirmed.

It is so ordered.

OMAN and WOOD, JJ., concur.

478 P.2d 570

STATE of New Mexico, Plaintiff-Appellee,
v.
Janice McLAM, Defendant-Appellant.
No. 520.

Court of Appeals of New Mexico.
Dec. 18, 1970.

H. Gregg Privette, Privette & Privette, Las Cruces, for appellant.

James A. Maloney, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Defendant appeals her conviction of voluntary manslaughter. Two points are relied on for reversal. They deal with an incriminating statement given to the police.

We affirm.

MIRANDA WARNINGS.

Decedent was found slumped in the front seat of his wrecked car. The only

noticeable injury was a gash on his forehead. Investigating officers attributed death to the auto accident. An autopsy determined that he had been shot. The police, in searching decedent's personal effects, found a card in his billfold with the defendant's name and directions to her house. Based upon this information the chief of police called the defendant and asked if he could come and talk to her about a case he was investigating. She consented. Chief Silva, Sergeant Gonzales, and Mr. Perry, the Assistant District Attorney, went to interview the defendant. When they arrived they found the defendant and her son in the reception area of the law offices in which she worked. Sergeant Gonzales took defendant's son out of the office during the investigation leaving the defendant with Chief Silva and Mr. Perry. The defendant offered the investigators some coffee or orange juice. The defendant was seated behind her desk during the interview in her usual manner. Chief Silva, in plain clothes as was Mr. Perry, sat across the desk from defendant. Mr. Perry was present during the interview but asked few questions. Before the interview started Chief Silva advised the defendant that she did not have to talk to them and she replied that she would like to talk to them. During the hour long interview, defendant disclosed that she knew decedent and had been with him shortly before he was found by the police. After this disclosure she became a suspect and was immediately given her "Miranda warnings." After the warnings she continued to disclose the circumstances surrounding the death of the decedent. At trial Chief Silva recounted the following conversation with defendant:

> "She said that she had left with him, that Stempler [the decedent] had not left by himself, that they had left together around 11:30 p. m. And they had driven on the road to El Paso and that she had told him that she didn't want to go to El Paso.
>
> "That then he turned around and from the highway to El Paso on back to town that they had stopped at just about every motel and he insisted on going inside and she didn't want to go inside. And they stopped at a few motels and then she was —she told him that she wanted to go home, that she didn't want to go to any motel. Then he kept insisting, so she pulled a gun out and fired one round in front of him, into the floorboard of the vehicle. That at that time he pulled over and stopped the car and she opened the door to get out.
>
> "At this time she said that Stempler turned around to grab her and she saw his face right in front of her and she fired and shot him in the forehead and then she had heard—the car took off. She had not seen the accident, that she heard the car crash. Then she said she walked home."

Defendant claims that from the above facts she was in the process of custodial interrogation and entitled to her "Miranda warnings" prior to the time they were given. We disagree. Reviewing the evidence in the light most favorable to admissibility we do not see sufficient facts to require us to hold as a matter of law that defendant was in custody and deprived of her freedom in any significant way prior to the time she was given her Miranda warnings. See State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966) and State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct.App.1969). She was in the familiar surroundings of her own office, she was told she did not have to say anything, and of her own free will decided to talk to the police. Chief Silva testified that she was talkative, cooperative, and very much at ease; she was not nervous, tense, or apprehensive. She was told three times by Mr. Perry that she could call her attorney-employer and she was only two or three feet from the telephone on her desk during the interview. Miranda v. Arizona, 384 U.S. 436, 87 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is concerned with the circumstances of an interrogation that may have a coercive effect upon the responses elicited. We find nothing in the record that requires a holding, as a matter

of law, that the atmosphere of the interview and interrogation was coercive at any time.

EXCULPATORY OR INCULPATORY STATEMENT.

The defendant next contends that her statement included exculpatory matter which the State failed to overcome in its case in chief. The general rule is that if the state offers a statement of the accused containing exculpatory matter, it must overcome the defendant's claim of excuse or justification. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965). As we interpret the statement, it merely states that decedent insisted that defendant go to a motel with him; that in response to this insistence defendant fired a warning shot; that decedent then turned to grab the defendant; and defendant shot and killed the decedent.

We agree that the defendant, as others similarly situated, may use reasonable force in defense of one's self. But as stated in State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968), "It is not every threatened beating that will justify a shooting in self-defense but, to the contrary, a voluntary manslaughter might thereby be established." The force threatened and imminent, and defendant's reaction thereto, must be taken into consideration. State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951); State v. Simpson, 39 N.M. 271, 46 P.2d 49 (1935); and State v. Parks, 25 N.M. 395, 183 P. 433 (1919). The facts surrounding defendant's choice of deadly force when confronted with a possible battery would sustain a conviction of voluntary manslaughter. We therefore hold that under the fact situation the statement was *inculpatory* of voluntary manslaughter although *exculpatory* of murder. Compare the fact situation of the present case with State v. Lopez, supra.

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

479 P.2d 294

Al GREER and Faye Greer, Husband and Wife, and Frank Yockey, Plaintiffs-Appellants,

v.

Harvey M. SALMON and Eva Salmon, Husband and Wife, and Evan C. Salmon and Avis D. Salmon, Husband and Wife, and Redfern & Herd, Inc., John J. Redfern, Pioneer Production Company, and all unknown claimants of interest in the premises adverse to the plaintiffs, Defendants-Appellees.

No. 9057.

Supreme Court of New Mexico.

Dec. 31, 1970.

Burr & Cooley, Farmington, for appellants.

Hinkle, Bondurant, Cox & Eaton, Roswell, for appellees.

OPINION

McKENNA, Justice.

Plaintiffs brought this action in the District Court of San Juan County to quiet title to an oil and gas lease covering the SE¼ NW¼ of Section 30, T. 29N., R. 11W, N.M.P.M. The defendants answered alleging that the lease had terminated in accordance with its terms. Two of the defendants, Evan C. Salmon and his wife, who allege that they are the owners of the oil and gas mineral estate below the base of the Pictured Cliff formation counterclaimed under our § 65-2-4, N.M.S.A.1953, asking that the court direct the lease be released of record and that they recover $100.00 as damages, and attorney fees of not less than $500.00 plus costs.

The case was submitted on a stipulation of facts and affidavits. The district court decreed that the plaintiffs' First Amended Complaint be dismissed with prejudice and granted judgment to the defendants on their counterclaim for compensatory damages of $100.00 and reasonable attorney fees of $500.00 plus costs.

Appellants Greer contend that the lease to them did not automatically terminate by its terms and that the court should have quieted their title to the lease. The record does not reveal the trial court's reasoning for granting summary judgment to the appellees.

The forty-acre lease to the appellants was granted on September 1, 1950. Commercial gas production was obtained from the Pictured Cliff formation prior to the expiration of the five-year primary term. Production continued intermittently through September 1956. From October 1956 until June 1960, except for 7 MCF produced in May 1958, no gas was produced into the pipeline of the purchaser, Southern Union Gas Company, as a result of a leak in the flow line between the well-head and the meter. The leak was discovered in May 1960, and production commenced June 1960 and continued thereafter. No drilling operations were conducted on the lease within a period of 90 days from September 1956. Although the well was capable of producing in commercial quantities, no gas was "sold or used" during the period from October 1956 through May 1960. Accordingly, no royalty was paid during those years to the lessors, nor was annual shut-in royalty paid to the lessors, as provided for in paragraph 3(b) of the lease. Since the resumption of production, the lessors received and accepted royalty payments on the production. In May 1957, the lessors had conveyed all minerals below the base of the Pictured Cliffs formation under the subject land to defendants Evan C. Salmon and his wife who in turn leased such minerals in September 1960 to some of the defendants. On May 9, 1960, Evan C. Salmon wrote to appellant-lessee Greer requesting a release of the September 1, 1950 lease, advising Greer that he had acquired the mineral rights below the Pictured Cliffs formation and that there had been no production for some time under the 1950 lease.

The habendum clause, paragraph 2 of the lease, reads:

> "It is agreed that this lease shall remain in force for a term of five years from this date, said term being hereinafter called 'Primary Term,' and as long thereafter as oil and gas, or either of them, is produced or *producible* by the lessee from any well or wells existing on said land or any Pooled Unit hereunder." (Emphasis ours.)

At all times the Pictured Cliff well was "producible," that is, capable of producing

in commercial quantities. The appellants argue that no automatic termination could occur in view of the wording of the habendum clause and, further, that the shut-in royalty clause was a covenant, not a condition, and not subject to the automatic termination provision of the habendum clause. They argue also that there was no permanent cessation of production or abandonment as evidenced by certain actions taken in attempts to restore production in 1958, 1959 and 1960.

Numerous cases have stated that the primary purpose of an oil and gas lease is to obtain production from which the lessor will be paid a royalty. See, for example, the recent decision of Metz v. Doss, 114 Ill.App.2d 195, 252 N.E.2d 410, 412 (1969). While it is true that a lessor and a lessee frequently vary from standardized oil and gas lease forms, which makes hazardous the application of standardized interpretations, it is evident from paragraph 1 of the 1950 lease that there was no departure from the primary purpose of the usual oil and gas lease:

> "That the said lessor * * * does grant, demise, lease and let unto the said lessee for the sole and only purpose and with the exclusive right of exploring, drilling, mining, operating for and producing oil and gas, or either of them, * * *."

The habendum clause, paragraph 2, supra, of this lease is unusual in the use of the phrase "produced or producible," but aside from this, it is a typical clause of limitation with a relatively short primary term and its "thereafter" provision designed for automatic termination. See Town of Tome Land Grant, Inc. v. Ringle Development Co., 56 N.M. 101, 240 P.2d 850 (1952); Terry v. Humphreys, 27 N.M. 564, 203 P. 539 (1922). Again, typically, at least as to purpose, the lease contains what has come to be known in the industry as "saving clauses"; paragraph 8 is a "cessation of production" provision and paragraph 3(b) contains a "shut-in royalty" clause for gas. Because the "cessation of production" and "shut-in royalty" clauses are designed to give the lessee some protection from automatic termination, logically, they are to be considered in conjunction with the habendum clause and in light of the primary purpose of the lease—the duration of the lessee's interest is to be viewed from the objective of the lease, to obtain paying production. 3 Williams Oil and Gas Law 36, 37, § 604; Town of Tome Land Grant, Inc., supra, 56 N.M. at 105, 240 P.2d at 852: "A lessee cannot be permitted to fail in development and hold the lease for speculative purposes unless in strict compliance with his contract for a valuable and sufficient consideration other than such development."

Paragraph 8, the "cessation of production" provision reads:

> "It is specially agreed that in the event that oil or gas is being produced from said premises, or any Pooled Unit(s), after the expiration of the Primary Term hereof and said production shall *for any reason* cease or terminate, lessee shall *have the right* at any time within ninety (90) days from the cessation of such production to resume *drilling operations in an effort to obtain further production* under this lease, in which event this lease shall remain in force *so long as* such operations are continuously prosecuted, as defined in the preceding paragraph, and if they result in production of oil or gas, *so long thereafter* as oil or gas is being produced or producible from any well existing on the premises, or any Pooled Unit." (Emphasis ours.)

Here, production ceased after the expiration of the primary term and no drilling operations were conducted within the 90-day period from cessation.

[redacted] It is apparent from the language that paragraph 8 was designed to fulfill the normal function of a cessation of production clause; to relieve the lessee from some of the harsh consequences of automatic termination by granting the lessee a period of 90 days to resume operations to

secure further production. It must also be noted that paragraph 8 grants the lessee a *right* to resume drilling operations as opposed to a *duty,* all of which militates against paragraph 8 being construed as a covenant rather than a condition affecting the term of the lease. The cases and commentators agree that such a provision must be construed as giving the lessee a set period of time within which to resume drilling operations in order to escape automatic termination of the lease. Woodson Oil Company v. Pruett, 281 S.W.2d 159 (Tex. Civ.App.1955); Hall v. McWilliams, 404 S.W.2d 606 (Tex.Civ.App.1966); Sunray DX Oil Co. v. Texaco, Inc., 417 S.W. 2d 424 (Tex.Civ.App.1967); Haby v. Stanolind Oil & Gas Co., 228 F.2d 298 (5th Cir. 1955); Berman, "Dry Hole, Drilling Operations, and 30 Day-60 Day Drilling Operations Clauses," 38 Tex.L.Rev. 270, 272 (1960); Hazlett, "Effect of Temporary Cessation of Production on Leases and Term Royalties," Southwestern Legal Foundation, Tenth Annual Institute on Oil and Gas Law and Taxation 201, 248–9 (1959).

In Woodson, supra, 281 S.W.2d at 164, it is said:

> "Appellants next contend that the cessation of production on the lease was sudden and only temporary, and that under such circumstances they were entitled to a reasonable time in which to remedy the defect and resume production. This might be true under the terms of some leases, but under the lease here the parties agreed and stipulated what would constitute temporary cessation. The lease provides, in effect, that if production should cease the lessee must commence re-working or additional operations within sixty days or the lease would terminate. If the cessation of production is for more than sixty consecutive days it is not to be regarded as temporary under the terms of this lease. If re-working or additional operations are not begun within the sixty-day period the lease terminates by its own provisions. * * *"

Hazlett, in his article, supra, states, at 249:

> "The courts have been unanimous in construing this clause as meaning that cessation of production for longer than the stipulated period cannot be considered 'temporary.' In effect, the provision is construed as giving the lessee a fixed period of time within which to resume production or commence additional drilling or reworking operations in order to avoid termination of the lease; the period of grace having been fixed by agreement of the parties, it cannot be extended by the courts, no matter what the circumstances or the cause of the cessation."

In our case, the failure to produce because of a leak in a flow line is literally within the meaning of the phrase in paragraph 8, "and said production shall *for any reason* cease or terminate" (emphasis ours). Furthermore, "production" must be equated with producing and paying a royalty. Francis v. Pritchett, 278 S.W.2d 288 (Tex.Civ.App.1955); Cowden v. General Crude Oil Co., 217 S.W.2d 109 (Tex.Civ. App.1948); Kies v. Williams, 190 Ky. 596, 228 S.W. 40 (1921). "'Production' means that minerals have been 'produced, saved and sold' or 'produced, saved and consumed.'" 3 Williams, supra, § 616.1, 283.

Accordingly, we cannot agree with the appellants' argument that the lease could not have expired because there was no permanent cessation of production, or abandonment by the lessee, or lack of good faith in attempting to restore production. The fact remains that no operations were performed within the fixed 90-day period, and the cessation of production beyond the fixed period cannot be considered as only a temporary one.

The appellants argue that the failure to perform under paragraph 8 did not trigger

automatic termination because the lease was continued beyond its primary term, and beyond the 90-day cessation period, by virtue of a producible gas well on the premises, pointing to the habendum clause, paragraph 2, supra, which states, "and as long thereafter as oil and gas, or either of them, is produced or producible by the lessee from any well. * * *"

Paragraph 3(b), which contains the shut-in royalty clause for gas, states:

> "*To pay to lessor, as royalty for gas from each well where gas only is found,* while such gas is being sold or used off the leased premises, one-eighth (⅛th) of the market price at the well of the amount so sold or used, *and while not so sold or used, the sum of Fifty Dollars ($50.00) per annum for each such well, payable on or before the first day of January following, and while such royalty is so paid such well shall be held to be a producing well within the meaning of paragraph 2 above.* * * *" (Emphasis ours.)

Historically, such a clause relates only to gas because a pipe line is necessary to market gas whereas oil can be marketed in many ways. Masterson, "Shut-in Royalty Clauses," 4 Rocky Mountain Mineral Law Institute 315, at 323 (1958).

As we have previously observed, a shut-in royalty clause is a saving clause associated with the habendum clause because its purpose is to grant a reasonable alternative to a lessee who is not able to produce gas, that is, market and pay the ⅛th royalty. It is a provision for substitute production or constructive production to arrive at a status of production as distinguished from actual production. Morriss v. First National Bank of Mission, 249 S.W.2d 269 (Tex.Civ.App.1952); Freeman v. Magnolia Petroleum Co., 141 Tex. 274, 171 S.W.2d 339 (1943). Normally, it differs from the royalty obligation of ⅛th, which is an express covenant, the non-payment of which does not trigger the automatic termination. Sperling, in his "Habendum Clause as Affected by Shut-in, Commence Drilling, Continued Drilling and Other Clauses," Southwestern Legal Foundation, Ninth Annual Institute on Oil and Gas Law and Taxation 1 (1958) at page 19, puts the distinction neatly:

> "In other words, ordinarily the payment of royalty is not a condition, but an express covenant, non-payment of royalty, however long delayed, having no more effect upon the duration of the lease than a breach of the other duties or covenants contained in the lease provisions. The distinction must be that, in the absence of actual production, the *status of production* which has a profound effect, not only upon the duration of the lease, but upon the relationship of the parties to the lease or those claiming under them or subject to their rights, *can only be created by the fact of payment.* Put another way, the fact of payment or the failure to make payment is as determinative of production or the lack of it as is the fact of actual flow of oil or gas from the property or any cessation thereof."

Bearing in mind the automatic termination provision of the lease, we note the rhetorical comment of the appellees, "If the mere existence of a well capable of producing gas will hold the lease under the habendum clause * * *, then clearly there is no necessity for this shut-in royalty clause." Our concern is what did the parties intend, because we cannot ignore the shut-in royalty clause. The appellants say that the shut-in royalty clause is a covenant, not a condition, containing a firm obligation to pay $50 per year, and the failure to pay the annual sum does not activate or trigger the automatic termination provision of the habendum clause but, rather, is governed by paragraph 15 of the lease. This paragraph requires notice by the lessor to the lessee of a breach of a duty, and if not cured, then a petition to the court for termination.

In Freeman, supra, the court, in determining whether a provision should be

regarded as a covenant or condition, observed in 171 S.W.2d at 342, that "* * * it remained a question of law, to be determined under the express terms of the lease applicable thereto, as to which of the undertakings of the parties to the lease are covenants and which are conditions." There is an established rule that an oil and gas lease is to be construed most strongly against the lessee. Kulp, Oil and Gas Rights 659, § 10.64. While this rule should be cautiously applied, construing this lease against the lessee is particularly reasonable and appropriate where the question is whether a lease is or is not in existence, and where, from October 1956 through May 1960, except for a small amount produced in May 1958, no gas was produced or royalty paid. Responsibility for not discovering and repairing the leak must be borne by the lessee. It was his duty to achieve the primary purpose of the lease, to explore, develop and produce. Town of Tome Land Grant, Inc., supra. Simons v. McDaniel, 154 Okl. 168, 7 P.2d 419 (1932), at 421, states:

> "Frequently this court has construed oil and gas mining leases strictissimi juris as against the lessee and liberally in favor of lessor. But this has always been to the end of promoting development as contemplated by the parties. * * *"

Weighing what we have previously said, with an examination of the particular language *"while such royalty is so paid such well shall be held to be a producing well within the meaning of paragraph 2 above"* (emphasis ours), in context with the entire lease, we conclude that the shut-in royalty clause must be viewed as a condition rather than a covenant. There is no absolute obligation to pay the sum of $50.00, instead the payment is optional in the sense that if payment is made, the requirement of the habendum paragraph is satisfied. The clause here is remarkably similar to what was held to be a condition in Freeman, supra, 171 S.W.2d at 341:

> "The answer is found in the language of paragraph 3(b), as follows: '3. The royalties to be paid by lessee are: * * * (b) on gas, * * * a royalty of $50.00 per year on each gas well from which gas only is produced while gas therefrom is not sold or used off the premises, and *while said royalty is so paid, said well shall be held to be a producing well under paragraph 2 hereof.*'" (Emphasis supplied.)

The phrase, "while such royalty is so paid" is a condition and has been so interpreted. See North Hampton School District v. North Hampton Congregational Soc., 97 N.H. 219, 84 A.2d 833 (1951); Berry v. J. C. Penney Co., 74 N.M. 484, 485, 394 P.2d 996 (1964). Our conclusion is consistent with our finding that paragraph 8, also a saving clause, is not a covenant.

The words "where gas only is found" and "not so sold or used" which appear in our clause must be read and are to be equated with "producible" which appears in the habendum paragraph. As we construe the habendum paragraph, it envisaged a producing well paying a royalty in order to prevent termination, but where gas was found and not sold or used, that is, where there was a producible *gas* well, that well would be treated as a producing well if the annual shut-in royalty was paid. This construction does not ignore the term "producible"; it accords the strength and importance that are due the "thereafter provision" of the habendum paragraph, and is in harmony with the primary purpose of the lease.

The appellants could have saved themselves from automatic termination by complying with paragraph 8. Not having done this, they could have saved themselves from automatic termination by paying the shut-in royalty for the producible gas well, but this was not done. Therefore, the lease did expire automatically at the end of January 1, 1957. Paragraph 15 of the lease governs the enforcement of the lessees' covenants and is not applicable

to the habendum clause and its associated saving clauses. See 4 Williams, supra, § 682.2, at 347, 348.

Finally, the appellants claim that the acceptance of royalties by the lessor since June 1960 constituted a confirmation of the validity of the lease. The weight of authority is that once a lease has automatically terminated, it cannot be revived. Woodson Oil Co. v. Pruett, supra, 281 S. W.2d 159 at 164; see Summers, The Law of Oil and Gas, 382, § 470, and cases cited, and Williams, supra, § 604.7, at 79.

As to the appellees' claim under § 65–2–4, N.M.S.A.1953, for additional attorney fees here, we have considered the request but none will be allowed.

The judgment is affirmed. It is so ordered.

TACKETT and SISK, JJ., concur.

479 P.2d 532

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Joe SAMORA, Defendant-Appellant.

No. 524.

Court of Appeals of New Mexico.

Dec. 31, 1970.

Larry L. Lamb, Lamb & Metzgar, Alburquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

The defendant, tried and convicted before a jury of the crime of burglary contrary to § 40A–16–3, N.M.S.A.1953 (1963 Supp.), urges upon appeal a single question which relates to the denial of effective assistance of appointed counsel. It is contended, in substance, that counsel's representation was so inadequate so as to deprive defendant of due process of law and to his right to counsel under the Sixth Amendment.

The claim of ineffectiveness concerns counsel's failure "* * * to request an instruction to the effect that intoxication would relieve the defendant of criminal responsibility if he were unable to form the criminal intent required for the commission of the crime of burglary."

A further claim of ineffectiveness relates to the failure of counsel to object to the following instruction.

> "You are instructed that voluntary drunkenness is no excuse or justification for crime, and in this case, notwithstanding you may believe from the evidence that at the time of the commission of the acts charged against him, the defendant was intoxicated, you are instructed that this will not constitute any defense for him and you will not acquit him on that ground."

Evidence was offered at the time of trial from which it could be found that defendant was so intoxicated that he could not form an intent to commit burglary. The failure of counsel to proceed, as defendant now asserts he should have proceeded in connection with the instructions, may have been no more than bad strategy on the part of counsel. See State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

We are unable to determine from this record, as a matter of law, that defendant's representation was so inadequate as to deprive him of his constitutional right

to the effective assistance of counsel. Accordingly, upon the record presented, the judgment should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

479 P.2d 533

Johnnie H. BRANNON, Plaintiff-Appellant,

v.

WELL UNITS, INC., and Northern Assurance Company of America, Defendants-Appellees.

No. 505.

Court of Appeals of New Mexico.

Dec. 24, 1970.

Robert W. Ward, Lovington, for plaintiff-appellant.

Ray C. Cowan, Girand, Cowan & Richards, Hobbs, for defendants-appellees.

OPINION

OMAN, Judge.

Plaintiff has appealed from a judgment awarding him workmen's compensation benefits at the maximum rate from May 28, 1969, to September 29, 1969. He contends the trial court erred in not awarding him benefits for total permanent disability after September 29, 1969, and in failing to award him attorney's fees. We affirm the award of weekly benefits, and reverse the failure to award attorney's fees.

Plaintiff's work experience had been primarily in the oil fields and in butchering, sizing, cutting, processing and curing of

meats. He sustained a low back injury on May 27, 1969, while employed by defendant employer as a floor hand on an oilwell worker unit. He had sustained disabling back injuries during the course of prior employments on at least four occasions between 1960 and 1967. He testified he had fully recovered from the back injuries and resulting pains suffered by him on each of these prior occasions. However, a fellow employee, who worked with him for defendant employer, testified plaintiff complained of back pains prior to May 27, 1969, and had taken time off from work on at least one occasion because of such pains. A Dr. Mayes, who treated plaintiff subsequent to his injury on May 27, 1969, testified plaintiff had given him a history of having commonly suffered backaches, and at times of pains radiating into his left leg, prior to the May 27 injury.

Dr. Mayes and a Dr. Dunn, who also treated plaintiff for his injuries subsequent to the May 27 incident, testified by way of deposition, and their depositions were offered into evidence by plaintiff. Both doctors expressed an opinion that plaintiff's history of prior back troubles indicated years of changes in and problems with an intervertebral disc in his low back.

The following facts found by the trial court have not been questioned, and, therefore, are binding on this court. Springer Corporation v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969); Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968).

"During these fifteen years, [prior to May 27, 1969] the plaintiff seemed to have worked fairly steadily except for four different periods between 1960 and 1967 when he was off work from three weeks to five months because of back injuries."

"During the nine months that plaintiff worked for defendant, he complained many times of his back hurting him and actually laid off work at least once because of it."

"Drs. Dunn and Mayes' testimony clearly shows as a medical probability that the incidents occurring May 27th, 1969, caused the plaintiff to suffer more pain in his back than he had suffered for about a year prior to that time and that this pain forced him to stay off work until the latter part of August or first of September."

"Plaintiff is now working for a wholesale meat company at a salary of $500.00 per month."

Plaintiff challenges at least portions of the following numbered findings of fact made by the trial court:

"7. Beginning July 2nd, 1969, he [plaintiff] was examined and treated by Dr. Jack Dunn, neurosurgeon, Lubbock, Texas, and Dr. Gordon W. Mayes, orthopedist, Lubbock, Texas, until September 29th, 1969, when Dr. Dunn released him to return to his usual occupation.

"8. Plaintiff resumed gainful occupation in late August or early September, 1969, and has worked ever since then.

"* * *

"10. No doctor who examined or treated the plaintiff would say that as a medical probability plaintiff was any worse off at the time of trial [January 7, 1970] than he was immediately before the incidents of May 27th, and one or two of them testified that if he were any worse off there was no way they could tell how much."

The challenged portion of Finding No. 7 is that Dr. Dunn released plaintiff on September 29, 1969, to return to his usual occupation. Plaintiff urges this portion of Finding No. 7 and Finding No. 8 are erroneous and are based solely on testimony of Dr. Dunn, which, plaintiff urges, was recognized by Dr. Dunn in his later testimony as having been based upon a false assumption that plaintiff had returned to his employment with defendant employer in September 1969.

The following testimony of Dr. Dunn clearly demonstrates that he did release plaintiff on September 29 to return to his usual occupation:

"Q. Well, now, Doctor, at the time you last saw him in your opinion was there any limitation in the kind of work Mr. Brannon could do?

"A. No, sir.

"Q. Do without pain?

"A. No. The last time I saw him it was my feeling and I discussed with him, that he should do his full work that if he had any sort of difficulty, that we would later bring him back in the hospital for further evaluation.

"He was still having some low grade symptoms but I had no restriction on his work because I wanted to find out if this thing was going to hold or not."

"* * *

"Q. You felt that he was able to go to work, go back to work in September, 1969?

"A. Yes, sir.

"* * *

"Q. There was no reason from your examination to think that he had not recovered in September of 1969, from this May 27th incident, the same as he had recovered from these previous injuries, is that correct?

"A. Yes, sir, I presume so."

"* * *

"Q. Dr. Dunn, going back to the episode two years before, when he had back injury with leg pain, and continued having intermittent pain, up until you examined him in December of this year, his symptoms could just as well have been from that injury as from the May 27th, injury, isn't that correct?

"A. Yes, sir.

"Q. And if he told Dr. Mayes that he had had pain all during these years off and on, you couldn't say that the May 27th incident had anything more to do with his condition than any of the five or so previous injuries, could you?

"A. No, sir."

It is true the doctor testified he had understood plaintiff had returned to his prior job with defendant employer, rather than working as a butcher. However, this mistaken understanding as to the nature of the work plaintiff was doing did not change the fact that the doctor had released plaintiff to return to his usual occupation.

It is also true the doctor's testimony suggests plaintiff was released to return to work for the purpose of determining whether such work would bring on a recurrence of the symptoms. However, he was released to return to his usual occupation.

As to Finding No. 8, there is no doubt it is supported by the testimony of plaintiff himself. Although he did not return to his prior employment with defendant employer, or to oil field work, some time in August or September, the date is not specified, he did go to work for a food establishment and, shortly after leaving that employment, entered upon his employment with the wholesale meat company to which reference is above made.

The depositions of the doctors clearly show support for Finding No. 10. The disability, if any, which plaintiff continues to suffer, was not specifically related by the doctors to any one of the several back injuries suffered by plaintiff, and, in particular, it was not related as a natural and direct result as a medical probability by their expert medical testimony to the May 27, 1969 incident, as required by § 59-10-13.3(B), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). See Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); Gammon v. Ebasco Corporation, 74 N.M. 789, 399 P.2d 279 (1965).

Undoubtedly challenged Findings Nos. 7, 8 and 10, quoted above, are supported by substantial evidence. Therefore, they must stand on appeal, if the substantial evidence rule is applicable. Martinez

v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970); Martinez v. Sears, Roebuck and Co., 81 N.M. 371, 467 P.2d 37 (Ct.App. 1970); Payne v. Tuozzoli, 80 N.M. 214, 453 P.2d 384 (Ct.App.1969). Plaintiff urges that because the testimony of Drs. Dunn and Mayes was presented to the trial court by way of depositions, the substantial evidence rule is inapplicable, and this court is in as good position as the trial court to determine the facts established thereby. He urges that this court is not bound by the findings of the trial court. He relies upon Price v. Johnson, 78 N.M. 123, 428 P.2d 978 (1967) and Garry v. Atchison, Topeka and Santa Fe Railway Co., 71 N.M. 370, 378 P.2d 609 (1963). Both of these cases involve the construction of deeds.

Plaintiff concedes that the rule, pertaining to findings of fact based upon documentary evidence, apparently does not relieve the appellate court from giving some consideration to findings made by the trial court, and does not convert the appeal into a trial de novo. Kosmicki v. Aspen Drilling Company, 76 N.M. 234, 414 P.2d 214 (1966); Commercial Warehouse Co. v. Hyder Brothers, Inc., 75 N.M. 792, 411 P.2d 978 (1965); Valdez v. Salazar, 45 N.M. 1, 107 P.2d 862 (1940).

In view of the testimony of plaintiff himself on some of the issues of fact found by the trial court in the said challenged findings, which testimony is contrary in many particulars to the testimony of the doctors, we are of the opinion that the rule urged upon us by plaintiff is not applicable, and that the substantial evidence rule is applicable. Moreover, we have reviewed the testimony of Drs. Dunn and Mayes, and our review convinces us that the challenged findings are not manifestly wrong or opposed to their testimony. Thus, we could not properly disturb the findings on this appeal, even if we were to apply the rule urged upon us by plaintiff. Kosmicki v. Aspen Drilling Company, supra; Valdez v. Salazar, supra.

Plaintiff next contends the trial court erred in failing to award him attorney's fees. The court predicated the judgment in this regard upon its conclusion that: "There being no evidence before the Court upon which to determine an attorney's fee for plaintiff, none is allowed."

Although it is true plaintiff never offered any specific or detailed evidence of the services performed by his attorney, a reading of the record clearly shows the attorney prepared the complaint for plaintiff, took the depositions of Drs. Dunn and Mayes, and represented plaintiff in the trial of the case. The record fails to show an offer of settlement, and recovery was effected by plaintiff. Thus, plaintiff was entitled to recover attorney's fees. Section 59-10-23(D), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). Compare Turrieta v. Creamland Quality Chekd Dairies, Inc., 77 N.M. 192, 420 P.2d 776 (1966); Rayburn v. Boys Super Market, Inc., 74 N.M. 712, 397 P.2d 953 (1964); Cromer v. J. W. Jones Construction Company, 79 N.M. 179, 441 P.2d 219 (Ct.App.1968).

It follows from what has been said that the case should be remanded with directions to award plaintiff a reasonable attorney's fee for legal services rendered in the district court consistent with the provisions of § 59-10-23(D), supra. Otherwise, the judgment of the trial court should be affirmed. This court should award plaintiff a reasonable attorney's fee for legal services in perfecting that portion of his appeal in which he has been successful, and, in our opinion, this is $500.00.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

SPIESS, C. J., not participating.

479 P.2d 537

STATE of New Mexico, Plaintiff-Appellee,

v.

Clarence Floyd CARRILLO, Defendant-Appellant.

No. 517.

Court of Appeals of New Mexico.

Dec. 11, 1970.

Robert N. Singer, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

OMAN, Judge.

Defendant appeals from his conviction of forcible rape. We affirm.

There is substantial evidence to support a determination that the following events occurred. Defendant met prosecutrix at a cocktail lounge and bar where she was employed as a bartender and cocktail waitress. She mistook defendant for a person she had previously known. At about 7:00 p. m. they left the bar and lounge in his automobile for the purposes of delivering some band uniforms to a motel and to thereafter have dinner together before she was to return to her employment at 9:00 p. m.

She delivered the band uniforms, and then she and an acquaintance of hers returned to the automobile where defendant was waiting. They then drove the acquaintance to a night club. As the acquaintance departed, he also referred to defendant as the person for whom the prosecutrix had mistaken defendant.

Upon her return to the automobile with her acquaintance after delivering the uniforms at the motel, she observed money had been taken from her purse, which she had left in defendant's automobile. She accused defendant of having taken the money and he denied it. An argument ensued, and this argument continued after the acquaintance was delivered at the night club.

Defendant failed to drive toward the restaurant at which they had planned to have dinner. At first he stated he was taking a different route. Then, as they obviously were going away from the restaurant and toward the outskirts of the city, he stated he was going by his brother's place to get money to replace that which the prosecutrix had accused him of taking. She urged him to forget the money, but he insisted. As they drove by a place which he said was his brother's, he stated his brother was not at home. He then said he would get the money from a brother-in-law. As he drove by a place supposedly that of a brother-in-law he observed that the brother-in-law was not at home. He then stated he was going to a pickle factory where he said his mother worked.

By this time the prosecutrix became suspicious and began noting street and road signs. She was still protesting and asking defendant to forget the money and return her to her place of employment.

Defendant drove by a number of houses, slowed down, and sounded the horn in his automobile. He finally drove by the pickle factory into an isolated area in the foothills south of Albuquerque where he stopped. He then announced he was going to have sexual relations with her, threatened and began struggling with her. In the struggle he removed some dark glasses from her and threw them from the automobile. These glasses apparently were later recovered by her or by him, because they were subsequently found near the ditch embankment to which reference is hereinafter made. Defendant also took from her, broke and threw from the automobile, a ball point pen which she had taken from her purse and was attempting to use as a defense weapon.

He forced her from the automobile, beat her into unconsciousness with his hands and fists, removed a portion of her clothing, and was having sexual relations with her when she regained consciousness. He later raped her again in the rear seat of the vehicle and forced her to take his penis into her mouth.

He then ordered her to lie in the rear seat in her nearly naked condition and threatened to kill her if she failed to obey him. He then began driving. At a certain point he ordered her to dress, climb over the back of the front seat, comb her hair, pretend she was very fond of him, and answer in the affirmative all questions he should ask upon their stopping at a certain house. She obeyed his orders under threats that he would run his vehicle over

her as he stated he had over another young lady.

They stopped at a house where about eleven or twelve young men were gathered in the yard drinking beer by a four-door Lincoln automobile. They were there briefly. Two or more men entered defendant's vehicle and he drove off toward an isolated place west of Albuquerque. The others followed in the Lincoln. They stopped near a ditch bank. Defendant ordered her from his car to the rear seat of the Lincoln, ordered her to remove her clothing, and then began assigning to the other men the order in which they were to have sexual relations with her. By this time she was offering no resistance because of fear and exhaustion.

Four, five or more of the men had relations with her. During this time she kept fainting, or lapsing into unconsciousness. Defendant then ordered a period of rest for her and gave her a beer to drink.

About this time two deputy sheriffs in an officially marked vehicle on a routine patrol came on the scene. They immediately directed their spotlight on the vehicles, and the men began running over the ditch bank. They noticed some men dragging and forcing a woman toward the embankment.

Prosecutrix had been ordered by defendant to run, and, thinking it was another group arriving to also rape her, she at first made efforts to comply. Then she noticed the official markings on the sheriff's vehicle, broke away and started running toward the vehicle and the officers crying for help and that she had been raped. She was in a state of hysteria. The only clothing she had on was a brassiere which was partially torn and hanging on one side.

The officers noticed blood on her arms, face, legs and body. They also noticed, as did the doctor who later examined her, that she had scratches and bruises on her face, arms and legs, and these are reflected, at least in part, in photographs taken of her the following afternoon and introduced into evidence.

The officers ordered the defendant and three others, who failed to make their escape over the embankment, to halt, and placed them under arrest. Then, at the request of prosecutrix, the officers gathered up her clothing, which was found partly in the Lincoln, partly in defendant's vehicle and partly on the ground.

Although not in the order presented in the briefs, the first point to be determined is whether the trial court erred in admitting into evidence the dark glasses and the ball point pen taken from prosecutrix and thrown by defendant from his automobile at the place where he first attacked and raped her. It is defendant's position that these items, later found by a police officer, were not admissible because they were not properly identified, and because they supported the prosecutrix' testimony that she had been forcibly raped and discredited defendant's testimony that she had willingly submitted. As already stated, the glasses were found by the officer near the ditch bank, and there is absolutely no question about the presence of prosecutrix, defendant and the other men at that place. The pen was found at the place where prosecutrix stated she was first raped and the pen thrown by defendant from the automobile. She was present when it was found by the officer.

The objections to the identification of these items of evidence are: (1) the prosecutrix was recalled to the witness stand to identify the items after having been excused from the witness stand, after the prosecutor had announced he did not intend to recall her as a witness, and after she had sat in the courtroom and listened to the testimony of the officer who recovered the items from the areas where they were found; and (2) "she could *not* positively identify the items * * * as hers."

The prosecutrix was never excluded from the courtroom. She was called as the first witness by the prosecution. She was excused for a while to permit two other witnesses to testify, and then resumed

with her testimony. At the close of her testimony and after the court had excused and advised her she could "sit in the courtroom or outside the room," defendant's attorney asked that she be requested to wait outside the courtroom if the prosecution intended to recall her. The Assistant District Attorney announced the prosecution did not intend to recall her. The court then observed, "She is the prosecuting witness anyway," and the trial continued.

When she was recalled for the sole purpose of identifying the glasses and pen, no objection whatever was made to her testimony, and she was cross-examined by defendant's attorney concerning the same.

In any event, the exclusion of witnesses from the courtroom is a matter resting within the sound discretion of the trial court. McCrossen v. United States (10th Cir. 1965), 339 F.2d 810, 11 A.L.R.3d 1268; State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961); State v. Curry, 27 N.M. 205, 199 P. 367 (1921); Sweitzer v. Sanchez, 80 N.M. 408, 456 P.2d 882 (Ct.App. 1969). There is nothing here to indicate an abuse of discretion on the part of the trial court in permitting the prosecutrix to remain in the courtroom, or to be further called as a witness for the purpose of identifying the glasses and pen.

In her testimony she positively identified the glasses as belonging to and as having been purchased by her at a named store. She also positively identified the pen as the one she had taken from her purse as a weapon of defense and which had been broken and thrown by defendant from his automobile. It is true on cross-examination she admitted the glasses and the pen were not originals and there were others like them. However, she at no time expressed any doubts about her identification of them as being hers.

In any event, positive identification is not essential to the admission of demonstrative evidence. Calhoun v. State, 406 P.2d 701 (Okl.Crim.1965); People v. Smith, 63 Ill.App.2d 369, 211 N.E.2d 456 (1965). Generally, on the questions of identification and admissibility of this type of evidence see State v. Gray, 79 N.M. 424, 444 P.2d 609 (Ct.App.1968); 2 Jones on Evidence, Civil and Criminal, §§ 442 and 443 (5th Ed. 1958). See also Hodgkins v. Christopher, 58 N.M. 637, 274 P.2d 153 (1954).

Defendant is unquestionably correct when he says the testimony as to the pen and its admission into evidence as an exhibit tended to support the testimony of the prosecutrix that she was forcibly raped and to discredit his contention that she voluntarily engaged in sexual relations with him. These were the purposes of this evidence, which was clearly relevant to issues in the case. Nothing said in State v. Kidd, 24 N.M. 572, 175 P. 772 (1917), upon which defendant relies, suggests this relevant evidence was not properly admissible. In the *Kidd* case the conviction was reversed and a new trial ordered because of the introduction of irrelevant testimony which discredited defendant's principal witness and was highly prejudicial to defendant's case.

The only probative effect the admission into evidence of the glasses could have had was to establish their existence, and to establish that prosecutrix had been in the area where they were found. Neither the existence of the glasses nor the fact that prosecutrix had been at the place where they were found is in dispute. Therefore, their admission into evidence could not possibly have prejudiced defendant, even if we were to find they should not have been admitted, which we do not.

The next point to which we direct our attention is defendant's claim that the conviction cannot be permitted to stand because the testimony of the prosecutrix is inherently improbable and is not corroborated by evidence pointing unerringly to defendant's guilt.

The evidence, upon which defendant predicates his contention that the prosecutrix' testimony is inherently improbable, is set forth above, except for her testimony (1) as to the route taken by defendant as

they drove through Albuquerque, which differed from his testimony in this regard, (2) that she remembered no stops being made by defendant's automobile as he drove from the night club at which they left the passenger until they entered the freeway, (3) that she made no outcry, even when plaintiff slowed his vehicle, and (4) that upon regaining consciousness and finding defendant having sexual relations with her, she noted her boots and pants had been removed, and her pants were beneath her.

We find nothing inherently improbable in her story, but, in any event, there was more than sufficient corroborative evidence of her claim that she had been raped to remove it from the rule of inherent improbability discussed in the following cases upon which defendant relies: State v. Till, 78 N.M. 255, 430 P.2d 752 (1967) cert. denied, 390 U.S. 713, 88 S.Ct. 1426, 20 L.Ed.2d 254 (1968); State v. Maestas, 76 N.M. 215, 413 P.2d 694 (1966); State v. Shouse, 57 N.M. 701, 262 P.2d 984 (1953); State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944); State v. Taylor, 32 N.M. 163, 252 P. 984 (1927); State v. Clevenger, 27 N. M. 466, 202 P. 687 (1921); State v. Armijo, 25 N.M. 666, 187 P. 553 (1920); Mares v. Territory, 10 N.M. 770, 65 P. 165 (1901).

Without trying to detail all the corroborating evidence and circumstances, we call attention to the following: (1) the efforts, and success of most of the men, to effect an escape when discovered by the officers; (2) the broken pen heretofore discussed; (3) the torn and disarranged condition of prosecutrix' brassiere, which was the only article of clothing she was wearing when rescued by the officers; (4) the scattered locations of her other clothing when rescued; (5) the bloody and bruised condition of her face, body, arms and legs, (there is no evidence she was beaten by anyone but defendant); (6) her cries for help and accusations of rape made immediately upon recognizing the official markings on the officers' vehicle; (7) her condition of hysteria upon being rescued by the officers; (8) a cigarette burn on defendant's one arm, which is consistent with her story that she burned him with a cigarette during her struggle with him; (9) blood on defendant's shirt; and (10) scratches on defendant's arms.

Defendant's final contention is that, by being tried jointly with one of the other men captured at the scene by the officers, he was denied a fair trial, and this denial constituted fundamental error requiring reversal.

The granting of separate trials to jointly-charged defendants is a matter resting within the discretion of the trial judge. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied 391 U.S. 927, 88 S.Ct. 1829, 20 L.Ed.2d 668 (1968); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960). Here, the question of severance was never presented to the trial judge. Any right defendant may have had to a separate trial is not to be equated with the concept of fundamental error. This concept is bottomed upon the innocence of the accused, or the corruption of justice. It is resorted to in a criminal case only if the innocence of defendant appears indisputable, or the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App.1969). Nothing presented by defendant in his arguments, and nothing we can find in the entire record of this case, suggests any such doubt as to his guilt.

The judgment of conviction should be affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

WOOD, J., not participating.

479 P.2d 766

Edward S. IKELMAN, Plaintiff-Appellee and Cross-Appellant,

v.

Leeta Mae IKELMAN, Defendant-Appellant and Cross-Appellee.

No. 9013.

Supreme Court of New Mexico.

Jan. 18, 1971.

Toulouse, Moore & Walters, Larry D. Beall, Albuquerque, for appellant.

Gallagher & Walker, Albuquerque, for appellee.

OPINION

COMPTON, Chief Justice.

Appellant appeals from a judgment denying her petition to vacate a judgment in a divorce proceeding. The decree, which included a separation agreement executed by the parties hereto, was entered on October 27, 1967. On September 26, 1968, appellant filed a petition to set aside the decree on the grounds that the agreement was tainted with fraud and that the decree had been fraudulently obtained. At a hearing, the trial court denied the petition but modified the decree as to allow appellant alimony of $100.00 per month. The appellant appeals and the appellee cross-appeals.

Appellant contends (a) that the trial court erroneously failed to divide the community property equitably between the parties and (b) that the trial court erred in not finding that the divorce decree and separation agreement had been fraudulently obtained.

We are unable to review the cause on the merits as no record of the hearing before the trial court was made, except the testimony of the appellee. A litigant seeking review of a ruling of the trial court has the duty to see that a record is made of the proceedings he desires to have reviewed. Section 21-2-1(14) (1) and (3), N.M.S.A. 1953; Westland Development Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141; Barnett v. Cal M Inc., 79 N.M. 553, 445 P.2d 974. We have carefully searched what record there is and find nothing that would tend to support the appellant's contentions.

In his cross-appeal appellee contends that the trial court erred in awarding alimony to appellant. What we have said with regard to the appellant is equally applicable to appellee; the record fails to show that the action of the trial court in awarding

alimony was improper. See Scanlon v. Scanlon, 60 N.M. 43, 287 P.2d 238.

The judgment should be affirmed.

It is so ordered.

TACKETT and OMAN, JJ., concur.

479 P.2d 767

Liberato LEAL and Isabel G. Leal, Plaintiffs-Appellants,
v.
Valentin LEAL et al., Defendants-Appellees.

Candido APODACA, Plaintiff-Appellee,
v.
Clifford BLOSSOM and Juliet Leal Blossom, Defendants-Appellants.

No. 9040.

Supreme Court of New Mexico.
Dec. 28, 1970.

Rehearing Denied Jan. 25, 1971.

N. Tito Quintana, Albuquerque, for appellants.

Ussery, Burciaga & Parrish, Albuquerque, for appellees.

OPINION

SISK, Justice.

This is an appeal from consolidated quiet title suits pertaining to real estate in Sandoval County, New Mexico. Appellants purport to appeal from a "Final Order and Decree" entered in the consolidated causes on June 18, 1969, insofar as it quiets title in the appellee Candido Apodaca to a tract identified as the Westerly Extension of Tract 84–A, Map 16, Middle Rio Grande Conservancy District, and to a portion of Tract 16, Map 16, Middle Rio Grande Conservancy District, which borders appellants' Tract 15 of said map.

Both parties had filed separate actions in which they named each other, and other persons, as defendants, and in which they each sought to quiet title to lands in addition to that here in dispute. The actions were consolidated by order entered May 16, 1967.

The "Final Order and Decree" entered in the consolidated causes on June 18, 1969 recited that it was made on the application of Candido Apodaca and granted the relief sought by him. Notice of Appeal in the consolidated cases was filed on July 18, 1969.

On March 30, 1970, however, a "Supplemental Final Order and Decree" was entered in the consolidated causes, subsequent to which no additional Notice of Appeal was ever filed.

We thus are confronted with the jurisdictional question concerning whether the 1969 Decree was appealable under Rule 54(b) of the Rules of Civil Procedure (§ 21-1-1(54) (b), N.M.S.A.1953). The 1970 Decree recited:

"This Court having heretofore on June 18, 1969, entered its Final Order and Decree, quieting title in Candido Apodaca to the properties described in Exhibits A and B therein, and the Court being advised that certain of the tracts of property described in Exhibit A in the Complaint in Cause No. 3997 are undisputed by any of the parties in consolidated Causes Nos. 3910 and 3997, finds that said Final Order and Decree should be supplemented to include the quieting of title of said tracts of property in Liberato Leal and Isabel G. Leal, plaintiffs in Cause No. 3997.

"This cause therefore coming on to be heard on its merits upon the application of LIBERATO LEAL and ISABEL G. LEAL for such Supplemental Final Order and Decree * * * and the Court * * * finds the facts to be as follows:

"1. That the Court has jurisdiction over the subject matter of this action and over the parties in this consolidated cause; that the parties include all of the defendants in Cause No. 3910 and all of the defendants in Cause No. 3997, as well as the Plaintiff, CANDIDO APODACA, in Cause No. 3910; that all such parties in said Cause No. 3910 and Cause No. 3997, except LIBERATO LEAL and ISABEL G. LEAL, are referred to hereinafter as 'adverse parties.' * * *."

The 1970 Decree then awarded certain tracts to appellants Liberato and Isabel Leal, excluded certain property awarded to appellee in the 1969 Decree, and finalized the determination of any overlap between Tract 15 and Tract 16 by reciting:

"6. If there is a conflict between Tract 15 and Tract 16 it is to be resolved in accordance with Candido Apodaca's Final Order and Decree filed June 18, 1969."

At the time the 1969 Decree was entered, from which the appeal was purportedly taken, Rule 54(b), supra, read:

"Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay *and* upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis ours.)

The last paragraph of the 1969 Decree recites:

"That the entry of this Final Decree as a Final Order and Decree adjudicating all claims involved in the above-entitled action is hereby expressly directed."

There is no "express determination that there is no just reason for delay" as required by the rule if a final judgment is to be entered as to fewer than all of the claims or parties, and the statement that it is adjudicating all claims is discounted by the above-quoted recitals from the 1970 Decree which establish that at the time of the filing of the Notice of Appeal there were unadjudicated claims outstanding.

Although the jurisdictional question was not raised by any party, we must raise it on our own motion. Carpenter v. Merrett, 82 N.M. 185, 477 P.2d 819 (decided December 7, 1970); Voisen v. Kantor, 81 N. M. 560, 469 P.2d 709 (1970); Aetna Casualty & Surety Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969); Nichols v. Texico Conference Ass'n, 78 N.M. 310, 430 P.2d

881 (1967); Chronister v. State Farm Mutual Automobile Ins. Co., 67 N.M. 170, 353 P.2d 1059 (1960). In Central-Southwest Dairy Cooperative v. American Bank of Commerce, 78 N.M. 464, 432 P.2d 820 (1967), it was held: "Both the 'express determination' and the 'express direction' must be present." Only the latter of these two requirements was omitted from the amendment to Rule 54(b) which became effective October 1, 1969.

The 1969 Decree was not appealable absent such "express determination." The Notice of Appeal was not timely as to the 1970 Decree, and we lack jurisdiction. Public Service Company v. Wolf, 78 N.M. 221, 430 P.2d 379 (1967).

The appeal must be dismissed, and it is so ordered.

WATSON and McKENNA, JJ., concur.

479 P.2d 769

EL PASO ELECTRIC COMPANY, a Corporation, Petitioner-Appellant,

v.

Mitchell LANDERS and Merle Landers, his wife, Earl Stull and Bessie C. Stull, his wife, and William A. Hall and Martha E. Hall, his wife, Defendants-Appellees.

No. 9058.

Supreme Court of New Mexico.

Dec. 31, 1970.

Rehearing Denied Jan. 25, 1971.

J. D. Weir, R. R. Regan, Las Cruces, for appellant.

Garland, Martin & Martin, Neil E. Weinbrenner, Las Cruces, for appellees.

OPINION

COMPTON, Chief Justice.

This is a condemnation action brought by El Paso Electric Company, a public utility, to acquire a right of way and easement,

100 feet wide, over the lands of the appellees, Landers, Stulls and Halls, for the construction and maintenance of an overhead 345,000 volt electric transmission line in Dona Ana County, New Mexico. There have been two jury trials; following the first trial the court required remittiturs in the amounts awarded, and, upon nonacceptance by appellees, a new trial was ordered. Upon the second trial, the jury awarded Landers $1,820.00; Stulls, $7,650.-00; and Halls, $3,500.00. Appellant again moved for remittiturs or in the alternative, a new trial, which motion was denied as to appellees Landers and Halls, but a $1,000.00 remittitur was required as to the Stulls or alternatively a new trial. Stulls accepted the remittitur and judgment was entered accordingly. Appellant brings the judgment here for review of alleged errors.

The refusal of the trial court to permit evidence of the purchase prices of the premises during cross-examination (American Telephone & Tel. Co. of Wyo. v. Walker, 77 N.M. 755, 427 P.2d 267), and the refusal to permit cross-examination as to assessed values for tax purposes, and to admit evidence as to such assessed values, are assigned as errors. There was no error in these rulings.

The fair market value of the land at the date of notice of taking is the measure of damages. Section 22-9-9, N.M.S.A.1953. From the comments of the court, it is evident that the court thought that the purchase prices were too remote in time in view of what had happened to land values in the county in the past years and its discretion in refusing to permit such evidence will not be disturbed on appeal. See 55 A.L.R.2d 793. Furthermore, the appellees' estimate of values was not based on elements of cost as was present in State ex rel. State Highway Commission v. Chavez, 80 N.M. 394, 456 P.2d 868. By itself, the assessed value of property is not competent direct evidence of value for purposes other than taxation. Gomez v. Board of Ed. of Dulce Ind. Sch. Dist. No. 21, 76 N.M. 305, 414 P.2d 522. No sufficient proof was offered or appears in the record that the owners of the land participated in fixing the appraised value of the lands for tax purposes. See 39 A.L.R.2d, Evidence-Tax Valuation, 214; 31A C.J.S. Evidence § 182(4).

The point is made that the court erred in admitting into evidence the testimony of two witnesses which was not strictly rebuttal testimony. We find no error in this regard. The order of proof is a matter addressed to the sound discretion of the trial court, and we find no abuse of discretion by the trial court. Glass v. Stratoflex, Inc., 76 N.M. 595, 417 P.2d 201.

The trial court refused appellant's request that the jury be permitted to view the premises and this ruling is asserted as prejudicial error. This question was within the province of the trial court and should not be disturbed absent an abuse of discretion, and no abuse of discretion is shown. Embrey v. Galentin, 76 N.M. 719, 418 P.2d 62.

The refusal of the court to grant a remittitur or a new trial is urged as a point for reversal of the judgment. There is no basis for this claim of error. We find ample evidence of a substantial nature to support the verdict of the jury. The amounts awarded by the jury were all between the highest and lowest values testified to by the various witnesses. We deem this evidence substantial. There is nothing in the record to indicate that the verdict of the jury was wrong or that it was made through mistake, prejudice, or that it was excessive as a matter of law, or that the jury had mistaken the measure of damages. See Vivian v. Atchison, Topeka and Santa Fee Railway Co., 69 N.M. 6, 363 P.2d 620; James v. Hood, 19 N.M. 234, 142 P. 162; United States v. Regents of New Mexico School of Mines (10 Cir.) 185 F.2d 389.

It is a well settled rule in this jurisdiction that this court will not weigh the conflicting evidence and substitute its opinion for that of the fact finder. Montgomery

Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399; State ex rel. State Highway Commissioner v. Chavez, supra; Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642; Varney v. Taylor, 77 N.M. 28, 419 P.2d 234; Grisham v. Nelms, 71 N.M. 37, 376 P.2d 1; Adams v. Cox, 55 N.M. 444, 234 P.2d 1043.

Other points are argued but they are disposed of by what has been said.

The judgment should be affirmed.

It is so ordered.

TACKETT and McKENNA, JJ., concur.

479 P.2d 771

The NEW MEXICO PROPERTY APPRAISAL DEPARTMENT, Petitioner-Appellee,

v.

BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY, New Mexico, Donald L. Lanford, John W. Teague, Thomas B. Kennann, as members thereof, Alvis Leon Faris, as County Assessor of Lea County, and Ruth W. Griffith, as Treasurer of Lea County, Respondents-Appellants,

E. C. Bennett, McNutt-Worrell Agency, Inc., John Gooch, Clyde Carson, Jr., Johnny May Crowder, Cotton Warehouse, Inc., J. C. Abbott and J. W. Spears, individually and as representatives of the class of taxpayers of which they are a part, Intervenors-Appellants.

No. 9115.

Supreme Court of New Mexico.

Jan. 18, 1971.

Robert W. Ward, F. L. Heidel, Lovington, for respondents-appellants.

James A. Maloney, Atty. Gen., James C. Compton, Jr., Asst. Atty. Gen., Sante Fe, for appellee.

OPINION

TACKETT, Justice.

This is a mandamus action brought by the New Mexico Property Appraisal Department, hereinafter referred to as "P.A.D.," against the Board of County Commissioners and the County Assessor of Lea County, to which the County Treasurer was added as a party, seeking to force the County Assessor to apply a uniform assessment ratio on property in the county subject to ad valorem taxes. Trial was to the court without a jury. The alternative writ of mandamus was made permanent. Respondents appeal.

The order allowing certain taxpayers to intervene was later set aside. The court did not err in this respect. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573 (1926).

We must first look to one of the statutes under which P.A.D., successor to the state tax commission, operates. Section 72-6-12.1, N.M.S.A., 1953 Comp., provides:

> "The state tax commission shall constitute and be the state board of equalization, and as such board of equalization shall require that all taxable tangible property be assessed uniformly in proportion to the value thereof. To the end that all taxable tangible property may be assessed and valued in accordance with article VIII, section 1 of the Constitution of the state of New Mexico, and in order to perform the duties imposed upon it by law, the state tax commission may promulgate all necessary rules and regulations, including standards of assessment, which rules and regulations shall be followed by the county assessors and the county boards of equalization in connection with the assessment and valuation of property for tax purposes."

The constitutional provision, Art. VIII, § 1, cited above, states:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."

See, Idaho Telephone Company v. Baird, 91 Idaho 425, 423 P.2d 337 (1967).

The P.A.D. promulgated General Order No. 18, dated November 9, 1968, which directed that the taxing authorities in each county of the state apply a uniform assessment ratio of 33⅓ per cent on the full actual value of all tangible property subject to ad valorem taxes for the year 1969. Respondents admit failure and refusal to comply with the order, contending that for "within county" purposes, a ratio of 16⅔ per cent could be applied in lieu of the 33⅓ per cent for state purposes. This contention is without merit, as will be hereafter discussed.

In accordance with the provisions of § 72-6-12.1, supra, the county taxing authorities are under the supervision, direction and control of the P.A.D., as to the assessment of all ad valorem taxes, and must follow the standards of assessments promulgated by the P.A.D. State ex rel. Castillo Corp. v. New Mexico State Tax Comm., 79 N.M. 357, 443 P.2d 850 (1968); State ex rel. Barlow v. Kinnear, 70 Wash. 2d 482, 423 P.2d 937 (1967).

The P.A.D. has the legal right and duty to establish, promulgate and enforce a uniform assessment ratio to be used throughout the state by all taxing officials in the assessment and collection of all ad valorem taxes.

The P.A.D. has the duty to establish and promulgate standards of assessment to insure that all property in the state, subject to ad valorem taxes, is assessed equally and uniformly in proportion to its value on a continuing basis. State ex rel. Castillo Corp. v. New Mexico State Tax Comm., supra. See, McKnight Shopping Center, Inc. v. Board of Property As-

sessment, Appeals & Review, etc., 417 Pa. 234, 209 A.2d 389 (1965). As authority to issue orders that must be followed by county officials, see, State Board of Equalization v. Vanderwood, 146 Mont. 276, 405 P.2d 652 (1965).

When the P.A.D. has established the assessment ratio that shall be applied, the local taxing authorities are under a mandatory and ministerial duty to comply. Section 72-6-12, N.M.S.A., 1953 Comp., and § 72-6-12.1, supra.

The assessors and boards of equalization have a clear legal duty to apply the assessment ratio of 33⅓ per cent of value to all property subject to their jurisdiction, regardless of the ultimate uses of any particular levies. State Board of Equalization v. Vanderwood, supra.

The county taxing authorities have no statutory authority or right to assess taxable tangible property contrary to the directions, rules, regulations and orders of the P.A.D., as the functions of the local taxing authorities are purely ministerial. People v. Pitcher, 61 Colo. 149, 156 P. 812 (1916).

Appellants place great reliance on the 1923 case of Love v. Dun[n]away, 28 N.M. 557, 215 P. 822, for authority to apply a different tax ratio for "within county" and state assessments, which case holds that:

> "* * * [T]he provision does not require that the rate of assessment shall be uniform and equal for all purposes throughout the state, but that the rate must be uniform and equal throughout the locality in which the tax is levied, and if the levy is for a state purpose, then the rate must be uniform and equal in all parts of the state; if for a county purpose, the rate must be equal and uniform throughout the county in which the levy is made, and so in any other taxing district. * * *"

Since the Love decision, our tax statutes relative to assessments on property and the ratio to be applied thereto have materially changed. This court, therefore, disavows that portion of the above quoted statement which might be interpreted to allow different ratios of taxation for state and county purposes.

We adhere to the principles of law set forth in State ex rel. Castillo Corp. v. New Mexico State Tax Comm., supra, wherein this court required the state tax commission to:

> "* * * determine, fix and promulgate a percentage ratio of the appraised value, to which the state levy shall be applied, so as to accomplish equality and uniformity upon subjects of taxation of the same class *for use in all counties of the State* with respect to ad valorem taxes to be levied for the year 1969 and to perform such duty annually thereafter. * * *" (Emphasis added.)

In the Castillo case, supra, this court did cite Love v. Dun[n]away, supra, for the proposition that:

> "* * * we are not in any sense concerned with the uniformity or lack thereof within a county * * * but only with the levy, for State purposes, of the ad valorem taxes."

By their analysis, the court did not intend that there could be a different tax rate applied to state and county assessments; rather, that the rate should be uniform for all counties within the state.

The taxing authorities of Lea County shall apply the 33⅓ per cent ratio, as directed by the P.A.D., to all property assessed for ad valorem tax purposes until such time as the P.A.D. deems it necessary to change the ratio to be applied.

In view of the many problems connected with assessment, preparation of tax rolls, schedules, notice to taxpayers, and collection of taxes, the taxing authorities are directed to use the ratio prescribed by the P.A.D. for the assessment period beginning in January 1970, and thereafter unless the ratio is changed.

The judgment is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

479 P.2d 774

Richard LUCERO, Petitioner,

v.

Felix RODRIGUEZ, Warden of the New Mexico State Penitentiary, Respondent.

No. 9024.

Supreme Court of New Mexico.
Jan. 11, 1971.

Original Habeas Corpus Proceeding

Now, therefore, it is ordered that the writ of habeas corpus issued herein on March 19, 1970, be and the same is hereby quashed.

479 P.2d 774

Mike WHITESIDES, Petitioner,

v.

J. V. GALLEGOS, District Judge, Tenth Judicial District, State of New Mexico, Respondent.

No. 9195.

Supreme Court of New Mexico.
Jan. 11, 1971.

ORDER

It appears from the order of the trial court that the petitioner requested affirmative relief, postponement of arraignment, prior to filing his affidavit of disqualification of the resident judge.

The petition for writ of prohibition is denied.

479 P.2d 774

TIMERON, North American Land Development, Inc., Robert H. Levenson, Johnny Mobley, Ray Brooks, and United States Leisure, Inc., Petitioners,

v.

The DISTRICT COURT OF LEA COUNTY, New Mexico, and Hon. Kermit E. Nash, Judge of the District Court of Lea County, New Mexico, Respondents.

No. 9202.

Supreme Court of New Mexico.
Jan. 25, 1971.

Original Prohibition Proceedings

Ordered that petition for writ of prohibition be and the same is hereby denied.

480 P.2d 161

Bill H. WOOD, Plaintiff-Appellant,

v.

CITIZENS STANDARD LIFE INSURANCE COMPANY, Defendant-Appellee.

No. 9106.

Supreme Court of New Mexico.

Jan. 25, 1971.

L. George Schubert, Hobbs, for plaintiff-appellant.

Heidel, Swarthout & Samberson, Lovington, for defendant-appellee.

OPINION

OMAN, Justice.

Plaintiff appeals from an adverse judgment in his suit for bodily injury allegedly covered under a policy of insurance issued by defendant. We affirm.

His claim was that his bodily injury came within the policy coverage of "* * * loss resulting directly, independently and exclusively of all other causes from bodily injuries effected solely through external and accidental means * * *." His suit on this claim was tried with his suit for workmen's compensation benefits to which he claimed to be entitled by reason of the same injury. The same evidence was adduced in support of both claims.

Through inadvertence a formal order consolidating the two cases was never entered. Thus, plaintiff appealed to the New Mexico Court of Appeals from the judgment entered in the workmen's compensation suit, which was also adverse to him. That judgment was affirmed. Wood v. Gandy, 82 N.M. 201, 477 P.2d 1016 (Ct. App.), decided December 4, 1970.

Plaintiff's contention is that he was overcome by a toxic gas, to wit, hydrogen sulfide, while preparing and placing a hot oil unit for the purpose of circulating chemically treated hot water through a tank containing crude oil and brine water. He claims he suffered labyrinthitis as a proximate result of being exposed to this gas.

His first point relied upon for reversal, as in Wood v. Gandy, supra, is that "THE TRIAL COURT ERRED IN NOT PERMITTING A CHEMIST TO TESTIFY AS TO THE EFFECTS OF HYDROGEN SULFIDE ON THE HUMAN SYSTEM. * * *" and in applying "THE WRONG STANDARDS IN REJECTING THE TESTIMONY OF THE CHEMIST." The qualifications of this witness, as developed by his testimony, are that he has a bachelor's degree in Chemical Engineering; has taken "* * * a nine weeks' management course * * *"; has specialized in designing and managing chemical plants; and is Vice President of a chemical company. He did testify that from his experience he knew hydrogen sulfide would be one of the gases emitted by the heating of the crude oil, and he was permitted to testify that hydrogen sulfide is toxic and extremely hazardous and dangerous.

The court sustained an objection to a question in which the witness was asked: "* * * from your experience with hydrogen sulfide what concentration of hydrogen sulfide would you say is required to put the plaintiff in the physical condition he found himself?" The court, in announcing a reason for its ruling, stated in part: "* * * For him to say what it [hydrogen sulfide] is going to do to a human body, I don't see that you have qualfied him."

The plaintiff made no effort to further qualify the witness and made no tender of proof. A proper tender or offer of proof is essential to the preservation of error in improperly excluding evidence. Williams v. Yellow Checker Cab Co., 77

N.M. 747, 427 P.2d 261 (1967); Falkner v. Martin, 74 N.M. 159, 391 P.2d 660 (1964). However, as already stated, the witness had testified that hydrogen sulfide was toxic and extremely hazardous and dangerous. Plaintiff had fully described the physical condition in which he found himself. The treating physician testified the gas was toxic to the human body in a low concentration, and, he thought, it was toxic in concentration as low as "* * * four parts per thousand." No effort was made to establish the concentration of the gas at the place and time plaintiff claims to have been overcome. Thus, as stated in Wood v. Gandy, supra, plaintiff could not have been prejudiced by the court's refusal to permit the witness to answer the question asked of him.

Further, the trial court was not in error in sustaining the objection on the basis of the lack of the witness' qualifications to give his opinion as to the effects of the gas on the human body. The qualifications of this witness to give such an opinion are not comparable to the qualifications of the non-medical witnesses who were permitted to testify in Roberts v. United States, 316 F.2d 489 (3d Cir. 1963) and Stertz v. Briscoe, 184 Kan. 163, 334 P.2d 357, 70 A.L.R.2d 1021 (1959), upon which plaintiff relies.

The trial court has wide discretion in determining whether one offered as an expert witness is competent or qualified to give an opinion on any given subject or proposition, and the court's determination of this question will not be disturbed on appeal, unless there has been an abuse of this discretion. Jaramillo v. Anaconda Company, 71 N.M. 161, 376 P.2d 954 (1962); Transwestern Pipe Line Company v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961); Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961); 2 Jones on Evidence, § 414 (5th Ed. 1958). The ruling of the trial court here was clearly not an abuse of this discretion.

Plaintiff next complains the trial court erred in accepting the diagnosis of plaintiff's condition made by a medical doctor, who had examined plaintiff only once at the request of defendants, rather than accepting the diagnosis of the treating osteopathic physician, who had treated plaintiff on seventeen occasions. Plaintiff asserts: "The only inference that can be drawn is that the trial court intentionally disregarded the opinion of the osteopath because of a bias against his school of practice." We disagree. No such inference of bias can properly be drawn from the trial court's finding: "That as a reasonable medical probability, the disability of which plaintiff complains is a result of a stroke (i. e., a cerebral vascular accident) due to preexisting hypertension."

No direct attack has been made on this finding. Unless findings are directly attacked, they are the facts in this court. Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967). However, in view of the nature of plaintiff's contentions under this point, we shall discuss them in some detail.

The osteopathic physician, after testifying that in his opinion plaintiff suffered from toxic labyrinthitis, was asked the following question by plaintiff's attorney to which he made the following answer:

> "Q. Do you have an opinion based upon reasonable medical certainty that the physical condition of the plaintiff as found by you was probably caused by the accident he described to you—
>
> "* * *
>
> "A. Yes."

It is impossible to definitely tell from the answer whether the defendant was stating that in his opinion the labyrinthitis was caused by the claimed inhalation of gas, or merely that he had an opinion. The matter of the osteopathic physician's opinion as to the causal relationship between the diagnosed labyrinthitis and the claimed inhalation of gas by plaintiff was explored no further. However, a fair evaluation of the substance of his entire testimony, as it relates to the question at hand, may be that in his opinion the condition of labyrinthitis, which he diagnosed, was

probably caused by plaintiff's inhalation of gas.

A medical doctor called as a witness by plaintiff, who had examined plaintiff on eleven occasions, testified as follows as to his diagnosis of plaintiff's condition in response to questions asked by plaintiff's attorney:

"Q. Did you arrive at a diagnosis regarding his condition, as related to the toxic gas he may have inhaled?

"A. It was my impression that this patient had hypertension, and was being treated, and that he had a toxic labyrinthitis, most likely associated with sinusitis, and toxic reaction from exposure to the gas.

"* * *.

"Q. Assume, Doctor Smith, that Mr. Wood had inhaled this toxic gas for a prolonged period of time, as he related to you, is that—does that aggravate his hypertension, or in any way related to disability as to the hypertension?

"A. I don't know when his hypertension began. I don't know for sure what kind of gas he was in. So, I could not give a real good answer as to what influence the gas would have upon hypertension, from what I know of it at the present.

"* * *.

"Q. Assuming that the patient's statement to you was true regarding inhalation of a toxic gas as you related in the history you obtained from him, do you have an opinion based on a reasonable medical certainty that he is disabled as a result of that accidental injury?

"A. I cannot state specifically that I know that this is from the gas. There are certain toxic reactions that could occur with certain gases that could produce labyrinth damage, but, I am not qualified to make a specific statement on this at this time."

The only other doctor who testified did so as a defense witness, and it was the claimed acceptance by the trial court of this doctor's diagnosis of which plaintiff now complains. His testimony as to his diagnosis is set forth in the opinion in Wood v. Gandy, supra; and he clearly gave it as his opinion that plaintiff had suffered a cerebral vascular accident, or stroke, as a result of his hypertension.

It was for the trial court, as the trier of the facts, and not for this court, to determine the credibility of the witnesses, the weight to be given their respective testimonies, and wherein the truth lay. Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970); Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968); Wood v. Gandy, supra; Rein v. Dvoracek, 79 N.M. 410, 444 P.2d 595 (Ct.App.1968). The fact that the witnesses upon whose credibility the trial court was required to pass were medical experts, and that the differences and conflicts to be resolved arose out of their medical opinions as to the causes and nature of plaintiff's disabling condition, does not alter the rule. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); Renfro v. San Juan Hospital, Inc., 75 N.M. 235, 403 P.2d 681 (1965); Montano v. Montoya-Saavedra, 70 N.M. 332, 373 P.2d 824 (1962); Wood v. Gandy, supra.

However, plaintiff urges our adoption of "* * * the rule that more weight be given the testimony of the treating physician than the examining physician * * *." As we understand his position, he is urging that we adopt a rule requiring the trier of the facts, as a matter of law, to give greater weight to the expert medical opinions of treating physicians than to expert medical opinions of physicians who have conducted only medical examinations for purposes of evaluation, regardless of the respective qualifications of the physicians, the nature and extent of the treatment, and the nature and extent of the evaluation examinations, and regardless of all other circumstances which might be developed bearing upon the credibility of the physicians and the weight to be given their respective opinions. He relies upon the cases of Rezza v. Cziffer, 186 So.2d

174 (La.App.1966); Stuart v. Anheuser-Busch Company, 185 So.2d 333 (La.App. 1966) and Troyer v. Armour and Company, 423 S.W.2d 58 (Mo.App.1967).

In the Stuart case it is stated: "The testimony of a physician who examines and treats the injured party is entitled to much greater weight than a physician examining the plaintiff at a later date * *."

This language would indicate support for a rule of evidence such as plaintiff urges upon us. The language used in the Rezza and Troyer cases at most lends very doubtful support for such a rule. In any event, this is not the rule in New Mexico, and we are not prompted by plaintiff's urgings to adopt such a rule. Once a medical witness has qualified to give an expert medical opinion upon a particular issue, the weight, if any, to be given his opinion on this issue, and the resolution of conflicts between his opinion and the opinions of other medical experts on the issue, are for the trier of the facts. Gallegos v. Kennedy, supra; Renfro v. San Juan Hospital, Inc., supra; Montano v. Montoya-Saavedra, supra; Wood v. Gandy, supra. See also Sawyer v. Washington National Insurance Company, 78 N.M. 201, 429 P.2d 901 (1967); Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964); Reid v. Brown, 56 N.M. 65, 240 P.2d 213 (1952).

Plaintiff's final point is that the trial court erred in finding "* * * PLAINTIFF'S DISABILITY WAS NOT CAUSED BY OR THE RESULT OF ANY BODILY INJURIES EFFECTED THROUGH ANY EXTERNAL AND ACCIDENTAL MEANS." His position under this point is predicated upon his assumption that his disability resulted from his inhalation of hydrogen sulfide gas. As stated above, the trial court found: "That as a reasonable medical probability, the disability of which plaintiff complains is a result of a stroke (i. e., a cerebral vascular accident) due to pre-existing hypertension."

As already stated, this finding has not been directly attacked, and the only indirect attack is as discussed above and rejected. Therefore, there being no causal connection between the claimed inhalation of hydrogen sulfide gas and plaintiff's disability, the court did not err in finding plaintiff's disability "* * * was not caused by, and is not the result of, any bodily injuries effected through any external and accidental means."

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

480 P.2d 165

William J. HANRATTY, Plaintiff-Appellee,

v.

MIDDLE RIO GRANDE CONSERVANCY DISTRICT, Defendant-Appellee,

and

Andres G. Vigil, a/k/a Andres Vigil, Defendant-Appellant.

No. 9039.

Supreme Court of New Mexico.

Dec. 14, 1970.

Rehearing Denied Jan. 25, 1971.

Second Rehearing Denied Feb. 17, 1971.

Milton S. Seligman, Albuquerque, for appellant.

Ussery, Burciaga & Parrish, Albuquerque, for Hanratty.

Hannett, Hannett, Cornish & Barnhart, Albuquerque, for Middle Rio Grande Conservancy District.

OPINION

COMPTON, Chief Justice.

This is an appeal from a summary judgment. The Middle Rio Grande Conservancy District filed Cause No. 3723 in Sandoval County to foreclose its lien for delinquent tax assessments against the land involved in this suit. Substituted service by publication was obtained upon appellant Vigil, the then owner of the property, and, upon his failure to answer, default judgment was entered in favor of the Conservancy District in 1962. The Conservancy District sold the property approximately four years later to appellee Hanratty.

Subsequently this action was filed by appellee Hanratty to quiet title to the property. Appellant Vigil answered and filed a cross claim against Hanratty and appellee, Middle Rio Grande Conservancy District, alleging that the default judgment entered against him in Cause No. 3723 was invalid because he was never served with process. Appellee Hanratty moved for and was granted summary judgment quieting title in himself and Vigil has appealed.

The decisive question is whether the appellant by counterclaim in a separate proceeding may attack the prior judgment entered in Cause No. 3723. The trial court found the attack to be a collateral attack and dismissed appellant's answer and cross claim.

We think the ruling of the court was correct. Appellant's attack on the judgment is not made in the same action as the foreclosure suit but rather it is an attempt to impeach the judgment by matters dehors the record in an entirely different action.

The question presented is conclusively settled in this jurisdiction. Arthur v. Garcia, 78 N.M. 381, 431 P.2d 759; Lucus v. Ruckman, 59 N.M. 504, 287 P.2d 68. Compare Barela v. Lopez, 76 N.M. 632, 417 P.2d 441; McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970.

In Arthur v. Garcia, supra, we said:

> "In the instant case, there is clearly an attempt, in a separate action, to impeach by matters dehors the record and, accordingly, this is a collateral attack."

In Lucus v. Ruckman, supra, we quoted with approval 34 C.J. 520, § 827 (49 C.J.S. Judgments § 408, p. 805) as follows:

> "'A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law and in a proceeding instituted for that very purpose, *in the same action and in the same court*; * * *'" (Emphasis ours)

In McDonald v. Padilla, supra, we said:

> "The rule is that as against a collateral attack, a judgment is valid unless the contrary appears in the judgment roll, and

the omission of every step in the proceedings except the entry of the judgment, does not overcome the conclusive presumption of regularity of a judgment when collaterally attacked, if the record does not affirmatively disclose the omissions. * * *"

The appellant asserts that the trial court abused its discretion in denying his motion to consolidate causes of action for the purpose of considering the motion for summary judgment and trial. The consolidation of causes of action is a matter vested solely within the discretion of the trial court and the exercise of such discretion will not be disturbed on appeal absent a showing of abuse of discretion. We fail to see any abuse of discretion on the part of the trial court in refusing to consolidate the cases.

Other points are argued but they are disposed of by what has been said.

The judgment should be affirmed and it is so ordered.

TACKETT and SISK, JJ., concur.

480 P.2d 168

The STATE of New Mexico, ex rel. NEW MEXICO PROPERTY APPRAISAL DEPARTMENT, Haskel B. Smith, Director, Petitioner,

v.

The Honorable Kermit E. NASH, District Judge, Fifth Judicial District, Lea County, New Mexico, and Frank C. Smith, Respondents.

No. 9127.

Supreme Court of New Mexico.

Sept. 30, 1970.

Original Prohibition Proceeding

Ordered that the writ of prohibition heretofore issued herein on September 10, 1970, be and the same is hereby made permanent;

COMPTON, Chief Justice, and WATSON, SISK and McKENNA, Justices, concurring; TACKETT, Justice, dissenting, being for the proposition that the writ should be made permanent on the second count, and quashed on the first count of the petition.

Further ordered that the Temporary Restraining Orders and Orders to Show Cause issued by the Hon. Kermit E. Nash on September 1, 1970 and September 9, 1970, respectively, be and the same are hereby vacated and set aside; COMPTON, Chief Justice, and WATSON, SISK and McKENNA, Justices, concurring; TACKETT, Justice, dissenting, being for the proposition that the orders to show cause with respect to the reinstatement should stand, and that portion of the orders dealing with the restraining and enjoining of the Property Appraisal Department should be vacated and set aside.

For opinion see 82 N.M. 279, 480 P.2d 169.

480 P.2d 169

The STATE of New Mexico, ex rel. NEW MEXICO PROPERTY APPRAISAL DEPARTMENT, Haskel B. Smith, Director, Petitioner,

v.

The Honorable Kermit E. NASH, District Judge, Fifth Judicial District, Lea County, New Mexico, and Frank C. Smith, Respondents.

No. 9127.

Supreme Court of New Mexico.

Oct. 19, 1970.

James A. Maloney, Atty. Gen., James C. Compton, Jr., Asst. Atty. Gen., Santa Fe, for petitioner.

F. L. Heidel, Robert W. Ward, Lovington, for respondents.

OPINION

PER CURIAM:

In this matter, we have decided to make the alternative writ of prohibition permanent. The writ is directed to both respondents and its effect is to prevent the Honorable Kermit E. Nash, Judge of the Fifth Judicial District, Lea County, New Mexico, and Frank C. Smith, the County Assessor, from further proceeding in cause No. 30,322, filed in Lea County against the Director of the Property Appraisal Department and to void the order previously entered in the cause. By ch. 31, Laws 1970, the State Tax Commission became the Property Appraisal Department.

The facts are as follows: Respondent Smith, then the County Assessor for Lea County, was suspended from office effective September 8, 1970, by letter notice of August 26, 1970, from the Director, for wilful failure to follow the department's directive to use, in Lea County, the uniform state-wide assessment ratio of 33⅓% of full value of all tangible property for 1969 ad valorem taxes. Respondent Smith filed on September 1, 1970, cause No. 30,-322 against the Director. The action had two counts: the first claimed that the Notice of Proposed Suspension was void and, if he had been suspended, he should be reinstated; the second count was for an injunction and for a restraining order, to restrain the Director from suspending and interfering with his duties as a county assessor or appointing any other person to assume his duties. Judge Nash then issued a restraining order and required the Director to show cause at a time subsequent. Thereupon, the Attorney General, on behalf of the Petitioner, sought an alternative writ which we granted and which we have made permanent. 82 N.M. 278, 480 P.2d 168.

Our reasoning for making the writ permanent is as follows: Section 15–38–4, N. M.S.A.1953, confers jurisdiction upon the district court in Lea County where "Upon the suspension of an assessor by the commission, the assessor shall have the right to petition the district court of the county for which he was elected for an order directed to the commission to show cause why he should not be reinstated." Section 15–38–3 requires that the assessor shall be entitled to a hearing "upon which a written order shall be made by the commission." This hearing had not been had and therefore there could be no final order of suspension. No final suspension for which he would be entitled to sue for reinstatement under the limited jurisdiction of § 15–38–4 has occurred. Accordingly, there was no jurisdiction in the district court, at the time of filing cause No. 30,322, to test the suspension. Furthermore, cause No. 30,322 was filed on September 1, 1970. The notice of suspension clearly states that the suspension did not become effective until September 8, 1970. Cause No. 30,322 in effect complains of something which did not or could not have become effective until 7 days later. Therefore, the suit was premature.

We take judicial notice that the legal questions attacking the directive of the Director to use the uniform state-wide ratio of 33⅓% is the subject-matter of an appeal pending in this court.

We add that if the Director transcends his authority to suspend under § 15–38–3, supra, by failure to follow the statutory procedure then the respondent can avail himself of his proper remedy in the District Court for Santa Fe County. See § 21–5–1(G), N.M.S.A.1953 (1969 Supp.); State ex rel. Bureau of Revenue v. Macpherson, 79 N.M. 272, 442 P.2d 584 (1968).

The writ is made permanent and it is so ordered.

TACKETT, J., not participating.

480 P.2d 171

Daniel J. MAIMONA, Plaintiff-Appellant,

v.

STATE of New Mexico, Defendant-Appellee.

No. 540.

Court of Appeals of New Mexico.

Jan. 8, 1971.

Peter M. McDevitt, McDevitt & McDevitt, Gallup, for plaintiff-appellant.

James A. Maloney, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

WOOD, Judge.

Defendant appeals from a denial of post-conviction relief, § 21-1-1(93), N.M. S.A. 1953 (Repl. Vol. 4), after an evidentiary hearing. The three issues, and our answers, follow.

Evidence to support finding that guilty plea was voluntary.

In 1967, defendant pled guilty. No appeal was taken from the judgment of conviction and sentence entered following the plea. In 1968, defendant moved for post-conviction relief. Relief was denied without a hearing. Appealing, this court remanded for an evidentiary hearing. One of the matters to be considered at this hearing was whether defendant "* * * was deceived and coerced into making his guilty plea by the prosecution; * * *" State v. Maimona, 80 N.M. 562, 458 P.2d 814 (Ct.App.1969). An evidentiary hearing was held October 3, 1969, before Judge Zinn, who found that the plea of guilty was entered without coercion and deception by the prosecution. No appeal was taken from this finding or the order denying post-conviction relief. The order was entered October 20, 1969.

The current appeal is from a denial of defendant's second motion for post-conviction relief, entered June 18, 1970, by Judge Musgrove. Defendant claims there is no evidence to support Judge Musgrove's decision that Judge Zinn's findings in connection with the October 3, 1969 hearing were proper. The answer to this contention is that Judge Musgrove made no such finding.

Defendant did request a finding by Judge Musgrove that Judge Zinn's findings were not supported by substantial evidence. This request was refused. In contending the refusal of this requested finding was error, defendant asserts there was no substantial evidence that defendant's guilty plea was voluntary. Thus, it appears that defendant is attacking Judge Zinn's finding that the plea was entered without coercion or deception.

For two reasons Judge Zinn's finding is not before us for review. First, we assume (but do not decide) that the correctness of Judge Zinn's finding could be litigated at the hearing before Judge Musgrove. This issue was not among the issues that defendant's counsel stated were being presented at the hearing before Judge Musgrove. A review of the record shows that this issue was never mentioned during the evidentiary hearing. It appears for the first time in defendant's requested findings. Since the question of evidence to support Judge Zinn's finding was not an issue before Judge Musgrove, it would have been error if Judge Musgrove had ruled on this question. Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966). Defendant's requested finding on the question was too late to raise the issue. Fredenburgh v. Allied Van Lines, Inc., 79 N.M. 593, 446 P.2d 868 (1968). Since Judge Zinn's findings were not an issue at the hearing before Judge Musgrove, there is no basis here for a review of a non-existent issue. See State v. Flores, 79 N.M. 412, 444 P.2d 597 (Ct.App.1968).

Second, what defendant seeks is appellate review of the propriety of Judge

Zinn's finding. It is too late to obtain such a review. Judge Zinn's order was entered October 20, 1969. Even if we assume the notice of appeal from Judge Musgrove's decision is an appeal from Judge Zinn's decision (which it is not), the appeal is not timely under § 21-2-1(5), N.M.S.A. 1953 (Repl. Vol. 4). State v. Garlick, 80 N.M. 352, 456 P.2d 185 (1969); State v. Sedillo, 81 N.M. 622, 471 P.2d 192 (Ct.App.1970); State v. Flores, supra.

Fairness of Judge Zinn's hearing.

Defendant claimed before Judge Musgrove, and asserts here, that Judge Zinn was prejudiced against him, did not decide the issues on the evidence and was swayed by personal animosity toward defendant. On this basis he claims he did not receive a fair and impartial hearing and was deprived of due process. The only evidence in support of this claim is defendant's testimony that Judge Zinn showed prejudice through his decision and his sentencing of defendant and because defendant felt Judge Zinn should have ruled in his favor. Judge Musgrove found that defendant received a fair and impartial hearing. The record of the hearing before Judge Zinn fully supports Judge Musgrove's finding.

Adequacy of representation by counsel.

Defendant claims he was inadequately represented by counsel at the hearing before Judge Zinn. He makes three claims under this issue.

First, he claims that counsel had not consulted with him prior to the hearing. The record is to the contrary; it refers to written correspondence in advance of the hearing and shows a consultation prior to the hearing. Defendant's claim then goes to the extent of the consultation. The amount of time counsel spent with defendant prior to the hearing provides no basis for post-conviction relief. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App.1968) states: "* * * the competence and effectiveness of counsel cannot be determined by the amount of time counsel spent or failed to spend with defendant. * * *" See also, State v. McCain, 79 N.M. 197, 441 P.2d 237 (Ct.App.1968).

Second, he claims that counsel did not subpoena a witness whose testimony was material to defendant's claim. The facts show no basis for this claim. The record shows counsel wrote to defendant and asked to be advised as to witnesses. Defendant declined to name witnesses in writing. At the time of the hearing, counsel indicated that he wished to have the testimony of one witness taken at a later date. The court refused to agree to this delay. Instead, it accepted as true that this one witness would testify as had been represented to the court. On the basis of this representation, the trial court found that testimony by defendant's fellow jail prisoners would corroborate defendant's testimony concerning his treatment in the county jail. There is no factual basis for the claim that counsel was inadequate in failing to subpoena a witness because counsel didn't know the name of the witness prior to the hearing and the representation as to the witness' testimony was accepted as true.

However, even if defendant had failed to subpoena a witness it would not establish inadequacy of counsel. The decision to call or not to call a witness is a matter of trial tactics and strategy within the control of counsel. Thus, a failure to call a witness does not establish inadequacy and provides no basis for relief. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct. App.1970); see State v. Wilson, 82 N.M. 142, 477 P.2d 318 (Ct.App.), decided November 13, 1970.

Third, he claims counsel did not perfect an appeal from Judge Zinn's order denying post-conviction relief although requested to do so. While there was no appeal from the order denying relief, the record does not establish that defendant requested his court appointed attorney to appeal the order. The evidence and inferences therefrom are conflicting. Defendant testified that he requested counsel to appeal. Counsel's letter to defendant

shows that counsel advised defendant he could appeal; that his appointment ended upon the filing of Judge Zinn's decision; that he was not in the position to handle an appeal; and that if defendant desired "* * * to pursue this further, I would suggest that you again request Court-Appointed-Counsel." The record shows that defendant knew how to file an appeal; he took his own appeal in the earlier appellate proceeding. State v. Maimona, supra. In this case, he also wrote to Judge Zinn stating that he desired to appeal. However, this appeal was not timely filed.

There was no requested finding that counsel was asked to appeal Judge Zinn's decision. See § 21-1-1(52) (B) (a) (6), N.M.S.A. 1953 (Repl. Vol. 4). The requested finding was that defendant was not adequately represented by counsel at the hearing before Judge Zinn. Judge Musgrove found that he was adequately represented. This finding is supported by substantial evidence. Thus, to the extent Judge Musgrove was requested to make a finding concerning the request for an appeal, the factual finding is against defendant.

Although the facts dispose of this claim, we refer to the legal basis of the claim since defendant suggests there are no New Mexico decisions on the question of a court appointed attorney's "* * * duty to perfect the appeal if his client wants one. * * *" State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App.1969) holds that court appointed counsel has a duty to represent his client until relieved and if a defendant requests counsel to appeal and counsel refuses to do so, this is State action entitling a defendant to post-conviction relief. See also, Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct.App.1970). Under State v. Gorton, supra, counsel would have been obligated to represent defendant until relieved. Thus, if defendant had requested counsel to protect his right to appeal, counsel, being court appointed, would have been obligated to do so. If counsel had refused to take an appeal in this situation, we would have a denial of a defendant's right to appeal. Standing alone, however, this would not amount to a showing of inadequacy of representation by counsel. Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct.App.1969).

The order denying relief is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

480 P.2d 174

STATE of New Mexico, Plaintiff-Appellee,

v.

Jesse Mitchell WASHINGTON and William Grady Powell, Defendants-Appellants.

No. 512.

Court of Appeals of New Mexico.

Jan. 22, 1971.

Stanley F. Frost, Tucumcari, for appellants.

James A. Maloney, Atty.Gen., Santa Fe, Thomas L. Dunigan, Asst.Atty.Gen., for appellee.

OPINION

HENDLEY, Judge.

Defendants appeal their conviction for unlawful possession of marijuana.

We reverse.

The following events occurred during a trip defendants were making with two friends between New York and California. On January 31, 1970 the State Police set up a road-block on the East side of Tucumcari, New Mexico to check driver's licenses and car registrations. The defendants were stopped in this routine check and, after having produced the requested driver's license and registration, were asked if they were in military service. Defendant Washington admitted being in the Army and claimed to have leave papers but was unable to produce them. The State Police told the defendants that they would have to go to headquarters so that they could verify if defendant Washington had leave papers. Defendants and their two friends complied with the request: one officer took one of the four in his car; the other officer took another in his car; and the remaining two drove their car between the two police cars, to the State Police Headquarters in Tucumcari. Upon their arrival all entered the building and the defendants and their two friends were told to empty the contents of their pockets on a table. One officer testified that this was done to search for weapons. Among the items placed on the table were car keys, money, cigarette papers, and small (approximately 2″ x 3″) manila envelopes. One of the officers, in going through the items on the table, unfolded the envelopes and looked at and smelled its contents. He immediately identified the contents as marijuana. The police officer testified:

> "After we found this marijuana, (referring to the marijuana found in the envelopes) again I asked Mr. Dowe (the driver of the automobile) if he had any marijuana in the car, and he said no. I said, 'Well, you don't mind us taking a look then, do you?' And he said, 'No, I don't mind,' or words to that effect."

Mr. Dowe and the police officer then went to the car. The search revealed two plastic canisters containing marijuana. They returned to the headquarters and the officer informed the defendants that they were under arrest and read them the *Miranda* warnings. Defendants read the warnings themselves and signed statements to the effect that they understood their rights. Defendants then executed incriminating statements which described where, when, and from whom they purchased the marijuana. Defendants' attorney moved to suppress all this evidence. The trial court denied the motion and the evidence was admitted.

We assume but do not decide that the search for weapons, as conducted, was permissible. However, once the defendants

placed their belongings on the table it was evident that they were not armed. The search, then, was at an end. Since defendants were not under arrest, a search and seizure incident to arrest was not involved. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct.App.1968).

We are unable to accept, as a proper basis for a further search, the officer's assertion that the cigarette papers suggested defendants might be marijuana smokers. Opening the envelopes exceeded the permissible scope of the type of search involved. In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the court stated:

> "* * * A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. [citations omitted]. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, * * *."

The envelopes and their contents were inadmissible in that they were found when the scope of the search was exceeded. The canisters of marijuana are inadmissible by reason of their relationship to the unlawfully discovered marijuana in the envelopes. Silverthone Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920); see Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Reversed.

It is so ordered.

SPIESS, C. J., and LaFEL E. OMAN, Justice, Supreme Court, concur.

SUTIN, J., not participating.

480 P.2d 401

STATE of New Mexico, Plaintiff-Appellee,

v.

David Lee COLVIN, Defendant-Appellant.

No. 546.

Court of Appeals of New Mexico.

Jan. 22, 1971.

Dewie B. Leach, Hobbs, for appellant.

James A. Maloney, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Judge.

Defendant pled guilty. His plea was accepted. He was sentenced. He appeals. He claims his sentence is illegal and his guilty plea should be set aside because of an alleged search of and seizure of items from premises occupied by a co-defendant.

We do not go outside the record. There is nothing in the record before us on which to base defendant's allegation. Thus, there is nothing for us to consider. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970); State v. Gunthorpe, 81 N. M. 515, 469 P.2d 160 (Ct.App.1970).

Further, the allegation made in this appeal was never raised to nor ruled on by the trial court. Defendant seeks to raise the alleged search and seizure issue for the first time in this court. He may not do so. State v. Ford, supra; State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App. 1970).

The judgment and sentence are affirmed. It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

480 P.2d 401

STATE of New Mexico, Plaintiff-Appellee,

v.

Fred Arthur SEDILLO, Defendant-Appellant.

No. 518.

Court of Appeals of New Mexico.

Jan. 15, 1971.

Leon Taylor, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Ray Shollenbarger, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

A jury found the defendant guilty of larceny and burglary and he was sentenced pursuant to the Habitual Criminal Statute, § 40A-29-5, N.M.S.A.1953 (Repl.1964). Defendant questions (1) the sufficiency of the evidence to support the conviction; (2) the admission into evidence of copies of log sheets prepared by the radio dispatcher for the police department; and (3) the constitutionality of the Habitual Criminal Statute.

We affirm.

SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY VERDICT.

On appeal from a conviction we view the evidence and all reasonable inferences therefrom in a light most favorable to support the verdict. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App. 1970), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Early on the morning of October 26, 1969, Officer Moody, of the Albuquerque Police Department, was patrolling the North Twelfth Street area in Albuquerque, New Mexico. He saw the defendant with two companions (one of the companions was a co-defendant Epifanio Sedillo) standing next to a 1963 Chevrolet station wagon parked by the Acme Fast Freight Company's warehouse. Officer Moody observed that the station wagon was full of cardboard boxes and suspected that a burglary was in progress. By this time, Officer Moody had driven past the scene of the crime and was unable to immediately apprehend the defendant and his two companions. He radioed Officer Brennan who was approaching the scene of the crime. Officer Brennan pursued the station wagon which had left the scene at a high rate of speed. The station wagon successfully lost Officer Brennan but after a five minute search he found Epifanio Sedillo near where the station wagon had been parked and arrested him. A few minutes later, the defendant, Fred Sedillo was found in a carport a few yards from where the station wagon was parked and he was arrested. A house adjoined the carport on each side and a person could not pass through the back of the carport because of a ten and one-half foot high fence. Defendant Sedillo was trapped in the carport since his only means of exit was through the front where the police were investigating the parked station wagon. Further investigation revealed that Acme had been burglarized and that the goods taken from Acme were the same as the goods found in the station wagon.

The only reasonable inferences from this evidence were that defendant was seen with the stolen goods at the scene of the burglary, that when he was so observed, he tried to escape apprehension, that he was arrest-

ed within a very few minutes after the escape attempt as a result of "hot pursuit" by the police, and arrested near the vehicle containing the stolen goods. We agree with defendant that "presence alone is insufficient to sustain a conviction" for burglary. However, the facts and reasonable inferences therefrom show much more than mere presence. There was substantial evidence to support the conviction. Compare State v. Sharp, 78 N.M. 220, 430 P.2d 378 (1967) and State v. Beachum (Ct. App.) 82 N.M. 204, 477 P.2d 1019 decided November 6, 1970.

ADMISSIBILITY OF THE POLICE DEPARTMENT RADIO DISPATCHER'S LOG SHEET.

A policeman went to the records division on the second day of trial and requested a copy of the dispatcher's log sheet showing calls received and transmitted by and from the officers investigating the burglary and larceny for which the defendant was convicted. The purpose of this evidence was to impeach the testimony of defendant's alibi witnesses concerning the time of day involved. The policeman was handed the log book and he made a copy of the appropriate page. The policeman testified at trial that the copy was a true and exact copy of the log maintained at the records division and it accurately showed what was shown on the original log sheet. The radio dispatcher was then called and she testified that she made the entries in the original log and that the copy was accurate. Defendant objected to the introduction of the copy. His claim is: "There was no attempt to have the copy certified as required by statute 21–1–1(44) (a) (3) N.M. S.A. (supra), nor was there testimony by the custodian of the records as to its authenticity."

The proof of official records statute [§ 21–1–1(44) (a) (3), N.M.S.A.1953 (Repl.1970)] requires that the record be certified by the officer having custody of the record and under the seal of his office. This was not done. However, subsection c, § 21–1–1(44) (c), N.M.S.A.1953 (Repl. 1970) provides an alternative to the official certification and states, "This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law." Another method authorized by law is discussed in Higgins v. Fuller, 48 N.M. 218, 148 P.2d 575 (1944). *Higgins* states that an "examined copy" may be admitted into evidence if the person who made it or who compared it with the original first testifies that it is a copy. Here, the dispatcher testified she made the original entries and that the copy was an accurate copy of the original. The policeman that made the copy testified he compared it with the original and it was an accurate copy. There was a proper foundation for the admission of the log sheet.

CONSTITUTIONALITY OF THE HABITUAL CRIMINAL STATUTE.

"Appellant [defendant] contends that the Habitual Criminal Statute 40A–29–5–A N.M.S.A. compilation (1969 supp.) [sic] is unconstitutional. It usurps the judicial power of setting sentence and bestows it upon the office of the District Attorney * * *. If the State Prosecutor sees fit to invoke the statute 40A–29–5–A, [sic] then the judge has no choice but to sentence accordingly. Thus, the judicial power of setting sentence is bestowed upon the prosecutor. * * *"

Defendant's contention is that the district attorney is not required to invoke the Habitual Criminal Act, rather, that he has discretion in invoking it. The claim is that such asserted discretion has the practical effect of allowing the district attorney to set the sentence. As stated in the brief:

"Although the above statute [Sec. 40A–29–6, N.M.S.A.1953 (Repl.1969)] in-

forms the prosecution of a duty to invoke the habitual criminal act, it does not state that he *must* invoke it. Therefore, in actual practice in the State of New Mexico it is at the discretion of the state prosecutor whether or not he will invoke the Habitual Criminal Statute in any given case. Hence, the prosecutor becomes the one who decides the sentence."

There is no merit to the claim that our statutory law gives the district attorney discretion as to whether he will invoke the habitual criminal provision. Section 40A–29–6, supra, states:

"* * * it shall be the duty * * * to file an information charging the person as a habitual offender."

See also § 40A–29–8, N.M.S.A.1953 (Repl. 1969). State v. McCraw, 59 N.M. 348, 284 P.2d 670 (1955) characterizes the Habitual Criminal Act as "mandatory."

However, defendant claims that there is, in actual practice, uneven enforcement of the Habitual Criminal Act. Assuming that such is the fact, that fact does not make the law unconstitutional. State v. Lujan, 79 N.M. 525, 445 P.2d 749 (1968); State v. Sharp, 79 N.M. 498, 445 P.2d 101 (1968) and State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct.App.1968).

Further, in this case, the law has been carried out. The district attorney has invoked the Act and defendant has been sentenced, by the court, pursuant to the Act. There has been no unconstitutional application of the Act to this defendant. The claim of unconstitutionality is without merit.

Affirmed.

It is so ordered.

WOOD, J., and La FEL E. OMAN, Justice, Supreme Court, concur.

480 P.2d 404

Hasbah CHARLEY, Sam Charley and Acey Charley, Plaintiffs-Appellants,

v.

RICO MOTOR COMPANY, a Corporation, and General Motors Acceptance Corporation, Defendants-Appellees.

No. 508.

Court of Appeals of New Mexico.
Jan. 15, 1971.

Robert Hilgendorf, Chinle, Ariz., Eric Treisman, Crownpoint, for plaintiffs-appellants.

Walter F. Wolf, Jr., Schuelke & Wolf, Gallup, for defendant-appellee Rico Motor Co.

OPINION

SPIESS, Chief Judge.

This appeal presents questions of first impression relating to the Uniform Commercial Code.

On May 19, 1964, appellants purchased a pick-up truck from Rico Motor Company (appellee) at a purchase price of $3,089.35. The full amount of the purchase price was not paid at the time of sale. An advance, or down-payment of $1,061.35 was made by the appellants, which consisted of a trade-in of another vehicle and appellants' promissory note in the principal amount of $467.00 payable to the order of appellee. The unpaid balance of the purchase price was evidenced and secured by a retail installment contract (contract) which was payable in monthly installments.

In September, 1966, the vehicle became involved in an accident and was delivered by one of appellants to appellee for repair. The vehicle was repaired by appellee at a cost of $833.87. Appellants failed to make an October, 1966 installment payment, as required by the contract, and thereafter made no further payments thereon. Appellants also failed to pay in full either the promissory note given as part of the down-payment, or the cost of repair.

On December 6, 1966, appellee orally notified one of appellants that the vehicle would have to be sold, but gave no information as to the time or place of the proposed sale. Except as to orally notifying one of appellants of the proposed sale, no other notification, written or oral, was given by appellee to any of appellants. The trial court found that appellee had repossessed the vehicle as of December 6th, 1966.

It appears from the record that, at the time of the oral notification of the proposed sale of the vehicle, appellants had paid in excess of 60% of the cash price of the vehicle. The percentage of the cash price paid is pertinent under § 50A–9–505, N.M.S.A.1953, part 1, Rpl. Vol. 8, in fixing the method and time of sale.

On March 9, 1967, appellee sold the pick-up truck for $1,585.00. It is conceded that this sum represented the fair market value of the vehicle at material times.

So far as is revealed by the record, appellee made no accounting to appellants of the proceeds of sale prior to the institution of this action by appellants. Prior to the

suit appellee did not undertake to collect from appellants the cost of repair of the vehicle, the unpaid balance of the purchase price under the terms of the contract, or the unpaid balance of the down-payment note.

On February 25, 1969, appellants commenced this action against appellee for a recovery of damages allegedly resulting from violations of the provisions of the Uniform Commercial Code. The claimed violations consisted of appellee's failure to give notice to appellants of the time and place of the proposed sale (§ 50A–9–504(3), N.M.S.A.1953, part 1, Rpl. Vol. 8) and appellee's failure to sell the vehicle within ninety days after repossession as required by § 50A–9–505(1), N.M.S.A.1953, part 1, Rpl. Vol. 8, which provides:

"If the debtor has paid sixty per cent [60%] of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent [60%] of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under section 9–504 [50A–9–504] and if he fails to do so within ninety [90] days after he takes possession the debtor at his option may recover in conversion or under section 9–507(1) [50A–9–507(1)] on secured party's liability."

The trial court concluded that appellee had failed to comply with the provisions of the Code in the respects alleged by appellants, and that appellants were entitled to judgment in conversion (§ 50A–9–505(1), supra, or an award under § 50A–9–507(1), N.M.S.A.1953, part 1, Rpl. Vol. 8. Appellants elected to recover in conversion because, as they stated, the amount recoverable in conversion exceeded the amount which could be recovered under § 50A–9–507(1), supra.

As we read the record it appears that questions actually submitted to the trial court for decision involve the adjustment of accounts as between the parties. Upon appeal, it is urged that the trial court erred in applying debts owed by appellants to appellee against the amount of the judgment rendered in appellants' favor.

In computing the judgment, the trial court deducted $581.27, the unpaid balance owing on the contract from the sum of $1,585.00 (value of the vehicle), and awarded judgment for appellants in the sum of $1,003.75, with interest. The court then reduced this award by the amount of the repair bill, $833.87, which was apparently treated in the nature of a counterclaim, thus leaving a net judgment of $178.47. This amount was applied in reduction of the unpaid balance of the down-payment note which was the subject of a counterclaim filed by appellee with its answer. The final result was the judgment against appellants in the sum of $142.45.

Appellants do not question the trial court's action in deducting the unpaid balance owing on the contract from the value of the vehicle in arriving at the damages in conversion. Consequently, we will assume, but do not decide, that such deduction was proper. It is contended that the balance thereafter remaining, namely, the sum of $1,003.75, and interest, should have been paid to appellants without being further reduced.

The reduction of the judgment by the amount of the repair bill, $833.87, is challenged. Appellants further contend that the trial court erroneously applied the net amount of the judgment, $178.47, toward a cost of repair of the vehicle in preparation for its resale. The court did find that appellee had rightfully expended $216.57 in pre-sale repair. This sum, however, was not included in the judgment, and the omission has not been questioned on appeal. The net amount of the judgment, as we have stated, was applied in reduction of the judgment rendered on appellee's counterclaim, which asked judgment for the unpaid balance of the down-payment note.

It is first argued that the cost of repair of the vehicle, $833.87, was incurred before the vehicle was repossessed by appellee and was not secured by the contract; that § 50A–9–504(1), N.M.S.A.1953, part 1, Rpl. Vol. 8, in providing for the distribution of the proceeds of sale of collateral, does not authorize such payment, and the deduction of this amount from the judgment was improper.

In essence, the contention is that in this form of action an asserted claim or offset which involves matters other than those specified in § 50A–9–504(1), supra, cannot properly be entertained by the court.

It is undisputed that appellants were indebted to appellee in the amount of the repair bill. Although the Uniform Commercial Code, § 50A–9–505, supra, permits a recovery in conversion, the action is nevertheless a suit of a civil nature, and the effect upon litigants of the rules of Civil Procedure is not avoided. We see no language in § 50A–9–505, supra, or elsewhere in the Commercial Code, which would preclude the full exercise of the right to interpose counterclaims under Rule 13, § 21–1–1(13), N.M.S.A.1953, Rpl. Vol. 4.

It is also contended that appellee's failure to plead by counterclaim, or other permissible means, the right to recover the cost of repairs precluded the offset of such amount. Appellants correctly observe that the repair bill was not asserted as a counterclaim, or by other affirmative pleading. A number of authorities are cited by appellants holding that a counterclaim must be presented by an affirmative pleading before a defendant may have recovery against plaintiff. We have no quarrel with this general statement. In this case, however, a pre-trial conference was conducted by the court, which was followed by a pre-trial order; that order, with respect to the repair bill, provided:

"* * * Defendant Rico Motor Company contends that the proceeds of sale were properly applied to the remaining indebtedness under the retail installment contract and that the surplus was properly applied to the outstanding repair charges. Defendant Rico Motor Company contends that the repair bill totalled $833.87, * * *"

Under Rule 16 of the Rules of Civil Procedure, § 21–1–1(16), N.M.S.A.1953, (Rpl. Vol. 4) relating to pre-trial procedure, it is expressly provided that the Court may make an order, which, when entered, shall control subsequent course of the action. See Transwestern Pipe Line Company v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961). Appellants were aware that appellee's claimed right to set off the repair bill was an issue in the cause.

Matters pertaining to the repair bill were litigated without objection on appellants' part. The issue was likewise a subject of findings and conclusions requested by appellants. In our opinion, these circumstances cured the absence of a formal counterclaim if such pleading was required. See Conway v. San Miguel County Board of Education, 59 N.M. 242, 282 P.2d 719 (1955).

Appellants' further contention that the deduction of the amount of the repair bill was improper because the lien for repair had not been foreclosed is without merit, because appellants were nevertheless indebted to appellees in such amount. The indebtedness, as we have held, was a proper basis for offset against the judgment.

Appellants further appear to argue that since the trial court found the time price differential, plus 10% of the cash price of the vehicle, equaled $916.77, that § 50A–9–507(1), N.M.S.A.1953, (pt. 1, Rpl. Vol. 8), would become applicable if the deductions from the judgment in conversion are permissible, in that such deductions would have the effect of reducing the net recovery below $916.77, and this amount as a minimum recovery should then have been awarded without deduction. This statute provides:

"If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appro-

priate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent [10%] of the principal amount of the debt or the time price differential plus ten per cent [10%] of the cash price."

As we have stated, appellants elected to recover in conversion, rather than under this section. Had they, however, accepted a recovery under the quoted section, in our opinion the same offsets would have been available to appellee and the judgment could likewise have been applied against the amount found owing to appellee under the counterclaim. We see nothing in the language of § 50A-9-507(1), supra, which would preclude either offsets or the application of the judgment to amounts found due under a counterclaim.

As had been pointed out, appellants' actual recovery in conversion was $1,003.75 and interest, which exceeded the amount which would have been awarded under § 50A-9-507(1), supra.

Appellants further argue that they are entitled to multiple damages consisting of damages in conversion, § 50A-9-505(1), supra, and the minimum statutory amount under § 50A-9-507(1), supra. We will not consider this contention because it was not urged in the trial court. Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct.App.1969), cert. denied 80 N.M. 608, 458 P.2d 860 (1969).

Appellants took the position in the trial court that they were not entitled to recover the statutory minimum because damages to which they were entitled in conversion exceeded such amount. It was not contended they were entitled to an allowance of damages both in conversion and the minimum statutory amount.

It follows that the judgment should be affirmed.

It is so ordered.

La FEL E. OMAN, Judge, Supreme Court, and HENDLEY, J., concur.

480 P.2d 690

In the Matter of the ESTATE of William Thomas KOGLIN, Deceased.

Anthony F. AVALLONE, Claimant-Appellant,

v.

Edith C. KOGLIN, Executrix-Appellee.

No. 9125.

Supreme Court of New Mexico.

Feb. 1, 1971.

Anthony F. Avallone, pro se.

Frazier, Cusack & Schnedar, Roswell, for executrix-appellee.

OPINION

TACKETT, Justice.

This is an appeal from an order of the District Court of Chaves County, New Mexico, which dismissed an appeal from the Probate Court of that county.

The facts are that Edith C. Koglin was appointed executrix under the will of William Thomas Koglin on January 8, 1968. The first publication of such appointment was on January 11, 1968. A claim against Koglin's estate was filed by Avallone on June 10, 1968, but notice of hearing on the claim was not given within six months, as required by § 31-8-3, N.M.S.A. (1953 Comp.). The probate judge denied the claim. Avallone gave notice of appeal to the district court on January 14, 1970.

By his order of June 15, 1970, Judge Reese held that there was no notice of hearing on the claim within six months from the date of the first publication, and further held that the court did not have jurisdiction to hear the appeal, as it was brought more than twelve months after the date of the first publication of notice of appointment of the executrix. The district court did not err in dismissing the appeal, as § 16-4-18, N.M.S.A. (1953 Comp.), allows ninety days to appeal a decision of the probate court. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

This court considered the very same issue as is now before us in the case of In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969), wherein we held:

> "There are two mandatory steps claimant must take if he would have his claim allowed: (a) Filing a claim; and (b) notice of hearing thereon. We have held that both of these requirements must be met; otherwise, the claim is barred. * * *"

Avallone complied with requirement (a), supra, but failed in requirement (b), supra.

The judgment is affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

480 P.2d 691

Bishop Lester CROWE, Pentecostal Lighthouse Church, also known as Pentecostal Gospel Lighthouse Church, Apostolic World Churches, Inc., J. B. Tidwell, James F. Blaine, Ivey D. Massey and F. Ray Smith, Plaintiffs-Appellants,

v.

STATE of New Mexico, ex rel. L. A. McCULLOCH, Jr., Director of Liquor Control, Bureau of Revenue, and Barber Super Markets, Inc., d/b/a Foodway, Defendants-Appellees.

No. 9089.

Supreme Court of New Mexico.

Feb. 8, 1971.

Neal & Neal, Hobbs, Merrill L. Norton, Lovington, for appellants.

Hernandez, Atkinson, Kitts, Kelsey & Hanna, Albuquerque, for Barber's Super Markets, Inc.

James A. Maloney, Atty. Gen., Ray H. Shollenbarger, Jr., Asst. Atty. Gen., Santa Fe, for Bureau of Revenue.

OPINION

OMAN, Justice.

This suit was filed by plaintiffs on February 24, 1969, pursuant to the provisions of § 46–5–16(E), N.M.S.A.1953 (Repl. Vol. 7, 1966) seeking review of the acts of the Chief of the Division of Liquor Control in connection with the claimed issuance of an additional liquor license within the City of Hobbs. The trial court dismissed plaintiffs' petition on the ground that it fails to state a claim upon which relief can be granted. We affirm.

In their respective briefs filed in this court, the parties have taken the position that the trial court's order, if it is to stand, must do so on either (1) the ground the petition shows the "issuance" of an "additional license" was not involved, or (2) on the ground plaintiffs were not persons aggrieved by the decision within the provisions of § 46–5–16(E), supra. We base our decision on the first of these grounds, and, therefore, need not and do not consider the second ground.

Section 46–5–16(E), supra, provides in part:

> "Any person, firm or corporation aggrieved by any decision made by the chief of division as to the *issuance or refusal to issue any additional license* may appeal to the district court of Santa Fe by filing a petition therefor in the court within thirty [30] days from the date of

the decision of the chief of division, * * *." (Emphasis added)

In their petition, plaintiffs, in effect, alleged the defendant, Barber Super Markets, Inc., filed an application for the transfer of ownership and location of a certain numbered liquor license; this liquor license was required to be cancelled by the Chief of Division for claimed violations by the licensee of § 46–6–1, N.M.S.A.1953 (Repl. Vol. 7, 1966), and, thus, the license had become invalid; and, therefore, the purported transfer of the license was not, in fact, a transfer, but the issuance of an additional license.

Plaintiffs concede § 46–5–16(E), supra, which gives the right of appeal from decisions of the Chief of Division, "as to the issuance" of "any additional license," does not give the right to appeal from decisions authorizing a transfer of an existing license. See Taggader v. Montoya, 54 N.M. 18, 212 P.2d 1049 (1949). However, they argue the license was required to be cancelled, and, therefore, was cancelled by operation of law. Thus, there was no license to transfer. They cite no authority for their position that the license was cancelled by operation of law, and they have neither alleged in their petition nor claimed in their arguments in this appeal that the license was, in fact, cancelled by the Chief of Division. On appeal the decision of the trial court will be presumed correct until the contrary is clearly shown. Ellis v. Parmer, 76 N.M. 626, 417 P.2d 436 (1966); State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct.App.1968).

It appears that the provisions of § 46–6–4, N.M.S.A.1953 (Repl. Vol. 7, 1966), (amended July 1, 1969), concerning proceedings and hearings, may not be applicable to claimed failures to comply with the provisions of § 46–6–1, supra, and in Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940), it was held, in the absence of statutory provisions for notice and hearing before cancellation of a license, the licensee has no legal right to such notice and hearing. However, all of Chapter 46, Articles 1 through 11, including § 46–6–1, supra, are a part of the Liquor Control Act. Section 46–1–1.1, N.M.S.A.1953 (Repl. Vol. 7, 1966). It is one of the duties of the Chief of Division to "cancel" licenses. Section 46–2–4(g), N.M.S.A.1953 (Repl. Vol. 7, 1966), (repealed July 1, 1969). Before cancelling a license pursuant to this duty, the Chief of Division must, of necessity, determine the facts which would authorize the cancellation. Floeck v. Bureau of Revenue, supra; Lorenzino v. State ex rel. James, 18 N.M. 240, 135 P. 1172 (1913). As already stated, plaintiffs do not allege in their petition or contend in their arguments before us that the Chief of Division either made such a determination of facts or cancelled the license which was transferred to defendant, Barber Super Markets, Inc. To accept plaintiffs' argument, that the license had been cancelled by operation of law, would be to relieve the Chief of Division of his duties to make a determination of facts authorizing the cancellation and to effect the cancellation pursuant thereto, and, in the case now before us, would be to give the court power to declare a license cancelled by operation of law without giving the licensee an opportunity to be heard, since the licensee was not made a party to this suit.

The order dismissing the petition should be affirmed.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

480 P.2d 693

STATE of New Mexico, Plaintiff-Appellee,

v.

James Buster RILEY, a/k/a John Eugene Thille, Defendant-Appellant.

No. 581.

Court of Appeals of New Mexico.

Jan. 29, 1971.

Donald D. Hallam, Hobbs, for appellant.

James A. Maloney, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

This is a burglary conviction. Section 40A–16–3, N.M.S.A. 1953 (Repl. Vol. 6). Defendant appeals. The issues are: (1) sufficiency of the evidence to support the verdict; and (2) admissibility of a written statement by a principal actor in the burglary. The conviction is affirmed.

(1) *Sufficiency of the evidence.*

On the night of February 28, 1970, Bennett and Riley were seen walking toward the Wells Service, Inc. building. Bennett and Riley had been previously employed by this company and were familiar with its interior. Upon arrival, Bennett picked up a rock and broke a window. He opened the window and went inside, while Riley remained outside. The police officers were called. Bennett handed out an adding machine and check protector to Riley.

After Bennett crawled out, each man carried an item under his arm and walked about twenty or twenty-five steps from the building where he lay down in the grass. The police officers drove to this place and arrested both men, the stolen items still in their possession. At the trial, Riley strongly denied participation in, or intent to commit, burglary. This raised an issue of fact

for the jury. We find the evidence is sufficient to sustain the verdict of the jury.

Although Riley never entered the building, he was an aider and abettor as defined in § 41-6-34, N.M.S.A.1953 (Repl. Vol. 6), and, therefore, a principal, or he was an accessory as defined in § 40A-1-14, N.M.S.A.1953 (Repl. Vol. 6). See State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967). He could, therefore, be prosecuted as a principal.

Bennett completed the crime of burglary by an unauthorized entry with the necessary intent. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967). Riley knew this fact, was present and participated. His intent, as an element of the crime, is seldom susceptible of proof by direct evidence, but it may be inferred from his acts. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969). In State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937), the court said:

> "* * * The question of whether the alleged aider and abettor did share the principal's criminal intent, and whether he knew the latter acted with criminal intent, is one of fact for the jury and may be inferred from circumstances. * * *"

The jury believed the State's witness, not Bennett and Riley. The testimony of a single witness may legally suffice as evidence to support a jury's verdict. State v. Hunter, 37 N.M. 382, 24 P.2d 251 (1933).

It should be made clear to each person convicted of a crime that the appellate court does not sit as a second jury; it sits as a court of review to determine whether error or injustice occurred during the trial. See Thurman v. Grimes et al., 35 N.M. 498, 1 P.2d 972 (1931).

(2) *Admissibility of statement of principal actor.*

A typewritten signed statement of Bennett was admitted in evidence at the trial without objection. Neither did Riley request the trial court to instruct on the issue. The error claimed is waived. State v. Minor, 78 N.M. 680, 437 P.2d 141 (1968); State v. Beachum, 78 N.M. 390, 432 P.2d 101 (1967), cert. denied 392 U.S. 911, 88 S. Ct. 2068, 20 L.Ed.2d 1369 (1968).

The judgment and sentence are affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

481 P.2d 88

Carlos J. NORERO and Justine O. Norero, Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY, Defendant-Appellee.

No. 9121.

Supreme Court of New Mexico.
Feb. 15, 1971.

Joe H. Galvan, Las Cruces, V. Lee Vesely, Silver City, for appellants.

E. C. Serna, Dist. Atty., W. Gilbert Bryan, Asst. Dist. Atty., Silver City, for appellees.

OPINION

McMANUS, Justice.

The plaintiffs filed this suit in the District Court of Grant County against the Board of Commissioners of that County. Plaintiff Norero alleged ownership in fee simple of certain lands in Grant County upon which is located a dirt road running through plaintiff's property. Grant County claims that this road is a public road. The plaintiffs claim the road is a private one, and asked for a temporary restraining order against the County from going upon plaintiff's land and from declaring the road a public way. A temporary restraining order was granted and upon trial the restraining order was dissolved and the district court declared the road to be a County road. From this decision the plaintiffs appeal.

It has been established that there are three methods of establishing public highways. For the first method we look to § 55-4-16, N.M.S.A. (1953 Comp.):

> "The board of county commissioners having considered the report of any road review, and the compensation to which any person or persons damaged having been ascertained and paid to the owner or owners or into court for him or them, may order the road to be open for travel and declared a public highway. And if they do so, or order, they shall cause notices to be posted at three [3] public places along the line of such road, giving all parties notice that they have or will direct their proper officers to open and work the same from and after sixty [60] days from the date of such notice; Provided, no such road shall be ordered opened through fields of growing crops or along a line where growing crops would thereby be exposed to stock until the owner or owners of such crops shall have sufficient time to harvest and take care of the same."

The second method of establishing a public highway is by dedication by the owner of the road to public use. The third method is by recognition of the road and maintenance of said road by the public authorities. Board of Com'rs of San Miguel County v. Friendly Haven Ranch Co. et al., 32 N.M. 342, 257 P. 998 (1927). See, also, Hall v. Lea County Electric Cooperative, 78 N.M. 792, 438 P.2d 632 (1968).

The first method, in pursuance of the law of the state, § 55-4-16, supra, by agreement of all participants, was not followed. The second method, dedication by the owner, was denied by the owners, and not controverted.

The third method, and the one that must determine the final result here, concerns the recognition and maintenance by the public authorities. Section 55-1-1, N.M.S.A. (1953 Comp.) delineates this method:

> "All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."

The trial transcript reflects that this road in question originally belonged to the plaintiffs and their predecessors in interest for over 45 years. Further, the witnesses at the trial testified that the Grant County road department had maps with the road in question marked in red, indicating a County road. However, there was nothing during the course of the trial to indicate the authority for this categorization.

Testimony was adduced to show that this road had been bladed by county machinery; that salesmen, neighbors, friends, state and federal officials had used the road. Objections were made by plaintiffs to blading operations; other uses were with the permission of the plaintiffs. None of these uses, in our opinion, is enough to satisfy § 55-1-1, supra, as having been "recognized and maintained by the corporate authorities of * * *" the county. This is particularly so in view of the statutory exemption of "except private roads," and also the protestations of the plaintiff landowner at various times throughout the years. Consequently, we feel that the County of Grant cannot find solace in any of the methods referred to in this opinion.

It follows that the judgment of the court below is erroneous; the cause is remanded, with direction to reinstate the case on the docket; to set aside the judgment in favor of the defendants, and to enter a new judgment in favor of the plaintiffs.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

481 P.2d 89

Felix TRUJILLO, Plaintiff-Appellant and Cross-Appellee,

v.

Julius ROMERO, d/b/a Julius Car Sales and Service, Defendant-Appellee and Cross-Appellant.

No. 9046.

Supreme Court of New Mexico.

Feb. 15, 1971.

Donald A. Martinez, Las Vegas, for appellant.

Roberto L. Armijo, Las Vegas, for appellee.

OPINION

STEPHENSON, Justice.

Plaintiff-Appellant (Trujillo) brought this replevin suit against Defendant-Appellee (Romero) seeking possession of an eight-wheeled-tandem trailer and damages for having been wrongfully deprived of its possession and use. Romero answered and counterclaimed for $186.16 as towing charges for the trailer and a tractor, claiming a lien on the trailer to secure payment. The trial court, sitting without a jury, found the issues in favor of Romero, but reduced his claim to $159.00 and ordered each party to pay his respective costs.

Trujillo appealed from the judgment and Romero cross-appealed from the court's failure to make an award to him of attorney's fees.

Trujillo first asserts that Romero failed to prove that he held a certificate of convenience and necessity from the Corporation Commission, or its "class" if he held one. New Mexico statutes require that Romero be certificated in order for him to lawfully furnish wrecker service. Sections 64–27–4 and 64–27–8, N.M.S.A., 1953 Comp.

Romero's counterclaim alleged that at all times material to this lawsuit, he was engaged in the wrecker service business "operating under License No. 3662 of the State Corporation Commission * * *." This allegation was admitted and no proof was therefore required. License No. 3662 is not described in the pleadings as to its "class," nor is it alleged that the towing service in question was covered thereby. We believe the fair intendment of the pleadings to be that Trujillo had a certificate of the proper class. The pleadings were so treated by the trial court. There was no evidence during the trial that Romero did not hold a certificate which covered the services rendered.

But, says Trujillo, the evidence at the trial drew the class of license into question, and Romero should have then demonstrated that he was properly certificated, which he failed to do.

It is true that a good deal of testimony was elicited concerning "classes," but in regard to the rate that should be applied, rather than in relation to types of licenses. That testimony could have been reasonably so understood in both this court and the trial court. The rates increase as the weight of the towed vehicle increases, and a point of controversy was whether the towed tractor and trailer combined weighed slightly less than 25,000 pounds or slightly more. If the former, the lower Class C rate would apply rather than the higher Class D rate applied by the trial court.

Because the class or type of Romero's certificate was not directly and specifically raised in the trial court, this issue will not be considered here. Perry v. Staver, 81 N M. 766, 473 P.2d 380 (Ct.App.); Barnett v. CAL M, Inc., 79 N.M. 553, 445 P.2d 974; Supreme Court Rule 20(1) [§ 21–2–1(20)(1), N.M.S.A., 1953 Comp.] This settled principle, coupled with Trujillo's admissions in his pleadings regarding Romero's certification which we have previously described, impels us to resolve issues relative to Romero's certification in his favor.

Trujillo next asserts that the state police officer who called for Romero's wrecker service lacked authority to do so. It is undisputed that Trujillo's tractor-trailer was involved in a collision and came to rest in the highway headed away from Las Vegas, about fifteen miles distant, and a state police officer summoned Romero to the scene to tow the vehicle away, which he did. Other pertinent facts

are less clear. The trial court found that the state police officer authorized Romero "to tow Plaintiff's Tractor-Trailer from the scene of the collision." Thus the trial court has resolved the conflicting testimony by its findings. The fact that there may have been evidence which would have supported different findings does not require a reversal for failure to adopt Trujillo's requested finding. Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525 (Ct.App.); Varney v. Taylor, 77 N.M. 28, 419 P.2d 234. And certainly there was substantial evidence to support the court's finding that the officer authorized the tow. It is fundamental that if there is substantial evidence in the record to support a finding, we are bound thereby. In deciding whether a finding has substantial support, we must view the evidence in the light most favorable to support the finding, and any evidence unfavorable to the finding will not be considered. Kerr v. Schwartz, 82 N.M. 63, 475 P.2d 457; Jones v. Anderson, 81 N.M. 423, 467 P.2d 995.

Although the court made no specific finding as to the destination of the tow authorized by the officer, it is, in support of the judgment, easily inferred to be Las Vegas from the court's award based on mileage to that town. Kerr v. Schwartz, supra; Jones v. Anderson, supra.

In construing and applying the statutes to which we now turn, we will consider that the police officer and no one else directed the tow be made from the point of the collision to Las Vegas.

Sections 64–18–49 and 64–18–50(a), N.M.S.A., 1953 Comp. are not, under the circumstances, applicable to this case, because the Trujillo vehicle was so disabled as to not be in violation of the former, and the latter does not in terms authorize the officer to call a wrecker. We agree with Trujillo that the officer's authority is not to be found in these two statutes.

The same is not true, however, of § 64–18–50(c), N.M.S.A., 1953 Comp. That section provides:

"No driver of any vehicle shall permit said vehicle to remain unattended on or adjacent to any public road, highway, or highway right of way of the state for a longer period than 24 hours without notifying the state police or sheriff's office of the county where said vehicle is parked or said vehicle shall be deemed abandoned. The state police or sheriff's officer may cause all such abandoned vehicles to be removed and the owner of the vehicle shall be required to pay all costs incident to the removal of said vehicle, Provided that wrecked vehicles may be removed at any time and without regard to the 24 hour period hereinbefore provided."

Trujillo asserts that the quoted section confers no authority on the police officer in this case because the vehicle was not left "unattended." He is contending that the provisions of the first sentence of the quoted statute concerning abandoned vehicles being "unattended" as a prerequisite for peace officers being authorized to see to their removal by the provisions of the second sentence, also restrict the authority of such officers under the proviso relating to wrecked vehicles. We do not agree. It is true that the evidence was to the effect that Trujillo "left a boy there, flagging there after the wreck" while he went for help. There is no indication that the vehicle was ever left unattended. The trial court's findings are silent on this subject.

Violation of the first sentence of § 64–18–50(c) is a penalty assessment misdemeanor which may result in imposition of a fine, as provided in § 64–22–4, N.M.S.A., 1953 Comp. (1969 Supp.). It is complete in itself insofar as creation of the misdemeanor is concerned. The proviso is entirely unrelated to that subject matter.

The portion of § 64–18–50(a) preceding the proviso deals solely with the subject of abandoned vehicles, and it is appropriate that a period of time should have been specified, i. e., twenty-four hours, as a standard by which to determine whether a

vehicle has been abandoned. This part of the statute makes no reference to wrecked vehicles. The proviso, on the other hand, makes no reference to abandoned vehicles but rather relates exclusively to wrecked vehicles. No passage of time is necessary to determine whether a vehicle has been wrecked.

In construing statutes we seek only the legislative intent. State ex rel. Clinton Realty Co. v. Scarborough, 78 N. M. 132, 429 P.2d 330; State v. Chavez, 77 N.M. 79, 419 P.2d 456. The entire act is to be read as a whole and each part shall be construed in connection with every other part so as to produce a harmonious whole. Winston v. New Mexico State Police Bd., 80 N.M. 310, 454 P.2d 967; State ex rel. Clinton Realty Co. v. Scarborough, supra.

The construction contended by Trujillo, viz., that so long as a wrecked vehicle is not left unattended a state police officer is unauthorized to arrange for its removal, would lead to strange results. A vehicle could presumably remain by, or even on, a highway indefinitely if attended. We feel sure that the legislature intended no such consequences. This would defeat the very purpose of the proviso which appears to be to facilitate expeditious removal of wrecked vehicles.

We should consider the consequences of various possible constructions and should not adopt a construction which would defeat the legislature's intentions, or lead to absurd results. Westland Development Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141; Midwest Video v. Campbell, 80 N.M. 116, 452 P.2d 185; State v. Nance, 77 N.M. 39, 419 P.2d 242, cert. den. 386 U. S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605.

We hold that the police officer in this case properly authorized removal of Trujillo's vehicle. The operative effect of the proviso appended to § 64–18–50(c) does not require the vehicle to have been unattended. Having come to this conclusion, it follows that Trujillo is "required to pay all costs incident to the removal of said vehicle" by the terms of the second sentence of § 64–18–50(c), supra.

Next, Trujillo asserts that he was overcharged, questioning the rates applied by Romero and the length of the tow. As we have said, if the tractor-trailer weighed over 25,000 pounds (as found by the trial court) the Class D rate applied by the court below was proper.

Romero testified that the weight of the tractor and trailer exceeded 25,000 pounds and the court's finding of weight is therefore supported by substantial evidence and the application of the Class D rate was correct.

As to the mileage of the tow, Romero testified that he had to tow past Manuelitas and on to Rociada in order to turn around, a total distance of twenty-nine miles from the point of pickup to Las Vegas. The trial court found the tow to have properly been twenty-nine miles, a finding supported by substantial evidence.

Finally, Trujillo complains of an award of $20.00 for one hour of extra labor and furnishing of extra equipment by Romero over and above that normally required to hook up the tow.

We agree with Trujillo's position as to the overcharge. Romero carried the burden of proof in regard to the propriety and correctness of his charges. We have searched the record and find no coherent explanation of what work, services or equipment were required or performed, or time spent, other than in the making of an ordinary hookup of the type covered by the Class D rate. The rate schedules do not provide for additional charges for ordinary hookups.

Romero has cross-appealed, asserting that the obligation in question was an open account and that the trial court therefore erred in not awarding him attorney's fees pursuant to § 18–1–37, N.M.S.A., 1953 Comp., which provides:

> "In any civil action in the district court or small claims court to recover on an open account, the prevailing party *may* be

allowed a reasonable attorney fee set by the court, and taxed and collected as costs." (Emphasis supplied.)

Assuming, arguendo, that the obligation was an open account, we are cited to no authority holding it to be an abuse of discretion to fail to make such an award for attorney's fees. The trial court is affirmed upon the cross-appeal.

The trial court is directed to reduce the amount of Romero's judgment to $139.00. As in the trial court, costs will be divided. Here they will be equally shared.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

481 P.2d 94

Edmond Beaubien CHAPMAN, Jr., Petitioner,

v.

BOARD OF BAR EXAMINERS of the State of New Mexico, Respondent.

No. 9042.

Supreme Court of New Mexico.
Feb. 8, 1971.

Botts, Botts & Mauney, Albuquerque, for petitioner.

Sumner S. Koch, Santa Fe, amicus curiae on behalf of Board of Bar Examiners.

OPINION

OMAN, Justice.

Petitioner seeks reversal of a decision of Respondent Board denying him admission on motion to the Bar of the State of New Mexico. We affirm the decision.

On May 5, 1969, Petitioner filed with this court an application, in the form of a "Petition and Affidavit," whereby he sought an order admitting him to practice law in all the courts of the State of New Mexico. The pertinent requirements for admission on motion were that the petitioner be a "* * * person regularly admitted to practice law in the highest court of any state or territory * * *" and who "* * * has actively and continuously practiced law for at least seven of the eight years immediately preceding the filing of his application, three years of which shall have been continuously in one jurisdiction, * * *" Rule II A. 10, Rules Governing Bar Examiners, Bar Examinations and Admission to the Bar of the State of New Mexico (25th Ed.). These rules have now been revised and replaced by the 26th Edition, March 10, 1970.

For the purpose of showing he met these requirements, Petitioner alleged in his application:

> "Having engaged in the general practice of law in the states of Kansas and Texas for the period of four and ten years, respectively, I respectfully request that I be granted admission upon certificates and motion and be not required to take or successfully pass the bar examination prescribed in this State."

He furnished a certificate from the Clerk of the Supreme Court of the State of Kansas showing his admission to the Bar of that state on June 29, 1949. He furnished no certificate, letter, or statement from any one concerning his claimed practice in Texas. In this regard see Warren v. Board of Bar Examiners, 75 N.M. 627, 409 P.2d 263 (1966), in which it was held a letter from the general counsel of the Atomic Energy Commission satisfied the intent of the rule calling for a certificate from a judge of the highest court of original jurisdiction of the foreign state.

In his statement as to his practice of law, he claims no practice in Kansas after September 1953. Thus, this practice cannot possibly be considered under the requirement that he must have "* * * actively and continuously practiced law for at least seven of the eight years immediately preceding the filing of his application, * * *." The seven years with which we are here concerned must have fallen between May 5, 1961, and May 5, 1969.

As to his claimed practice in Texas, he shows he served as house counsel for Hughes Investment Corp. and Hughes Title Company at Pampa and Wichita Falls from February 1956 to June 1962.

From June 1962 to December 1962, he shows himself as a partner in and Title Examiner for Wichita Title Company at Wichita Falls. From December 1962 to April 1966, he shows himself as Vice-President and Title Examiner for Wichita Title Company, Inc., at Wichita Falls. From April 1966 to December 1966, he shows himself as President and Title Examiner for Central Abstract & Title Co. at Wichita Falls. From April 1967 to present [May 5, 1969], he shows himself as Vice-President and Title Examiner for First Title Guarantee and Trust Co. He does not show where he performed these services, but he claims to have resided in Albuquerque, New Mexico, since January 1, 1967, and to have established residence in New

Mexico on June 1, 1967. Information found elsewhere in the record shows he has lived and worked in Albuquerque as Vice-President and Manager of First Title Guarantee and Trust Co. since April 10, 1967.

If he intended to claim his work in Albuquerque between April 10, 1967 and May 5, 1969, as practice in Texas, the record fails to support such a claim. If he did not intend to claim his work in Albuquerque as practice in Texas, then he failed, insofar as his application is concerned, to meet the requirement that he must have "* * * actively and continuously practiced law for at least seven of the eight years immediately preceding the filing of his application, * * *." As shown by the above quotation from his application, he claims only to have practiced in Kansas and Texas.

The Clerk of this court also serves as Secretary of the Board of Bar Examiners, and she was serving in this capacity on September 26, 1969, when the Board interviewed Petitioner in connection with his application for admission on motion. One of the Secretary's duties was to make a record of the proceedings and a tape recorder was used for this purpose at the interview. However, unknown to the Secretary at the time, the recorder was not functioning properly, and, consequently, no record was made of the proceedings. The member of the Board who conducted the principal questioning of the Petitioner has stated by affidavit:

> "* * * That during the questioning, petitioner was asked if he contended that he had been engaged in the practice of law during the time in which he resided within the State of Texas; that petitioner's answer was in the negative. That petitioner was asked also if he had made application for admission to the bar of the State of Texas and his reply was in the negative. That, in view of petitioner's answers to the foregoing questions, the Board of Bar Examiners of the State of New Mexico did not further inquire into the moral character of petitioner, in that it was apparent that petitioner was not qualified for admission on motion to the bar of the State of New Mexico, by reason of not having been engaged in the practice of law for at least 7 of the 8 years preceding his application for admission to the bar of the State of New Mexico. * * *"

Petitioner, by affidavit, has responded to the affidavit of the member of the Board, and in Petitioner's affidavit he gives the following as his version of the interview:

> "* * * that at the time of his appearance before the Board of Bar Examiners, questions were asked of him by the interrogating member of the Board, relating to the duties of his employment for the period of time throughout the seven years prior to the date of his application. That affiant stated in response to these questions that he examined deeds, deeds of trust, real estate contracts, wills, mortgages, and other documents relating to real estate titles to determine their legal sufficiency and whether or not they were adequate to transfer legal title to and from the parties named in each. That he examined records in the county clerk's offices and made decisions as to the validity of instruments pertaining to real estate. He then rendered legal opinions on the sufficiency of the title of a great many parcels of land in order to determine the insurability of the title. Based upon affiant's opinion, title insurance was either written insuring the title to the parcels or it was not written until corrections were made to perfect the title. Following this explanation, the interrogating Board member then asked if affiant had held himself out generally as an attorney in the general practice of law during this period of time. Affiant answered 'no, not in the sense in which you are asking it.' No further questions were asked about affiant's work in Texas or New Mexico and no questions were asked of affiant concerning his moral character or touching upon his moral or ethical qualifications. Affiant estimates that the interview before the Board lasted for a total of ten minutes."

The members of the Board were present at the interview and heard questions asked of and answers given thereto by Petitioner. By letter dated October 15, 1969, Petitioner was informed:

"The following is an excerpt from the minutes of the meeting of the Board of Bar Examiners, held September 26, 1969, in Albuquerque, New Mexico:

"'No. 2173. Edmond B. Chapman, Jr. Upon motion duly made, seconded and unanimously passed, the application for admission on motion was denied on the ground that Mr. Chapman has not actively and continuously engaged in the practice of law for at least seven of the eight years immediately preceding the filing of his application, and he has failed to carry the burden of proof in satisfying the Board that he does meet that requirement.'"

The burden was on Petitioner to present facts which would warrant the Board in recommending his admission on motion. The Board decided the facts presented did not warrant such a recommendation. We will overturn the judgment of the Board only to correct an injustice, or when convinced the ruling of the Board is not well-founded. Sparkman v. State Board of Bar Examiners, 77 N.M. 551, 425 P.2d 313 (1967). Under the facts, we are unable to say an injustice was done Petitioner, or the ruling of the Board was not well-founded.

Petitioner is now contending the Board's decision was inadequate because it "* * * failed to state with particularity in what respect petitioner has failed to meet with the requirements of Rule II, Paragraph 10."

We cannot agree. In fact Petitioner in no way questioned the decision of the Board until after reading the opinion in Harty v. Board of Bar Examiners, 81 N.M. 116, 464 P.2d 406 (1970), which was not issued until January 26, 1970, some three months after the date of the letter advising him of the Board's decision. It was not until February 18, 1970, that he wrote the Board as follows:

"In view of the decision of the Supreme Court of New Mexico, in the case of William G. Harty, Petitioner, vs. Board of Bar Examiners of the State of New Mexico, Respondent, Original Proceeding No. 8877, it is respectfully requested that the Board permit this applicant to appear before it at its meeting, Saturday, February 28, 1970, for the purpose of giving further evidence which will permit the Board, in its discretion, to waive the taking of Bar Examination pursuant to Rule 11, Section 10, of Rules Governing Board of Bar Examiners."

The Board denied the request on the grounds that "* * * its decision of September 26, 1969, became final some time ago and that there are no proper grounds for reconsideration or reopening."

We are unable to say the Board abused its discretion or acted improperly in refusing to permit Petitioner to give further evidence in support of his application.

Petitioner also urges that "Rule II, Paragraph 10 is in violation of the 14th Amendment of the Constitution of the United States." He predicates this position upon the following language taken from Rask v. Board of Bar Examiners, 75 N.M. 617, 409 P.2d 256 (1966): "* * * Absent some sort of guidelines, we are inclined to believe that the rule as phrased becomes almost an arbitrary power and cannot be reconciled under the due-process clause. * * *"

He argues:

"The Board's conclusion that Petitioner had not actively and continuously engaged in the practice of law was a determination made without any facts to support it, and the Rule permits the Board such broad discretion that the power granted to the Board is arbitrary and should not be permitted, particularly where no facts are given by the Board to support the Board's determination. * * *"

He then cites Ross v. State Board of Bar Examiners, 78 N.M. 747, 438 P.2d 157 (1968); Warren v. Board of Bar Exami-

ners, supra; and Harty v. Board of Bar Examiners, supra, as establishing a pattern which covers his claimed practice of law. He urges that to now deviate from that pattern by denying his application for admission on motion would be to deny him the benefit of the equal protection clause of the Fourteenth Amendment.

We are unable to agree with this argument. As already stated, the burden was on Petitioner to establish by facts that his claimed practice of law brought him within the seven years' practice provision of the rule. The above recited facts, taken from his sworn application, together with his statement to the Board at the time of the interview, as shown by the Board member's affidavit to which reference is above made, clearly show he did not meet the seven year practice provision of the rule, and he was so advised by the Board in its letter of October 15, 1969.

The decision of the Board of Bar Examiners is affirmed, and, consequently, the Petition filed in this court is denied.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

481 P.2d 98

STATE of New Mexico, Plaintiff-Appellee,

v.

Marvin VAUGHN, Defendant-Appellant.

No. 9031.

Supreme Court of New Mexico.

Feb. 1, 1971.

Rehearing Denied Feb. 25, 1971.

Asa Kelly, Jr., Silver City, for appellant.

James A. Maloney, Atty. Gen., Justin Reid, C. Emery Cuddy, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

McMANUS, Justice.

Defendant appeals from a conviction of murder, alleging that the District Court of Hidalgo County did not have jurisdiction to try his case; that because the lower court proceedings were not based upon a grand jury indictment, they violated the defendant's Fifth and Fourteenth Amendment rights; that the defendant was prejudiced by the introduction of a psychiatrist's rebuttal testimony contrary to certain of his constitutional and evidentiary rights, and that there was no substantial evidence supporting findings of fact made by the trial judge concerning his denial of a request for change of venue.

The defendant alleged that the district court did not have jurisdiction because he did not waive his right to be charged by grand jury indictment, instead being proceeded against by criminal information filed by the district attorney. However, this contention was settled in State v. Sanders, 82 N.M. 61, 475 P.2d 327 (1970), where this Court stated:

"The only pertinent issue presented in the petition before us, which has not heretofore been passed upon by this court, is the contention that he was not indicted by a grand jury and, therefore, his constitutional rights have been violated. This contention is without merit as it is not supported by anything other than his previous motions to vacate judgment and sentences.

"Article II, § 14, New Mexico Constitution, provides for presentment or indictment by a grand jury *or information filed by the district attorney or attorney general.*" (Emphasis ours.)

Because the lower court proceedings need not have been based upon a grand jury indictment, as discussed above, but could properly be based upon an information, the defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution were not violated.

The defendant's primary contention lies in the alleged inadmissibility of a psychiatrist's testimony concerning the veracity of the defendant in claiming a loss of memory. The defendant claimed a loss of memory during the time of the alleged events. To rebut this testimony the State put forth the expert testimony of a psychiatrist who examined the defendant and who stated his opinion that the defendant had no genuine loss of memory. Dr. Cooper testified as to the mental state of the defendant as it concerned his alleged loss of memory, not as to specifics related to him by the defendant concerning the alleged circumstances. As in Hunt v. State, 248 Ala. 217, 27 So.2d 186 (1946), "[T]here was no affirmative act or declaration of defendant offered against him, but only the expert opinion reached by the doctors as the result of their examination. See, also, In re Spencer, 63 Cal.2d 400, 46 Cal.Rptr. 753, 406 P.2d 33 (1965).

Prior to beginning an examination of the defendant, he was warned that the psychiatrist was employed by the State and could not say what might be used for or against him. Although the defendant further alleges that coercion was used in interviewing the witness, this allegation arising out of the statement of the psychiatrist that the defendant's memory loss was somewhat inconsistent "under some pressure," the record does not substantiate this belief. The "pressure" used by the psychiatrist was only that of pointing out prior inconsistent statements of the defendant to him as they related to his alleged loss of

memory, a not unusual psychoanalytical tool.

Finally, the defendant alleges that there was not substantial evidence supporting the trial court's findings of fact that a change of venue was not necessary. Yet, conflicting evidence was presented to the court concerning the necessity for a change of venue and, under such circumstances, the refusal of such a motion was discretionary. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

The trial court's judgment is affirmed. It is so ordered.

TACKETT and STEPHENSON, JJ., concur.

481 P.2d 100

Judson H. FITZGERALD and Charlotte M. Fitzgerald, his wife, Defendants-Appellants,

Superb Cabinet Shop, Blueher Lumber Co., Inc., Kimbrough-Carpenter, Inc., Carroll & Loy Plumbing & Heating Corp., Defendants-Cross-Claimants and Appellees,

Mock Homes, Inc., Defendant-Appellee and Cross-Appellee,

v.

BLUEHER LUMBER COMPANY, Inc., Defendant-Cross-Claimant-Appellee and Cross-Appellant.

No. 9086.

Supreme Court of New Mexico.

Feb. 15, 1971.

Hines & Sullivan, Albuquerque, for appellants.

Perry S. Key, Albuquerque, for appellee Kimbrough-Carpenter.

Oliver Burton Cohen, Albuquerque, for appellee Blueher Lumber.

Menig, Sager & Curran, Albuquerque, for appellee Superb Cabinet Shop.

OPINION

COMPTON, Chief Justice.

This case is one of a series which resulted from the bankruptcy of Mock Homes, Inc., a general contractor, after the sale of various residential properties and prior to the time for filing labor and materialmen's liens had expired. See Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979; Carpenter v. Merrett, 82 N.M. 185, 477 P.2d 819 (Decided December 7, 1970); and Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (Decided December 14, 1970).

This action was filed by appellee Kimbrough-Carpenter, Inc., a subcontractor under Mock Homes, Inc., to foreclose a labor and materialmen's lien against the home of appellants, Judson and Charlotte Fitzgerald. The Fitzgeralds had purchased Lot 10, Block 7 of Desert Terrace, Unit No. 2 prior to the time for filing of liens had expired. The complaint joined other lien claimants, some of whom filed cross-claims.

This appeal is by the home owners from a judgment in favor of appellees, Superb Cabinet Shop, Blueher Lumber Company and Kimbrough-Carpenter, Inc. The claims of the other defendants have either been settled or dismissed without appeal.

Appellants first contend that the trial court erred in denying their motion to dismiss the cross-complaints of appellees, Blueher and Superb Cabinet, for failure to commence timely action. This point was also raised in Daughtrey v. Carpenter, supra, and we think our ruling there is controlling here. The pleadings of the cross-complainants contained certificates of service of mailing to opposing counsel of record similar to those found sufficient in Daughtrey. Rule 5(a) and (b) of the Rules of Civil Procedure [Section 21-1-1(5) (a) and (b) N.M.S.A. 1953] do not require service of a summons with a cross-claim except on parties in default. Daughtrey v. Carpenter, supra.

Appellants next contend that the trial court erred in admitting into evidence the claim of lien of appellee Blueher. A similar claim also was made in Daughtrey. The facts here as to the filing of the original and the "supplemental lien" and the additions placed thereon are the same, except, here the "supplemental lien" was not reverified by Blueher's general manager. Also, a photostatic copy of the original lien, certified by the county clerk, rather than the "supplemental lien" was placed into evidence by the appellee.

Appellants contend that the alteration of the original instrument voided it; however, they do not claim any deficiency in the original instrument as such. This claim of error is without merit. Copies of documents, properly certified, were admissible. Section 21-1-1(44) (a) (3) N.M.S.A.1953. Moreover, no prejudice is shown

to the appellants by the introduction of the photostatic copy. Compare Crego Block Co. v. D. H. Overmyer Co., 80 N.M. 541, 458 P.2d 793; Daughtrey v. Carpenter, supra.

Appellants contend that the trial court erred in refusing to grant their motion to dismiss the cross-claim of appellee Blueher for failure to prove that the materials were incorporated into appellants' property. We find no error in this regard. Appellants cite as authority for their position Panhandle Pipe and Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705. That case is distinguishable on its facts. In Panhandle, material for *two* different destinations was shipped under a single invoice, whereas, here, the material listed on each separate invoice placed into evidence was shipped to only *one* destination, appellants' property. The invoices admitted into evidence, together with the testimony of Michael Pushnik, outside salesman for appellee Blueher, show that he sold the materials to Mock Homes, Inc. Milton Wade, general manager of Blueher, testified that the materials were delivered to appellants' property. Use of the materials in appellants' home may be presumed from such delivery. Panhandle Pipe and Steel, Inc. v. Jesko, supra. See Annot., 39 A.L.R.2d 394.

Appellants make the same contention with regard to the claim of appellee Kimbrough-Carpenter, Inc., that is, failure to prove delivery and incorporation into appellants' property. We also find no merit in this point. Substantial evidence to support the findings of delivery and incorporation are found in the record. As we indicated in Panhandle, an invoice alone supports an inference of delivery under the circumstances here. The material listed on the invoice admitted into evidence had a *single* destination, that of appellants' property. Then, appellants' admission that the installation of the floor was done by appellee's employee supplied the necessary proof of incorporation.

Appellee, Kimbrough-Carpenter, contends that this court is without jurisdiction to consider this appeal because appellants' notice of appeal was not timely filed. This point previously was raised by appellee's motion to dismiss and denied. We see no purpose to discuss it further.

Appellants claim that the trial court abused its discretion in awarding attorney's fees to appellees. Kimbrough-Carpenter, Inc., was awarded attorney's fee of $250.00 on a judgment of $407.85; Blueher Lumber Company was awarded attorney's fee of $459.20 on a judgment of $2,296.00; and Superb Cabinet Shop was awarded attorney's fee of $250.00 on a judgment of $471.12. Such fees are allowed as costs and we see no abuse of discretion. Daughtrey v. Carpenter, supra. The trial court in its discretion may allow additional attorney fees for this appeal. Daughtrey v. Carpenter, supra.

Kimbrough-Carpenter in its answer brief has asserted a claim for additional damages under our Rule 17(3) [Section 21–2–1(17) (3) N.M.S.A.1953]. We find no merit in this claim.

By its cross-appeal Blueher Lumber Company urges that the trial court erred in not allowing interest on its judgment. All of Blueher's invoices contained an interest charge of one per cent per month on past due accounts. While there may or may not have been an agreement on this point between the subcontractor, Blueher, and the general contractor, Mock Homes, the cross-appellees, Fitzgeralds, certainly had no such contractual relationship with Blueher. We have held that the establishment of a mechanics lien does not warrant a personal judgment against an owner who is not in a contractual relationship with the lien claimant. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519. We think it is only logical that interest is not a lienable item chargeable to a third party owner who is not in a contractual relationship with the claimant.

The judgment is affirmed and remanded to the trial court in order that it may exercise its discretion whether to allow or disallow to appellees, Blueher, Superb Cabinet

and Kimbrough-Carpenter, a reasonable amount for the services of their attorneys before this court.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

481 P.2d 103

STATE of New Mexico, Plaintiff-Appellee,

v.

Clarence M. BRUCE, Defendant-Appellant.

No. 9116.

Supreme Court of New Mexico.

Feb. 15, 1971.

Frank P. Dickson, Jr., Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Roy G. Hill, Sp. Asst. Atty. Gen., Sante Fe, for plaintiff-appellee.

OPINION

TACKETT, Justice.

The District Court of Bernalillo County, New Mexico, denied a motion for post conviction relief filed December 9, 1969. Defendant appeals.

Defendant was convicted by a jury in October 1962, of sodomy. He was sentenced to not less than one year nor more than life. Since the date of sentencing, defendant has filed several motions for post conviction relief, as well as a habeas corpus petition, all raising substantially the same issues, which were denied without a hearing.

Defendant's primary contention is that the trial court erred in refusing to grant him a hearing on the motion to vacate judgment and sentence on the issue of inadequacy of counsel. In State v. Wilson, 82 N.M. 142, 477 P.2d 318 (Ct.App.1970), we find the following:

> "We have uniformly held that before a defendant can be heard to complain of the inadequacy of his counsel he must show that the proceedings leading to his conviction amounted to a sham, a farce, or a mockery. * * *"

No such showing is presented in the instant case.

It was incumbent on defendant, to merit a hearing on the motion, to set forth matters therein which, if proved, would require the setting aside of the conviction. This he did not do. Where an examination of the motion discloses a total absence of ground which could accomplish

the end sought by petitioner, the trial court is not required to grant a hearing. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968). Such is the situation in the instant case. The ground for the attack on the judgment and sentence was without merit and no hearing was required.

The judgment is affirmed. It is so ordered.

OMAN and STEPHENSON, JJ., concur.

[redacted]

481 P.2d 104

STATE of New Mexico, ex rel. STATE HIGHWAY COMMISSION of New Mexico, Petitioner-Appellee,

v.

Benjamin M. SHERMAN, Helen Hood Sherman, the Estate of Jeannette G. Sherman Sawyer, Deceased, Mrs. Nancy Lou Ajemian and Paul Frederick Sherman, Defendants-Appellees,

v.

Aileen Rose RUNYAN, Defendant-Appellant.

No. 9084.

Supreme Court of New Mexico.

Jan. 18, 1971.

Rehearing Denied Feb. 23, 1971.

[redacted]

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[redacted]

[redacted]

Robertson & Reynolds, Silver City, for appellant.

Ray Hughes, Deming, for appellees.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Luna County, New Mexico, by the State Highway Commission, designated "Highway," to condemn property owned by Benjamin M. Sherman, et al, under lease to appellant Runyan. The case was tried without a jury in two trials, the first between Highway and the Shermans, in which judgment was entered in favor of the Shermans for $10,800. No appeal was taken from this first judgment. The second trial was between Runyan and the Shermans for an apportionment of the award under the first judgment. In the second trial, judgment was entered for Runyan in the sum of $756.81 and $10,043.-19 for the Shermans. From the second judgment Runyan appeals. Supreme Court Rule 5(5), (§ 21-2-1(5) (5), N.M.S.A., 1953 Comp.) (Repl. Vol. 4).

The trial court found that the Shermans and Nancy Lou Ajemian are the owners in fee simple of Tract 8-2 located in Deming, New Mexico; that a part of such property was condemned by the State of New Mexico; that Runyan succeeded to the rights as tenants of certain service station improvements situated on the property; and that her tenancy would have expired fifteen days following the taking by the State; that, by a previous trial, the State was obligated to pay $10,800, plus interest, for all of the property condemned; that, at the trial of the second cause on apportionment, Runyan failed to produce sufficient evidence of the value of the improvements subject to the obligation of removal at the expiration of the lease; that the Shermans admitted that Runyan was entitled to $756.81 damages and they consented to judgment for that amount in her favor. The trial court made conclusions of law flowing from its findings. Neither the above findings of fact nor conclusions of law were challenged by Runyan; therefore, the findings of fact upon which the case rests on appeal are binding upon the Supreme Court. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); State ex rel. Thornton v. Hesselden Construction Co., 80 N.M. 121, 452 P.2d 190 (1969).

Unless findings are directly attacked, they are the facts in this court, and a party claiming error on the part of the trial court must be able to point clearly to the alleged error. Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967).

It is the duty of a litigant seeking review to see that a record is properly prepared and completed for review of any questions by an appellate court, as such questions for review are established only by the record, and any fact not so established is not before an appellate court. Supreme Court Rule 14(1), (3), (§ 21-2-1(14) (1) (3), N.M.S.A., 1953 Comp.) (Repl. Vol. 4); Westland Development Co.

v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969). Runyan failed in this important aspect.

Runyan relies on three points for reversal of the lower court's decision. Under point I, Runyan contends:

> "THE COURT ERRED IN REFUSING TO GRANT PETITIONER'S MOTION FOR JUDGMENT FILED FEBRUARY 25, 1969 (Tr. 63–64). THE COURT SHOULD HAVE GRANTED SAID MOTION AND DECIDED THE ENTIRE CASE ON THE BASIS OF THE CONTRACT ENTERED INTO BETWEEN PETITIONER AND APPELLEES AND AS INTERPRETED BY THE 'REVIEWER'S CONCLUSION OF VALUE' (Tr. 60, 117–118)."

Runyan's contention under point I must fail, as neither the alleged contract between Highway and the Shermans nor the "Reviewer's Conclusion of Value" were ever offered or admitted into evidence.

A litigant seeking review of a ruling of the trial court has the duty to see that a record is made of the proceedings he desires reviewed; otherwise, the correctness of such ruling cannot be questioned. Barnett v. CAL M, Inc., 79 N.M. 553, 445 P.2d 974 (1968). Runyan did not preserve a proper record for review.

Runyan under point II, contends that the trial court erred in refusing to allow her to participate in the first case designated "A," which was between Highway and the Shermans. This point is ruled against Runyan. She only appeals the second judgment, which is the apportionment between herself as lessee and the Shermans, the fee owner.

The matter of apportionment is of no concern to the Highway and is an issue in which only the Shermans and Runyan are involved. 4 Nichols on Eminent Domain, § 12.42[2] at 306. The second judgment was entered in favor of Runyan after trial on the apportionment. She was granted a full opportunity to establish the damages sustained in what was known as case "B;" however, she merely presented evidence by the highway appraisers, who had only appraised the fee and not the improvements, which she was obligated to and did remove within fifteen days. Based on such scanty evidence, the trial court was hard put to allow the award under the second judgment, as Runyan testified:

> "However, under the unit rule, as stated by Mr. Hughes, in his brief, and I quote (reading) 'The tenant is generally not entitled to recover the value of the buildings or fixtures as a separate item in addition to the value of his leasehold interest.' That's why I made no claim for the leasehold interest, because this is generally accepted, apparently, under the law quoted from Nichols Eminent Domain. Now, in this case, I made no claim under the terms of the lease. That's why I had no witness testify as to the value of the remaining leasehold or remaining term of the lease."

See, State v. Pahl, 257 Minn. 177, 100 N.W.2d 724 (1960); Southern California Fisherman's Ass'n v. United States, 174 F.2d 739 (9th Cir. 1949).

Runyan's point III has been hereinbefore covered, except her contention that the trial court erred in holding that she was the moving party in the so-called case "B." This contention is without merit as, in eminent domain proceedings, the owner has the burden of establishing his damages; therefore, he opens and closes the evidence as well as the arguments. The burden was on Runyan to establish her damages. She was the moving party. Section 22–9–50, N.M.S.A., 1953 Comp. (1969 Supp.). See, 5 Nichols on Eminent Domain, § 18.5 at 18–249, and 1970 Supp. at 27; El Monte School District v. Wilkins, 177 Cal.App.2d 47, 1 Cal.Rptr. 715 (1960).

Runyan had different attorneys during the proceedings; however, she chose to try the case pro se. This may have been unfortunate, as there is little

doubt that she would have had a better record for review by this court had she used an attorney at trial. Those who choose to plead or appear pro se are bound by all of the applicable procedural rules and enjoy no greater rights than those who employ counsel. Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957).

The judgment is affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

481 P.2d 107

In the Matter of Laura Leslie DOWNS, a Juvenile.

STATE of New Mexico, Appellee,

v.

Harry DOWNS, Appellant.

No. 9119.

Supreme Court of New Mexico.
Feb. 15, 1971.

Garland, Martin & Martin, William L. Lutz, Las Cruces, for appellant.

James A. Maloney, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

McMANUS, Justice.

This is a juvenile delinquency proceeding brought pursuant to § 13-8-19 et seq., N.M.S.A. (1953 Comp.), in the Juvenile Court of Otero County, New Mexico. The petition alleged that Laura L. Downs, the juvenile, had habitually deported herself as to injure or endanger the morals, health, or welfare of herself or others.

At a hearing before the court the juvenile admitted the charges. The court placed Miss Downs on probation until age 21 and placed her in the custody of her mother. As a part of the hearing, Harry Downs, the juvenile's father, was ordered to pay $75.00 a month for her support. The father, Downs, appealed from this order. The only party before this Court for a review is the appellant, Harry Downs. Consequently, the arguments and authorities raised insofar as the juvenile is concerned will not be considered.

It appears that Harry Downs was served with a document labeled "Citation," directing him to be present at a hearing on May 1, 1970. At this hearing the juvenile admitted the matters alleged in the petition. Another hearing was set on May 8, 1970, with the appellant father appearing by virtue of the "Citation." Near the end of the hearing the court inquired of appellant if there was any reason why he should not contribute to the support of Laura Downs. The appellant made a short reply stating there were reasons that he should not pay. The court then ordered Harry Downs to pay $75.00 per month towards the support of the juvenile.

The appellee contends that this Court has no jurisdiction to entertain an appeal from the juvenile court. This contention has been settled by this Court in Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968), wherein the Court said, "The juvenile court provided for in the 1955 law is part and parcel of the district court and is not an inferior court created pursuant to Art. VI, § 1, N.M. Const." Inasmuch as the juvenile court is a division of the district court and not inferior, it follows that such an appeal as this properly lies in this Court.

The serious question before us in this cause concerns due process as related to Art. II, § 18, of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution. Under due process every citizen is guaranteed that his liberty or property will not be taken from him unfairly. It also insures that he will be informed of any claim against him and will have a chance to present his side of the case. See State ex rel. Reynolds v. Allman, 78 N.M. 1, 427 P.2d 886 (1967) and Sorensen v. Jacobson, 125 Mont. 148, 232 P.2d 332 (1951). In the present case the appellant was ordered to appear as a witness in the juvenile delinquency matter. At the hearing he was asked:

"THE COURT: * * * Mr. Downs, is there any reason why you shouldn't support, contribute to the support of this girl?

"MR. DOWNS: I don't think any adult should have to put up with her, her attitude is that she can do anything she wants to and any adult that doesn't like it can go jump in the lake. Under those conditions, I don't think any adult should have to put up with her or support her.

"THE COURT: Mr. Downs, I'm going to order you to pay the sum of $75 a month for the support of this girl, to be paid through the Clerk of the Juvenile Court, which is right down the hall here, the amount of $75 a month, and the first payment to be made no later than May the 15th."

It is obvious that Harry Downs was not apprised ahead of time that a judgment might be rendered against him. Nor did he have the opportunity to properly present his side of the case. The hearing accorded him failed to comply with the requirements of § 13-8-50, N.M.S.A.1953 (Repl. Vol. 3, 1968), in that he was not advised of the powers of the court to order and decree that he make payments for the support and treatment of his daughter as provided in § 13-8-57, supra, and in that he was not given reasonable opportunity to be heard as required by §§ 13-8-50 and 13-8-57, supra.

The judgment insofar as Harry Downs is concerned is reversed and remanded to to the Juvenile Court of Otero County for proceedings not inconsistent with this opinion. It is so ordered.

TACKETT and OMAN, JJ., concur.

481 P.2d 400

E-L SKIP TRACING AND COLLECTION SERVICE, INC., Plaintiff-Appellee,

v.

Charles J. STEIN, Defendant-Appellant.

No. 9122.

Supreme Court of New Mexico.

Feb. 15, 1971.

Rehearing Denied March 9, 1971.

Motion for Leave to File Second Rehearing Denied March 19, 1971.

[redacted]

Charles J. Stein, pro se.

J. Stephen Gammill, Albuquerque, for appellee.

[redacted]

OPINION

COMPTON, Chief Justice.

This cause originated in the Small Claims Court of Bernalillo County on an account, and the decisive question presented is whether the appellant's appeal to the district court was timely. We conclude it was not.

Section 16-5-12, N.M.S.A.1953, states in part:

> "Appeals to district court.—Any person aggrieved by any decision of any such small claims court, may appeal to the district court of the county in which such decision has been rendered, or order or judgment made, by filing within thirty (30) days of the entry of same, a motion praying for an appeal; and upon the allowance of same, shall within ten (10) days thereafter, file an appeal bond with two [2] or more sureties, conditioned that such appellant shall prosecute his appeal with diligence and effect and pay all costs of such appeal as shall be lawfully adjudged against him; such bond shall be approved in writing by the judge of such court; * * *."

Summary judgment was entered by the small claims court on June 2, 1969. On July 1, 1969, appellant moved for the allowance of an appeal to the district court. The order granting the motion and fixing the amount of the appeal bond was entered by the small claims court on July 7, 1969, but no appeal bond was filed within 10 days thereafter. The district court entered judgment affirming the judgment of the small claims court and appellant has appealed.

The requirements of § 16-5-12, supra, are mandatory, and timely compliance therewith is jurisdictional. See Chavez v. Village of Cimarron, 65 N.M. 141, 333 P. 2d 882.

The judgment should be affirmed, and it is so ordered.

TACKETT and STEPHENSON, JJ., concur.

481 P.2d 401

Manuel P. SANCHEZ, Jose M. Sanchez, Juanita S. Sena and Mary Isabel Hoffmann, Plaintiffs-Appellees,

v.

CITY OF SANTA FE, a municipal corporation of the State of New Mexico, Pat Hollis, Reynaldo V. Torres, Robert H. Beers, Alex R. Gonzales, Albert L. Grubesic, Richard Halford, Alfonso Larragoite, Raymond G. Murphy and Morry Yashvin, Defendants-Appellants.

No. 9014.

Supreme Court of New Mexico.

Jan. 25, 1971.

Rehearing Denied March 3, 1971.

Dean S. Zinn, Santa Fe, for defendants-appellants.

Claude S. Sena, Santa Fe, Robinson & Stevens, Albuquerque, for plaintiffs-appellees.

Frank R. Coppler, Santa Fe, for amicus curiae Municipal League of New Mexico.

OPINION

McMANUS, Justice.

Defendant City of Santa Fe appeals from a declaratory judgment holding that certain subdivision regulations complained of by plaintiffs were unlawful and in violation of our State and Federal Constitutions.

It is undisputed that an enabling statute of the State of New Mexico was in force authorizing an ordinance regarding subdivision regulations. There was due adoption of the land subdivision regulations under said city ordinances. The portion of the Santa Fe City Ordinances pertinent hereto reads as follows:

"2. For lands being subdivided within the corporate limits of the Municipality, the Subdivider shall pay to the Municipality, prior to the approval thereof, the sum of fifty dollars ($50.00) for each lot being subdivided and intended to be used or which is zoned for use as a residential lot. Sums collected under this provision shall be placed in a separate special 'PUBLIC FACILITIES PURCHASE FUND' and shall be used by the Municipality only for the purchase or improvement of public facility sites or parts thereof, shown or generally located or otherwise indicated on or by the officially adopted master plan, and which sites are intended to serve the area being subdivided. No such purchase or improvement shall be made unless the same is approved by the City Council with the advice of the Planning Commission."

In their Point 1 the defendants claim that the plaintiffs failed to exhaust their administrative and other statutory remedies and urge that the complaint should have been dismissed by the trial court. We have held that the plaintiffs, having questioned the constitutional validity of the applicable statutes, ordinances and regulations, need not exhaust their administrative or statutory remedies. Sandia Savings and Loan Association v. Kleinheim, 74 N.M. 95, 391 P.2d 324 (1964).

The defendants' second and major point discusses the legality of requiring a $50.00 fee for each lot as a condition precedent to final plat approval. A close scrutiny of the statute involved, § 14–18–6, N.M.S.A. (1953 Comp.), does not specifically confer any right upon the municipality to exact the $50.00 fee per lot. Section 14–18–6, supra, states, among other items, that the subdivision regulations may provide for:

"(1) the harmonious development of the municipality and its environs; * *

"(3) adequate open space for traffic, recreation, drainage, light and air; and * * *

"B. Subdivision regulations may govern: * * *

"(4) other matters necessary to carry out the purposes of the Municipal Code; and * * *."

There appears to be no specific direction in the City Ordinance for the use of the money so accumulated. The language of the City Ordinance does not give assurance that the fees collected will be used to solve a problem peculiar to the land being subdivided, which in this case consists of only six lots, being lots 24 through 30 of the Miracerros Addition to the City of Santa Fe.

Cities exist only by virtue of statutory creation and have only such power as statutes expressly confer without resort to implication. Coronado Development Co. v. City of McPherson, Kansas, 189 Kan. 174, 368 P.2d 51 (1962); see, also, Rosen v. Village of Downers Grove, 19 Ill.2d 448, 167 N.E.2d 230 (1960). Having decided that the ordinances in question are not geared for regulation so as to make it a police power, it follows that such a fee

requirement is in the nature of a tax. The power to tax is never inferred. Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1961).

Finally, defendant contends that the plaintiffs' first amended complaint fails to state a proper claim for relief under the New Mexico Declaratory Judgment Act, § 22-6-1, N.M.S.A. (1953 Comp.). The prerequisites of "actual controversy" warranting consideration in a declaratory judgment action are: a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the claim; interests of the parties must be real and adverse; and the issue involved must be ripe for judicial determination. Marshall v. Hill, 47 Del. 478, 93 A.2d 524, 525 (1952); Vol. 2 Words and Phrases, p. 342. In the instant case the defendants required the plaintiffs to pay the fee, the plaintiffs refused to do so, and an actual controversy existed between the parties.

In the light of the foregoing it is unnecessary to further discuss constitutional aspects of this case.

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

481 P.2d 403

Cecil Clyde NELSON, Jr., Plaintiff-Appellant,

v.

Zelma Lee NELSON, Defendant-Appellee.

No. 9072.

Supreme Court of New Mexico.

Feb. 22, 1971.

Harry L. Patton, Clovis, for plaintiff-appellant.

Dan B. Buzzard, Clovis, for defendant-appellee.

OPINION

STEPHENSON, Justice.

This is an appeal by Plaintiff-Appellant (Husband) from an adjudication by the District Court of Roosevelt County that he was in contempt for failure to pay a

community debt which the court had ordered him to pay in a divorce decree.

The appeal involves the question of whether a subsequent discharge in bankruptcy excuses noncompliance with the court's order in circumstances where the debt in question was not discharged by the bankruptcy proceedings and was enforced against the wife.

The chain of events and circumstances which bring this case before us can be summarized as follows:

A. The decree of divorce was entered on August 26, 1969. With minor exceptions, Husband was awarded the community property and ordered to pay the community debts, one of which was an obligation to the Internal Revenue Service (IRS) apparently for 1967 federal income taxes. The decree also required Wife to pay Husband $750.00 in relation to some farm and irrigation equipment which was Wife's separate property and $630.00 for labor on Wife's farm in preparing it for the current crop year. No mention is made of Wife's car. No appeal was taken.

B. On August 28, 1969, Husband filed a debtor's petition in Federal District Court seeking a discharge in bankruptcy. Schedules attached to the petition, inter alia, mentioned the tax liability and to Wife a "contingent liability on debts listed herein: $10.00."

C. Also on August 28, 1969, Wife's attorney filed an unverified motion reciting that IRS had levied on her automobile for a community debt; that Husband had failed to comply with the decree and that he should be adjudged in contempt.

D. On September 9, 1969, the court entered an order finding Husband had not complied with the decree and was in contempt; sentencing him to thirty days in jail, but suspending sentence for sixty days to enable him to comply with the decree; amending the decree in certain respects and directing Husband to sell certain separate personalty (sporting goods, furniture, appliances) and apply the proceeds upon the obligation to IRS, together with certain cash which he had on his person.

E. Wife filed another motion on December 2, 1969, reciting that she had paid IRS $1,113.84; that Husband had failed to comply with the September 9 order and should be adjudged in contempt or purge himself by making repayment to Wife.

F. Husband's discharge in bankruptcy was dated December 4, 1969.

G. A hearing was held on December 18, 1969. On March 11, 1970, the court made findings reciting the chronology of events; that Husband had claimed and was allowed in the bankruptcy proceeding an exemption in regard to the separate personalty the court had ordered him to dispose of as described in "D" above; that he had not disposed of that property and had not paid over the cash also mentioned in "D." It concluded that he was in contempt "and should be required to serve the 60-day jail sentence heretofore imposed." (Only thirty days had been imposed.)

H. Also on March 11, 1970, an order issued ordering Husband confined for sixty days and granting Wife judgment against Husband for the $1,113.84.

This appeal followed.

The trial court concluded that the community debt of the parties to the government was not discharged by the bankruptcy proceedings. We agree. Section 17a(1) of the Bankruptcy Act, 11 U.S.C.A. § 35, provides in pertinent part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as

(1) are taxes which became legally due and owing by the bankrupt to the United States * * * within three years preceding bankruptcy: * * * And provided further, that a discharge in bankruptcy shall not release or affect any tax lien;

(2) are liabilities * * * for alimony due or to become due, or for maintenance or support of wife or child, * * *."

The parties do not assert that the tax obligation was discharged, but devote much of their briefs to a discussion of subsection (2) regarding alimony, Wife asserting and Husband denying that the direction of the trial court to Husband to pay community debts was, in truth, in the nature of an award of alimony. Both parties rely on Nesbit v. Nesbit, 80 N.M. 294, 454 P.2d 776.

In Nesbit, the divorce decree which preceded the husband's bankruptcy required Mr. Nesbit to pay Mrs. Nesbit $275.00 per month as child support, awarded her the family home and automobile and ordered him to pay the community debts. Upon appeal, this court sensed a question, probably from the disparity of awards to the parties by the decree, as to whether the decree simply divided the property or took into account alimony and additional support money. The court said:

"An order to pay the community debts may be in the nature of an award of alimony or support money not dischargeable in bankruptcy. 11 U.S.C. § 35. The answer turns on whether the requirement was made as a part of a determination by the court of the amount reasonably required as support and maintenance for the wife and children. If such was the purpose and intent, it was exempt from discharge. If, on the other hand, it was a part of a property settlement, it was discharged."

Every feature that apparently led the court to consider the true nature of the court's direction to Mr. Nesbit to pay the community debts, i. e., the matter of child support and the disparity of awards, is lacking here. The record contains no reference to alimony or support and alludes to no fact or legal principle appropriate to an award of alimony or consideration of that issue.

The trial court stated on more than one occasion in the record that it was dividing or had divided the property. Thus, we are led directly to the conclusion that the trial court simply divided property and did not award alimony.

Although we have agreed with Husband's basic position that the trial court's order directing him to pay the community debts was not an award of alimony, we do not thereby resolve matters in his favor.

There is a surprising lack of authority regarding situations in which a bankrupt has been directed by a prior divorce decree to pay a nondischargeable tax obligation. We have examined the cases cited by the parties in their briefs and by the court in Nesbit and find them to be distinguishable. The parties frankly state that they have found no case directly in point, nor have we.

All concede that the tax obligation was not discharged by the bankruptcy. It was owed by both parties before the discharge; and, so far as IRS was concerned, it was owed by both after. By no alchemy has the bankruptcy proceeding affected the parties' obligation to the government. Why should Wife pay the taxes rather than Husband? Husband suggests no answer to this riddle. He simply ignores his obligation to the government and urges that his "debt" to Wife was discharged.

We are not convinced Husband owed a debt to Wife at the time of the decree. The older, and perhaps more technical cases define "debt" as being a contractual obligation to pay a fixed sum of money at an ascertainable time. State ex rel. Beach v. Board of Loan Com'rs, 19 N.M. 266, 275, 142 P. 152, 155. Certainly there was no debt owed by Husband to Wife in this sense. If we accept the broadest connotation of the word as meaning simply money

owed, the same is true. Husband owed no debt to Wife. Rather, they both owed the government. Husband's present problem arises not from a debt owed to Wife, but rather from an in personam order contained in the divorce decree requiring him to pay a sum of money owed by both parties to a third entity, viz., IRS.

We hold that Husband's nondischargeable obligation to IRS, coupled with the in personam direction of the trial court contained in the divorce decree to pay it, was not discharged or even affected by the bankruptcy proceeding.

Finally, Husband asserts that his sentence was improvident because he was financially unable to comply with the court's directions.

Inability to pay is, of course, a good defense. Horcasitas v. House, 75 N.M. 317, 404 P.2d 140; Wilson v. Wilson, 45 N.M. 224, 114 P.2d 737; Sears v. Sears, 43 N.M. 142, 87 P.2d 434; Andrews v. McMahan, 43 N.M. 87, 85 P.2d 743, 120 A.L.R. 697. The burden of proving the defense rests upon him who asserts it in alimony cases, Armijo v. Armijo, 29 N.M. 15, 217 P. 623, and in child support cases, Wilson v. Wilson, supra. No reason occurs to us why the burden should be elsewhere in a case involving noncompliance with an in personam order to pay community debts.

Husband testified, and his testimony was uncontroverted, that he had been constantly unemployed since the time of the decree. There was no other evidence that he was unable to comply with the decree. He requested a finding of fact that due to no fault on his part, he had been unemployed at all times since the decree and was at all times unable to perform the obligation imposed upon him by the decree to pay the community debts. This finding was refused by the court and the refusal is assigned as error.

The ultimate fact essential to the establishment of the defense under consideration is inability to pay. The fact of unemployment is merely evidentiary. Hence the material finding requested by Husband was a blend of the ultimate fact of inability to pay, as to which there was no direct evidence, or at least of which the trial court was unconvinced, and of the evidentiary fact of unemployment. Trial courts are not required to make findings of evidentiary facts. Rule 52(B) (a) (2) [§ 21-1-1 (52) (B) (a) (2), N.M.S.A., 1953]; Galvan v. Miller, 79 N.M. 540, 445 P.2d 961; State ex rel. State Highway Comm. v. Pelletier, 76 N.M. 555, 417 P.2d 46. Inasmuch as Husband carried the burden of proof, the court's refusal to find his inability to pay is deemed an adverse finding on that issue. Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842; Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970.

Further, it is to be recalled that the trial court, after having adjudged Husband to be in contempt by the September 9, 1969 order, granted him, for a period of sixty days, an opportunity to purge himself of contempt. The court then amended the decree to provide that certain of Husband's separate personalty be sold and the proceeds, together with cash on his person, be applied to the IRS debt.

In its decision made in conjunction with the order from which this appeal is taken, the court found that Husband had not complied with the requirements of the September 9 order to sell the personalty and apply the proceeds, together with the cash, to the IRS debt. This finding was based upon Husband's uncontroverted testimony. Under these circumstances, we are not disposed to disturb the trial court's actions based upon any asserted inability on the part of Husband to pay IRS.

The trial court's order will be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

481 P.2d 407

John Doyle BURTON, Petitioner-Appellant,

v.

STATE of New Mexico, Respondent-Appellee.

No. 9147.

Supreme Court of New Mexico.

Feb. 22, 1971.

Fred T. Hensley, Portales, for petitioner-appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

OMAN, Justice.

Defendant was convicted of second degree murder on September 3, 1957, upon his plea of guilty. He was thereupon sentenced to imprisonment in the State Penitentiary for a term of from three years to life.

He is now before us on appeal from an order denying his motion for post-conviction relief filed pursuant to Rule 93, Rules of Civil Procedure for the District Courts [§ 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. We affirm.

His four points relied upon for reversal will be considered in the order of their presentation in the briefs. The first is:

"That the trial court erred in refusing to find that the statement given to the New Mexico State Police * * * in August of 1957 was involuntary for the reasons that coercion was used by the New Mexico State Police and that petitioner was not afforded the opportunity of counsel at any time prior to signing the confession."

At the evidentiary hearing on his Rule 93 motion, the confession, or statement, was received into evidence. Defendant testified at the hearing that he had been subjected to coercive conduct by the State Police. However, the trial court did not accept this testimony as true, but found: "The Statement given by Petitioner to the State Police * * * in August of 1957 was a voluntary statement, and no threats nor coercion were used against him."

Defendant identified the statement as the one he had given and signed and testified as follows in relation thereto:

"Q. What about this confession that you signed, was that confession the truth or was it not the truth?

"A. It was the truth."

Later in his testimony he claimed the police directed him to write the following portion of the statement:

"I, John Doyle Burton, am twenty-four years of age and reside at Melrose, N. Mex. I give the following statement of my own free will and accord without duress or threat and without promise of clemency. * * * I have been advised I do not have to give a statement to anyone and if I do anything I say may be used against me in a criminal court of law."

His testimony at the hearing on his motion differed greatly in many respects from what is contained in his signed statement of 1957 as to the events leading to the homicide and his actions thereafter. Under these circumstances the trial court was not obliged to accept his testimony as to the claimed coercion and threats by the State Police in securing the statement from him. Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970); Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967).

The finding by the trial court that the statement was voluntary, and that no coercion or threats had been used by the police, is supported by the language of the statement itself and by defendant's testimony that the statement was true. The statement, as already shown, was received into evidence, and a finding supported by substantial evidence will not be disturbed on appeal. State v. Johnson, 81 N.M. 318, 466 P.2d 884 (Ct.App.1970).

There is nothing in the record to suggest the statement ever came to the attention of the trial judge who accepted the voluntary plea of guilty and entered the conviction thereon, and the statement was certainly not received into evidence against defendant at any evidentiary proceeding leading to his conviction, because there was no such proceeding. Therefore, the following cases upon which he relies do not support his position. State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct.App.1969); State v.

Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App.1968); State v. Ortiz, 77 N.M. 316, 422 P.2d 355 (1967); State v. Gammons, 76 N.M. 85, 412 P.2d 256 (1966); State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943); Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965); Wade v. United States, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

However, defendant urges that his knowing that he had given the statement operated coercively upon him in deciding to plead guilty and that he "* * * is entitled, at least, to a hearing to ascertain if the confession was in fact involuntary."

He has been given such a hearing on his Rule 93 motion, and, as shown above, the trial court found the statement, or confession, was voluntary. Under these circumstances, the fact that he was not furnished counsel prior to giving the statement is not a basis for setting aside his conviction. Compare Hanson v. State, 79 N.M. 11, 439 P.2d 228 (1968).

In his second point he asserts: "That the trial court erred in refusing to find that [he] was not advised fully by his attorney as to the possible penalties for second degree murder."

Defendant's attorney in 1957 is now a District Judge, and he testified at the hearing on the motion. His testimony was that he had advised defendant of the possible penalties. The trial court found defendant had been fully advised by competent counsel as to the penalties, and this finding is clearly supported by substantial evidence. The mere fact that defendant testified the attorney had told him the penalty would be imprisonment for a period of from three to twenty-five years, which was contrary to the attorney's testimony, did not make the attorney's testimony insubstantial. Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968); State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct.App.1970).

In his third point he claims: "That the trial court erred in refusing to find that [he] was not fully advised by his attorney of all possible defenses to the charges against him."

The one possible defense about which he claims he was not advised was that of self-defense. In his testimony at the hearing on his motion he told an entirely different story about the claimed attack upon him by the person he killed than was told by him in his statement to the police in 1957. In the 1957 statement he did say as he and the murdered man were in the act of getting a beer out of the trunk of an automobile decedent struck him with "* * * his fist or something else," but that he had no cut or scratch to evidence the blow. He stated that they then began to fight, and he, defendant, "* * * picked up the jack out of the rear of the car and hit [decedent] with it," which laid decedent's head open and resulted in his death.

At the hearing on the motion, some thirteen years later, the attorney testified he had no clear recollection of defendant having told him of a fight between defendant and decedent. The attorney did, however, recall having fully discussed with defendant the charges of murder pending against him; the possible defense of intoxication, and particularly to the charge of first degree murder with which defendant was charged and which was dismissed upon his plea of guilty to second degree murder; the drinking by defendant and decedent and many of their movements prior to the homicide; the fact that defendant had "grasped the jack * * * and sort of used it like a hoe and literally chopped this man to death with it, at least he [decedent] had wounds which would seem to indicate that"; and that defendant had disposed of the body by dumping it into a dry well and then trying to burn it.

The fact the attorney after thirteen years does not recall having been told by defendant of a fight with decedent, if, in fact, there was such a fight, and if, in fact, defendant told the attorney of the fight, does not constitute a violation of any constitutional or other right which would make his conviction on a voluntary plea of

guilty subject to collateral attack under Rule 93.

The trial court's finding that "petitioner did not discuss with his attorney any fight between himself and the deceased. * * *" is supported by substantial evidence. This being the case, there could have been no obligation on or reason for the attorney to discuss with defendant the matter of self-defense. Compare State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967); State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

The failure of an attorney to advise a defendant of all possible defenses is no basis for a claim of incompetency of counsel. See State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct.App.1969). Compare State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967); Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct.App.1969); State v. Knerr, supra.

In his final point defendant asserts: "That the trial court erred in refusing to find that Judge Hensley [who accepted the plea and imposed sentence] at the arraignment and at the sentencing failed to address the petitioner personally."

His claim is that it was the obligation of the trial court, at the arraignment and before accepting his plea of guilty, to inform him that the maximum possible penalty was life imprisonment. He relies upon State v. Knerr, supra, and State v. Gilbert, supra. Neither of these cases support his position. Here, as above shown, defendant was fully advised by competent counsel as to both the maximum and minimum penalties which could be imposed upon being adjudged guilty.

Besides, defendant admits the trial court asked if he understood the charge against him, and advised that "* * * it was a penitentiary offense." If defendant then failed to understand the possible consequences of his plea, he could have so announced or asked his attorney. In any event, his claimed failure to understand the consequences of his plea, under the circumstances here existing, is not ground for post-conviction relief. State v. Elledge, 81 N.M. 18, 462 P.2d 152 (Ct.App.1969); Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct.App.1969).

The order denying the motion to vacate the judgment and sentence is affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

481 P.2d 410

STATE of New Mexico, Plaintiff-Appellee,

v.

Charles Chadwick CRANFORD, Defendant-Appellant.

No. 506.

Court of Appeals of New Mexico.

Feb. 5, 1971.

William J. Heck, Hobbs, for defendant-appellant.

James A. Maloney, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant's appeal questions the sufficiency of the evidence to sustain his conviction of illegal possession of mercury. Section 54-5-17, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp. 1969) states in part:

> "Illegal possession of mercury consists of possessing more than one [1] pound of mercury without also possessing a bona fide bill of sale or other instrument in writing relating to the mercury in possession stating the name and address of the seller, the name and address of the purchaser, the date of the sale, the amount sold, and the price paid therefor; * * *."

Defendant's contention is: "* * * Although the state established evidence of possession of mercury, in failing to show the absence of a bill of sale or other instrument in writing, the state failed to sustain its burden of proving beyond a reasonable doubt one of the necessary elements of the crime. * * *" We agree that the State has the burden of proving a negative—that the defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in defendant's possession. State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App.1969).

As to how this negative may be proved, the State refers us to the following from State v. Davis, supra:

> "* * * Proof of this negative may be by the unexplained absence of a bill of sale or instrument in writing from which it may be (but not required to be) inferred that defendant did not possess such an item. Such an inference is an evidentiary matter. * * *"

The inference may be drawn if the absence of a bill of sale or instrument in writing is unexplained. Here, however, there is no direct evidence that a bill of sale or instrument in writing was absent. With no direct evidence of this "absence," an inference may not be based on the "unexplained absence." State v. Davis, supra, does not provide an answer to the contention that the State failed to prove the absence of a bill of sale or other instrument in writing.

The answer to defendant's contention is that there is other evidence from which the required negative may be inferred.

There is evidence that 60 pounds of mercury, contained in a plastic chlorox bottle and a glass apple juice jug, a funnel containing traces of mercury and "some scales" were found in a closet in the living room of premises rented by defendant. There is evidence that defendant was living at these premises. Upon these items being discovered, defendant stated: "'That's not supposed to be there.'" Approximately two days before trial, after defendant had been represented by counsel for several months, defendant approached

one of the investigating officers. The officer testified that defendant "* * * asked me if he plead guilty to this which is being tried here today, could I get him a probated sentence. He stated that he was guilty and he would like to try to plead guilty for a probated sentence."

The evidence that, according to defendant, the mercury in his closet was not supposed to be there, and the evidence that defendant acknowledged his guilt to the investigating officer, permits the inference that defendant did not possess a bona fide bill of sale or other written instrument relating to the 60 pounds of mercury in his closet.

There being evidence from which the required negative could be inferred, and the jury having drawn that inference by its verdict of guilty, the judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

481 P.2d 412

STATE of New Mexico, Plaintiff-Appellee,

v.

Daniel D. GOMEZ, Defendant-Appellant.

No. 548.

Court of Appeals of New Mexico.

Feb. 5, 1971.

Elvin Kanter, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant appeals from a judgment and sentence rendered pursuant to a jury ver-

dict finding him guilty of taking a vehicle intentionally and without the consent of the owner in violation of § 64-9-4, N.M.S.A. 1953 (Repl.Vol. 9, pt. 2). We affirm.

Three points are relied upon for reversal. The first point as stated by defendant is:

"Defendant's conviction should be reversed because his trial was prejudiced by his being observed in handcuffs by members of the jury prior to the beginning of trial and during recess."

Defendant says that his attorney "* * * moved to strike the entire jury panel because some of them had observed the defendant in handcuffs, in the custody of a deputy sheriff in the corridor prior to the commencement of the trial. * * * After the luncheon break, defendant's attorney made a new motion for a mistrial because a number of the jurors observed defendant in handcuffs, in the custody of a deputy sheriff returning to the trial. * * *" Both of these motions were denied. The question, in substance, is whether the trial court abused its discretion in denying either or both of the motions.

It is not contended that defendant was in handcuffs in the courtroom at any time during jury selection or trial. Territory of New Mexico v. Kelly, 2 N.M. 292, 37 Pac.States Repts. 292 (1882), cited and relied upon by defendant, does not seem to us to support his position. In *Kelly*, the court, in reciting the facts after pointing out that the defendant was in irons, said:

"In the present case, had the irons remained on the prisoner during his trial, or for any considerable portion thereof, we would be compelled under this rule to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time, while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, * * *"

Upon this fact statement, the court concluded "* * * we are of the opinion that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground."

It appears to us that the possibility of prejudice, as disclosed by the facts in the present case, was substantially less than that considered in *Kelly*.

We are in accord with the holding of the Supreme Court of Arizona involving a factual situation and contention, both comparable to those presented here, wherein the following appears:

"Appellant next contends his rights were prejudiced because he was handcuffed when he was brought to the courtroom and that the jury panel, standing out in the hallway, saw him with the handcuffs on. Neither appellant nor his counsel contends that he remained shackled during the course of the trial. So far as the record shows he was not manacled inside the courtroom, and what he complains of is the fact that he was moved from the jail to the courtroom with handcuffs on. It has long been recognized that a prisoner coming into court for trial is entitled to make his appearance free of shackles or bonds. However, exceptions to this rule have been made, and in such matters the conduct of the trial rests in the sound discretion of the court. Under the record in the instant case there is nothing to show that the trial court abused this discretion, or that the handcuffs were not removed as soon as safety would permit. * * *"

State v. Sherron, 105 Ariz. 277, 463 P.2d 533 (1970). We do not find an abuse of discretion on the part of the trial judge in denying either or both of defendant's motions.

By his second point defendant asserts:

"The admission of irrelevant and prejudicial evidence that defendant wrecked the automobile he was accused of taking and that he refused medical treatment so deprived him of due process of law that his conviction should be reversed de-

spite the fact that no objection was made below."

The record reflects that, upon being questioned by a prosecutor, the owner of the automobile allegedly taken by the defendant testified:

> "* * * it was wrecked. They had run into an adobe wall. * * * You couldn't move the car. The undercarriage, I believe, was bent, the frame was bent. The hood was bent. The driver's side was bent in, the fender was bent and the radiator was against the fan. It was just wrecked."

Defendant concedes that no objection was made to the introduction of the evidence at the trial. He further recognizes that, absent such objection, the admissibility of the evidence is generally not reviewable. DeVilliers v. Balcomb, 79 N.M. 572, 446 P.2d 220 (1968); State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938). Defendant, however, seeks to invoke the doctrine of fundamental error as a means of securing a review of the claimed error. The doctrine is resorted to only under exceptional circumstances and is applied as a means of preventing a miscarriage of justice.

In State v. Torres, 78 N.M. 597, 435 P. 2d 216 (Ct.App.1967), is stated:

> "The doctrine of fundamental error is resorted to in criminal cases only if the innocence of the defendant appears indisputable, or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. State v. Sanders, 54 N.M. 369, 225 P.2d 150 (1950). If there is a total absence of evidence to support a conviction, as well as evidence of an exculpatory nature, then an appellate court has the duty to see that substantial justice is done and to set aside the conviction. State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967). * * *"

The record here does not disclose the presence of these elements and, consequently, the doctrine is not available.

As a further means of securing a review, defendant argues that the introduction of the evidence resulted in a deprivation of due process. He relies upon State v. Webb, 67 N.M. 293, 354 P.2d 1112 (1960). The only question presented in *Webb* for reversal was the contention that defendant was denied due process of law in that he was an indigent and that the trial court failed to provide a psychiatric examination as to his sanity. The attack, as pointed out by the court, in these circumstances was "on the judgment as being inherently and fatally defective for lack of due process." The evidence in the present case was not of such a nature as to render the judgment inherently or fatally defective as was the case in *Webb*.

The testimony as to the collision of the vehicle and the fact that it had collided with a building was corroborative of the testimony of an officer relating to his pursuit of defendant while defendant was driving the car, and at which time defendant skidded into a building.

Further objection was made relating to testimony that defendant had refused medical treatment at the time of arrest. This evidence was probably inadmissible, but, in our opinion, could not have been prejudicial.

Defendant finally contends that he should be granted a new trial because "* * * An excessive number of leading questions were allowed over defense attorney's objections." Some five questions, claimed to have been asked, are quoted in the brief in chief. Defendant has not undertaken to show that permitting the questions to be asked was prejudicial. He had the burden of showing prejudice. State v. Mitchell, 43 N.M. 138, 87 P.2d 432 (1939); State v. Young, 37 N.M. 66, 17 P.2d 949 (1932). From our reading of the questions we are unable to see how defendant could have been prejudiced through the asking.

The judgment should be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

481 P.2d 698

R. J. GASKIN, Trustee for De Vargas Development Company (N. S. L.) formerly a New Mexico Corporation et al., Plaintiffs-Appellees,

v.

Payne S. HARRIS and Soliska R. Harris, Defendants-Appellants.

No. 9027.

Supreme Court of New Mexico.
Jan. 25, 1971.
Rehearing Denied March 10, 1971.

Catron, Catron & Donnelly, Santa Fe, for defendants-appellants.

Stephenson & Olmsted, Santa Fe, for plaintiffs-appellees.

OPINION

McMANUS, Justice.

Plaintiffs brought suit in the District Court of Santa Fe County to enjoin the defendants from constructing on their residential property a structure alleged to be in violation of an architectural restriction applicable to the property. The court entered judgment ordering removal of the offending structure, a swimming pool enclosure.

The plaintiffs, except for Mr. Gaskin who is successor to the interests of the original subdivider, are the owners of lots within the De Vargas Development Company Subdivision No. 2, a residential development in Santa Fe. The defendants are the owners of a lot within the same subdivision, on which lot they constructed the swimming pool cover in question. It is likewise undisputed that all of the property in the subdivision is subject to certain restrictive covenants containing building restrictions, the material parts of which provide:

"FIRST: That no building whatever except a private dwelling house with the necessary outbuildings, including a private garage, shall be erected, placed or permitted on said premises or any part thereof, and said dwelling house per-

mitted on said premises shall be used as a private residence only * * *; and said dwelling house and necessary outbuildings shall be in the style or form or appearance known as the Old Santa Fe or Pueblo-Spanish style of architecture; * * *.

"IT IS UNDERSTOOD AND AGREED that said covenants on the part of the grantee herein, shall attach to and run with the land hereby conveyed, and the party of the first part (the Company) or any owner of adjacent or abutting premises, shall have the right to enforce compliance with said covenants by injunction, or other legal proceedings. * * *"

The defendants were in the process of constructing a swimming pool enclosure on their property which was visible from outside their property, and from the plaintiffs' lots. The plaintiffs complained that this structure violated the restrictive covenants of the deeds to the subdivision as it did not in any manner conform to the "Old Santa Fe or Pueblo-Spanish" style of architecture required by the covenants. Instead, the pool enclosure was in a modern style variously described as being of an oriental or pagoda style, but certainly in no way resembling the adobe style known to Santa Fe.

In their Point 1, the defendants refer to change of condition as to architectural styles in their subdivision and the relative hardships that would be imposed upon them if they should be ordered to remove the structure in question. Yet, as to the alleged change of conditions, even the defendants' own architect, Plettenberg, conceded that the homes within the subdivision, even if not complying exactly with the definition of "Old Santa Fe or Pueblo-Spanish style of architecture," were of a consistent and uniform type of construction:

"Q In other words, these were quite consistent, quite uniform, what you chose to characterize as violations, in other words, the houses, whereas they don't conform to what you consider to be Old Santa Fe or Pueblo-Spanish, so at least conform with one another?

"A Yes, they do."

This testimony really does not show a "change" of conditions in the true sense of the phrase. All of the expert witnesses did however state that the structure involved was in violation of the architectural restriction applicable to this subdivision. Two of the expert witnesses testified, in part, as follows:

"Q Mr. Hill, in reference to the protruding addition, the so-called second story addition, if you will, that which protrudes above the main structure, in your professional opinion is the second story structure included in any way, shape or form in the terms of art Old Santa Fe style or Spanish pueblo?

"A I would say definitely not because the method of framing, the use of materials, such as the enclosing Fiberglas, plastic materials, are certainly far removed from what one would construe as being Old Santa Fe style."

Mr. Walker testified:

"Q Now, Mr. Walker, referring to this structure you have sketched on this Exhibit Thirteen and your view of it in your professional opinion as an architect, does it conform to either of the styles of architecture we have mentioned that is to say Old Santa Fe or Spanish pueblo? Now, I refer to the part which rises up above the main building only?

"A I would not consider the upper section in either of those categories."

The Historical Zoning Ordinance of Santa Fe, Sec. 28-43.6(a), Santa Fe City Code, was referred to during the trial and it was agreed that it was the only document containing a definition of "Old Santa Fe style" in writing. The trial court was the author of this ordinance and in his

findings of fact in this cause said that except for the defendants' property, all lots in the subdivision "* * * have been improved with buildings in substantial conformity with the Old Santa Fe or Pueblo-Spanish styles of architecture." While it is true that this Court has held, in a case involving medical testimony, that uncontradicted evidence is conclusive upon the court as a trier of the facts, see Ross v. Sayers Well Servicing Co., 76 N.M. 321, 414 P.2d 679 (1966), it is our opinion, considering the facts in this case as to the evidence presented by the expert witnesses and the aesthetic nature of the issues, that the trier of the facts may take the whole panorama into consideration, including his own knowledge of the area. Consequently, in this cause the fact finder may reject expert opinion evidence. See Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967).

In their briefs and arguments before this Court, the defendants emphasized that they were not asking the court to extinguish the architectural restriction contained in the covenants but only not to enforce it in this case. In Montoya v. Barreras, 81 N.M. 749, 473 P.2d 363 (1970), the plaintiff sought to exclude residential restrictions from only the one lot owned by plaintiff in said subdivision. This Court held that absolution as to some, but not all, of the lots is not a valid construction of an instrument containing covenants where the language of the instrument manifests an intent for orderly neighborhood development. In the instant case the defendant would have the architectural restriction removed from his lot, while leaving the restriction on the rest of the subdivision. This cannot be done.

Finally, the defendants would argue relative hardship in that they had no actual notice of the restrictive covenants from the time they bought their lot, until after the swimming pool cover was substantially erected. Therefore, they contend that the trial court committed reversible error in failing to make findings to that effect as requested by the defendants. Yet, this Court has previously held, and we reaffirm the proposition, that it is not error to refuse requested findings of fact not material to the court's decision. State v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966); Middle Rio Grande Conservancy District v. Crabtree, 69 N.M. 197, 365 P.2d 442 (1961). In this case, the restrictive covenant does exist, and because of the aims and purposes of such covenants, as discussed above, the relative hardship to the defendants is far outweighed by the benefits to the community affected.

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

481 P.2d 700

Rose S. LOPEZ, individually and as Administratrix of the Estate of Apolonio A. Lopez, Deceased, Plaintiff-Appellant,

v.

ALLIED CONCORD FINANCIAL CORPORATION, Defendant-Appellee.

No. 9129.

Supreme Court of New Mexico.

Feb. 1, 1971.

Rehearing Denied March 9, 1971.

Chavez & Roberts, Santa Fe, for appellant.

Sommer & Lawler, Santa Fe, for appellee.

OPINION

COMPTON, Chief Justice.

This is an appeal from an order of the trial court denying appellant's motion to require the district court clerk to correct docket entries to reflect a timely filing of her notice of appeal.

The case was tried to the court on February 27, 1969, at which time the court directed the parties to submit requested findings of fact and conclusions of law. Findings and conclusions were submitted on March 20, 1969. On April 29, 1969, counsel for appellee notified counsel for appellant of the decision of the court granting judgment for appellee. Appellant's counsel initialed the proposed judgment and returned it to appellee's counsel on May 15, 1969, with the request that he be notified of the date of entry of judgment for purposes of appeal. The proposed judgment, along with appellant's request for notification, was submitted to the court on May 19, 1969, but the judgment was not signed and entered until August 5, 1969.

Meanwhile, on June 17, 1969, appellant's counsel filed a notice of appeal with a further request for notification of date of entry of judgment; the notice was not filed by the clerk obviously because no judgment had been entered.

Appellant first became aware of the filing of the judgment on March 23, 1970. She then filed her motion to correct the docket entries to show a timely filing. The court denied the motion on the basis that it had lost jurisdiction over the cause due to the passage of thirty days from the time of entry of judgment.

Appellant contends that the trial court erred in (a) holding that it had lost jurisdiction due to the passage of thirty days; (b) in failing to consider the effect of § 21-9-2, N.M.S.A.1953; and (c) in not granting appellant's motion to correct docket entries to reflect timely filing of notice of appeal.

We think the ruling of the trial court was correct. The case is controlled by what we said in Chavez v. Village of Cimarron, 65 N.M. 141, 333 P.2d 882. In that case the court also failed to notify the appellant of the date of entry of judgment. Appellant therein also tried to get this court to adopt Federal Rule 77(d), 28 U.S.C.A.

We quote the pertinent language:

> "There [referring to federal cases] the clerk of the court failed to comply with a positive rule of the court to give notice, but here we have the failure of Judge Hensley to comply with the written request of plaintiff's attorney that he be notified of the mailing of the order to the clerk. The giving of such a notice is no part of the duties of a District Judge; we have clerks whose duty it is to give such information when requested, but we do not have any rule comparable to Rule 77(d) of the Federal Rules. A letter addressed to the clerk, or a telephone call requesting this information would no doubt have promptly brought it."

The taking of an appeal within the time provided is jurisdictional. Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288; Chavez v. Village of Cimarron, supra.

What we have said disposes of all points raised by appellant.

The judgment should be affirmed.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

481 P.2d 702

BOARD OF TRUSTEES OF the TOWN OF LAS VEGAS (Administering the Las Vegas Land Grant) and Donaciano Marrujo, Plaintiffs- Appellees,

v.

Elauterio MONTANO et al., Defendants-Appellants.

No. 9020.

Supreme Court of New Mexico.

Feb. 15, 1971.

Donald A. Martinez, Las Vegas, for defendants-appellants.

Roberto L. Armijo, Las Vegas, for plaintiffs-appellees.

OPINION

OMAN, Justice.

Except for Defendant E. R. Zacker, defendants have appealed from a judgment declaring and establishing a vested right in plaintiffs to use and enjoy, for purposes of ingress and egress to and from their respective lands, a presently existing road across the lands of the respective defendants. As a part of their said right of ingress and egress over and along said road for all lawful purposes, plaintiffs were adjudged and decreed to have the right to make necessary repairs to said road, and defendants were restrained and enjoined from interfering with or hindering plaintiffs in their use and enjoyment of the road. We affirm.

No question is raised concerning the correctness of the trial court's findings that all the lands over which the road passes lie within the Las Vegas Grant, a Mexican Land Grant, confirmed by the United States Congress on June 21, 1860, as Private Land Claim No. 20; a patent, in the nature of a relinquishment or quitclaim, was issued by the United States on June 27, 1903, conveying and granting the lands in the Grant to the Town of Las Vegas; plaintiff Marrujo acquired title to his lands from plaintiff Board of Trustees of the Town of Las Vegas, as administrator of the Las Vegas Grant [the instrument of conveyance was a Quitclaim Deed dated March 12, 1966]; and the Las Vegas Grant is managed by the said Board of Trustees acting under the jurisdiction and control of the District Court of San Miguel County.

By their first point relied upon for reversal, appellants contend the Laws of New Mexico 1903, Ch. 47, and Laws of N.M. 1909, Ch. 103 [§§ 8-6-1 through 13, N.M. S.A.1953 (Repl.Vol. 2, 1966)] constitute special legislation in violation of the Springer Act [July 30, 1886, Ch. 818, § 1, 24 Stat. 170, 48 U.S.C. § 1471] and Art. IV, § 24, Constitution of New Mexico.

Appellants raised this question in the trial court by motion which was overruled. The provisions of the Springer Act relied upon are as follows:

> "The legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> "* * *
>
> "Regulating county and township affairs.
>
> "* * *
>
> "Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village.
>
> "* * *
>
> "The sale or mortgage of real estate belonging to minors or others under disability.
>
> "* * *
>
> *"In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof."* (Emphasis added)

Article XXII, § 4, Constitution of New Mexico, provides in part:

> "All laws of the territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this Constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; * *."

The provisions of Art. IV, § 24, Constitution of New Mexico, relied upon by appellants, are as follows:

"The legislature shall not pass local or special laws in any of the following cases: Regulating county, precinct or district affairs; * * * the sale or mortgaging of real estate of minors or others under disability; * * * incorporating cities, towns or villages, or changing or amending the charter of any city, town or village; * * *. *In every other case where a general law can be made applicable, no special law shall be enacted.*" (Emphasis added)

Appellants recognize there are a number of legislative enactments pertaining to particular community land grants within New Mexico, which differ considerably in their provisions relative to the selection and makeup of the governing, or managing, bodies of the respective grants, and, also, as to the powers, and the manner of the exercise thereof, which these governing bodies have over the control, management and disposition of the lands within these respective grants. See Ch. 8, Arts. 3 through 10, inclusive, N.M.S.A.1953 (Repl. Vol. 2, 1966).

However, appellants urge that general laws, applicable to all community land grants within New Mexico, have been enacted. They cite Laws of 1891, Ch. 86, and Laws of 1897, Ch. 54, repealed by Laws of 1917, Ch. 3, § 19; Laws of 1907, Ch. 42, now appearing, as amended, in Ch. 8, Art. 1, N.M.S.A.1953 (Repl. Vol. 2, 1966).

The 1917 Act, which repealed and replaced the 1891 and 1897 Acts, and which now appears in its amended form as Ch. 8, Art. 2, N.M.S.A.1953 (Repl. Vol. 2, 1966), does not purport to have general application to all community land grants in New Mexico, but only to those organized and incorporated under the provisions of the 1891 and 1897 Acts.

In § 2 of the 1907 Law, now appearing as § 8-1-2, N.M.S.A.1953 (Repl. Vol. 2, 1966), it is provided:

"This act [now article] * * * shall not apply to any land grant which is now managed or controlled in any manner, other than herein provided, by virtue of any general or special act."

In Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937) it was held the 1907 enactment was not applicable to the Chilili Grant which was subject to prior legislative provisions as to the management thereof [See Ch. 8, Art. 4, N.M.S.A.1953 (Repl. Vol. 2, 1966)], and that the 1907 Act was intended to apply only to grants for which no legislative provisions had been theretofore made for their management. As stated above, legislative provisions had been made by Laws of 1903, Ch. 47, for the management of the Las Vegas Grant, and § 10 of this 1903 Act ratified any and all prior appointments by the District Court of San Miguel County of trustees for the management of the grant and any and all other acts and things done and performed by the court in assuming jurisdiction over the management, control and administration of the grant.

Nevertheless, appellants urge that "The community land grants in New Mexico are all of the same kith, kind, class and nature. * * *"; a uniform system of government, control or management over their affairs should have been established by the Legislature; the 1891, 1897 and 1907 enactments demonstrate their susceptibility to a general law establishing a uniform system of governing, controlling or managing their affairs; and the legislative enactments pertaining only to specific grants, and particularly those pertaining to the Las Vegas Grant, which are here in question [Laws 1903, Ch. 47, and Laws 1909, Ch. 103, now appearing, as amended, in Ch. 8, Art. 6, N.M.S.A.1953 (Repl. Vol. 2, 1966)], constitute special legislation violative of the prohibitions contained in the above quoted provisions of the Springer Act and of Art. IV, § 24, Constitution of New Mexico.

Although there are unquestionably basic likenesses in the nature of all community land grants in New Mexico, there

are also differences, such as their geographic locations, the times of their origin, the laws and governments under which they were created, the forms of government and administration under which they developed and were controlled, etc. The fact that they may be susceptible to a uniform system of government, management or control does not require legislative enactment of a general law in this regard applicable to all community grants.

There is a close correspondence in meaning and purpose between the principles underlying the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and of Art. II, § 7, Constitution of New Mexico, and the general versus special law provisions of the Springer Act, supra, and of Art. IV, § 24, Constitution of New Mexico, supra. See County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773 (1948); Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925); Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962); State ex rel. Lee v. Gates, 149 W.Va. 421, 141 S.E.2d 369 (1965); In Re Estate of Carlson, 9 Cal.App.3d 479, 88 Cal.Rptr. 229 (1970). The fact that the Legislature has enacted laws applicable to only one grant, and has thus classified some of the grants differently, is entitled to great weight. Only if a statutory classification is so devoid of reason to support it, as to amount to mere caprice, will it be stricken down. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967). If any state of facts can be reasonably conceived which will sustain a classification, there is a presumption that such facts exist. State v. Persinger, 62 Wash.2d 362, 382 P.2d 497 (1963). Every presumption is to be indulged in favor of the validity and regularity of legislative enactments, and they will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting them. City of Raton v. Sproule, supra.

Much of the legislation concerning the governing, or management, of the affairs of community grants, as shown by the legislative enactments referred to above, has been concerned with particular grants and the different systems by which they have been governed, or managed. There have been a number of decisions by this and other courts declaring and establishing rights in grant lands arising out of and dependent upon the management, control and disposition of these lands under these diverse systems established by special legislative acts. See for example, City of Socorro v. Cook, 24 N.M. 202, 173 P. 682 (1918); Williams v. Lusk, et ux., 28 N.M. 146, 207 P. 576 (1922); Merrifield v. Buckner, supra. See also Board of Trustees of Town of Torreon Land Grant v. Garcia et al., 32 N.M. 124, 252 P. 478 (1925).

The Las Vegas Grant has been held not to be a town, city or other municipal corporation within the contemplation of Art. 8, § 3, Constitution of New Mexico, and "* * * is not of the nature of an agency or instrumentality of the state government, as are the other municipal corporations named." State v. Bd. of Trustees of Town of Las Vegas, 28 N.M. 237, 210 P. 101 (1922). We are of the opinion that this holding, as to the Las Vegas Grant, for tax purposes, is equally applicable within the contemplation of the above quoted provisions of the Springer Act and Art. IV, § 24, Constitution of New Mexico. These community land grants, although not corporations, are in the nature of quasi municipal corporations. Bibo v. Town of Cubero Land Grant, 65 N.M. 103, 332 P.2d 1020 (1958). The governing body of a grant is a creature of the Legislature, and has only such powers as are conferred by the particular act creating it. Its principal function is to hold title to and manage the common lands of the grant. Merrifield v. Buckner, supra.

In view of the difference in the nature and origin of the different community land grants; in view of the long legislative

history—dating back as far as 1876—of enactments relating to the control, or management, of the lands of specific grants; in view of the fact that there is some discretion in the Legislature to determine in which cases special laws should be passed [Scarbrough v. Wooten, 23 N.M. 616, 170 P. 743 (1918)]; and in view of the presumptions indulged in favor of the validity of legislation, we are of the opinion that the prohibitions against special legislation as contained in the Springer Act, supra, and in Art. IV, § 24, Constitution of New Mexico, supra, are not applicable to enactments relating to the governing or managing bodies of specific community land grants, or to the manner in which these bodies exercise their powers of control, management and disposition over grant lands.

Under their second point, appellants first contend seven of the trial court's findings are not supported by substantial evidence, and, therefore, the conclusions based thereon, must fall. On appeal only that evidence and the reasonable inferences to be drawn therefrom which support the findings will be considered. This evidence and these inferences must be viewed in their most favorable light in support of the findings. Kerr v. Schwartz, 82 N.M. 63, 475 P.2d 457 (1970).

The record has been examined in its entirety and the consensus is that the challenged findings are supported by substantial evidence. It follows that the trial court's conclusions, which properly follow from these findings and which conclusions have not been challenged except for the claimed lack of substantial support in the evidence for the findings upon which the conclusions are based, must be sustained.

In the second portion of their Point II, appellants contend "the Trial Court Erred in Overruling [Their] Motion to Dismiss at the Close of Plaintiffs' Case in Chief on the Grounds that Plaintiffs had Failed to Establish a Prima Facie Case."

Unquestionably, the complaint was predicated on the position that the road was a "public road," and the evidence failed to establish a public road. However, appellants did not elect to stand on their motion, but proceeded with their case after the denial thereof. They thereby waived any error committed in the denial of the motion. A. & N. Club v. Great American Insurance Company, 404 F.2d 100 (6th Cir. 1968). Thereafter the case resolved itself into a question of the rights of plaintiffs to ingress to, and egress from, their lands over the existing road across the lands of the respective defendants. We have already decided that the findings as to the existence and use of this road for over thirty years, as well as the necessity for its use by plaintiffs, are supported by substantial evidence.

By their final point, appellants claim error on the part of the trial court "* * * In Refusing to Dismiss the Board of Trustees From the Case as a Party Plaintiff Because it Had Not Consented to Being a Party and Did Not Join the Plaintiff Marrujo in Seeking the Relief Sought by the Complaint Herein." They rely upon § 18-1-11, N.M.S.A.1953 (Repl.Vol. 4, 1970), which provides:

> "18-1-11. *Proof of authority.*—The court may, on motion of either party and on showing of reasonable grounds thereof, require the attorney for the adverse party or for any one of the several adverse parties to produce or prove by his oath or otherwise the authority under which he appears and until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear."

The attorney representing the Board of Trustees had represented it for about eighteen years; the complaint was filed on June 13, 1967; answer thereto was filed on July 13, 1967; the motion attacking the attorney's authority was filed on March 18, 1969; and arguments on the motion were heard and the case tried on April 11, 1969. No action was or has ever been taken at any time by the Board of Trustees

to renounce or rescind any action taken by its attorney on its behalf in this suit.

No minutes of the board authorizing the suit were produced. Between the time of the filing of the suit and the date of trial, the membership of the Board of Trustees had changed, and one of the members of the board as of the date of trial testified that to his knowledge the Board of Trustees had given no authority to be made a party plaintiff to the suit.

Under these circumstances, we are of the opinion the trial court acted within its discretion in declining to require the attorney to produce further proof of his authority to represent the Board of Trustees.

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT J., concur.

481 P.2d 707

STATE of New Mexico, Plaintiff-Appellee,

v.

David E. McNEECE, Defendant-Appellant.

No. 529.

Court of Appeals of New Mexico.

Feb. 12, 1971.

Mari W. Privette, H. Gregg Privette, Privette & Privette, Las Cruces, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Leila Andrews, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant was erroneously convicted and sentenced because the proceedings against him, for possession of marijuana, were under the inapplicable general statute, § 54–7–13, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp.1969). The applicable statute is § 54–5–14, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2). State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.), decided December 11, 1970.

The appeal does not question which statute is the applicable one. However, "* * * [l]ack of jurisdiction at any stage of a proceeding is a controlling consideration to be resolved before going further. * * *" State v. Arnold, 51

N.M. 311, 183 P.2d 845 (1947). We may raise the question of jurisdiction on our own motion. State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967); State v. Arnold, supra.

Is the conviction and sentence of defendant under an inapplicable statute a question of jurisdiction? We hold that it is. One aspect of jurisdiction is the power or authority to decide the particular matter presented. Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967), and cases therein cited; see dissent in Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968). The trial court had no authority to convict and sentence defendant under an inapplicable statute. It, therefore, proceeded without jurisdiction.

Defendant's conviction and sentence are reversed. The cause is remanded with instructions to dismiss the charge against defendant under the inapplicable statute. State v. Riley, supra.

It is so ordered.

LaFEL E. OMAN, Justice, Supreme Court, and HENDLEY, J., concur.

481 P.2d 708

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald B. RENDLEMAN, Defendant-Appellant.

No. 585.

Court of Appeals of New Mexico.

Feb. 12, 1971.

C. N. Morris, Silver City, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Thomas L. Dunigan, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Rendleman was convicted and sentenced for the unlawful possession of marijuana under § 54-7-13 N.M.S.A.1953 (Repl. Vol. 8, pt. 2), known as the Uniform Narcotic Drug Act. Rendleman appealed. We reverse.

This case falls directly within State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.) decided December 11, 1970, in which § 54-7-14 of the Uniform Narcotic Drug Act was held inapplicable, and § 54-5-14 N.M.S.A.1953 (Repl. Vol. 8, pt. 2), a special act, was held operative.

The conviction and sentence are reversed. The cause is remanded with instruction to vacate the conviction judgment and sentence, and dismiss the charge under which Rendleman was prosecuted.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

481 P.2d 709

Kenneth BALIZER and Arthur Bazan, a Minor, by his next friend, Isauro Bazan, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Paul W. SHAVER, Chief of Police of the City of Albuquerque, New Mexico, et al., Defendants-Appellees.

No. 579.

Court of Appeals of New Mexico.

Feb. 5, 1971.

Paul A. Phillips, Albuquerque, for plaintiffs-appellants.

Frank M. Mims, John P. Burton, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

SPIESS, Chief Judge.

This appeal challenges the constitutionality of a so-called vagrancy ordinance of the City of Albuquerque, New Mexico, and likewise presents certain other issues for determination.

The action was brought by two named plaintiffs on their own behalf and on behalf of all others similarly situated. [§ 21-1-1 (23) (a), N.M.S.A.1953 (Repl.Vol. 4)].

The complaint is in three causes of action. The first seeks a declaratory judgment that the ordinance is unconstitutional on its face and as applied, and, further, prays injunctive relief against enforcement of the ordinance. The second is a count by plaintiff Balizer for false arrest as against defendant Hattaway, a policeman, and the third cause of action is by plaintiff Bazan against defendant Stucker, a policeman, and the City of Albuquerque, for false arrest.

The ordinance under attack as quoted in the complaint provides:

"SECTION 24. VAGRANCY. Vagrancy shall consists [sic] of either:

"A. Being without visible or lawful means of support or although possessing the physical ability to work, failing or refusing to actively seek employment;

"B. Loitering in, about, or on any street, land, avenue, alley, any other public way, public place, at any public gathering or assembly, or in or about any store, shop, or business or commercial establishment, or on any private property or place without lawful business there;

* * * * * *

"E. Loitering about or on any public, private, or parochial school, college, seminary grounds, or buildings, either on foot or in or on any vehicle, without lawful business there."

In addition to Stucker and Hattaway, defendants consist of the City of Albuquerque, and a number of officials of the City of Albuquerque, including the members of the City Commission.

The defendants jointly moved to dismiss the complaint, and each count thereof, upon the ground that they fail to state a claim, or claims against the defendants upon which relief can be granted. [§ 21-1-1(12) (b) (6), N.M.S.A.1953 (Repl.Vol. 4)]. The motion was granted by the court, and an order was entered dismissing the complaint; from the order this appeal is prosecuted.

Where a complaint is challenged on the ground that it fails to state a claim upon which relief can be granted, facts well pleaded are to be treated as the facts upon which the case rests. Rubenstein v. Weil, 75 N.M. 562, 408 P.2d 140 (1965). Consequently, a decision in this court has its basis in such facts. The named plaintiffs, by the first cause of action, allege that they are "citizens of the United States and residents of Albuquerque, Bernalillo County, New Mexico. They are both accustomed to be on and in public thoroughfares, streets, land, avenues, alleys, and public ways and public places and go upon the college grounds or school grounds."

Both of these plaintiffs allege that they have been arrested and charged with vagrancy under the challenged ordinance.

The plaintiff Bazan alleges that on the 27th day of August, 1968, at approximately 10:30 P.M. he was sitting in a public park in the City of Albuquerque, peacefully conversing with friends, when he was arrested by defendant Stucker and charged with violating § 24(b) of the vagrancy ordinance. Upon trial in the municipal court, the charge was dismissed.

The plaintiff Balizer alleges that he was peacefully walking on the campus of the University of New Mexico from the Student Union to his car in the library parking lot when he was arrested by defendant Hattaway and charged with violating § 24(e) of the vagrancy ordinance. The

complaint against Balizer was dismissed upon motion of the City Attorney.

Both plaintiffs allege that they "were subjected to indignity and abuse and harassment. They were booked, fingerprinted, and searched, and interrogated." It is alleged that the ordinance is employed as a basis for arrests upon mere suspicion and without probable cause.

Before considering the challenge to the constitutionality of the ordinance, we encounter preliminary contentions relating to whether the proceedings can properly be treated as a class action, and whether the complaint presents a case of actual controversy warranting declaratory relief. We do not consider whether a proper class action is presented because, in our opinion, the facts disclose a justiciable controversy in the named plaintiffs. If the complaint fails to meet the requirements of Rule 23 [§ 21-1-1(23), N.M.S.A.1953 (Repl.Vol. 4)], termination of the action would be proper only insofar as it seeks relief on behalf of the class. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964).

Defendants do not question the availability of declaratory proceedings as a means of testing the constitutionality of criminal or penal municipal ordinances. See Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941); Fenster v. Leary, 20 N.Y.2d 309, 282 N.Y.S.2d 739, 229 N.E. 2d 426 (1967). Defendants suggest, and we think correctly so, that declaratory proceedings will lie only in cases of actual controversy. Section 22-6-1, N.M.S.A. 1953. Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940). Upon this ground defendants argue that, because both named plaintiffs were acquitted of the charges of vagrancy by the municipal court, no actual controversy is presented. The remedy, in our opinion, is available under circumstances where one seeking relief is actually threatened with an unconstitutional deprivation of personal rights. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); Colorado State Board of Optometric Exam. v. Dixon, 165 Colo. 488, 440 P. 2d 287 (1968); compare State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301, decided November 23, 1970.

We look to the complaint to determine whether it discloses that plaintiffs are threatened with deprivation of constitutional rights through the contemplated enforcement of the challenged ordinance.

The plaintiffs allege:

> "By the use of the color of this ordinance, the Defendants have deprived and threatened to deprive the Plaintiffs and those similarly situated, of the privileges and immunities granted to citizens of the United States, and continue to threaten to deprive them and others of their rights and privileges and immunities under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States."

In our view, this language, coupled with the alleged facts relating to prior arrests which have been stated, adequately discloses a fact situation from which it can properly be said that plaintiffs are actually threatened with deprivation of their personal constitutional rights and consideration of the constitutionality of the ordinance is warranted as against the contention that no actual controversy is present.

The defendants further appear to suggest that the order of dismissal is sustainable on the ground that the granting of declaratory relief is discretionary. Allstate Insurance Company v. Firemen's Insurance Company, 76 N.M. 430, 415 P.2d 553 (1966). The trial court, however, in this instance, did not purport to exercise discretion as to whether it would entertain the action; it simply granted the motion to dismiss, which, as we have stated, was on the basis that the complaint failed to "state a claim or claims against the defendants upon which relief can be granted."

The constitutional attack upon the ordinance, and in particular paragraphs B. and E., which are quoted, is upon the

ground that these paragraphs are vague and over broad. We hold that the paragraphs B. and E. are unconstitutional upon their face.

In accordance with the ordinance, vagrancy is defined in terms of "loitering" (See ordinance quoted, supra).

The term "loiter" is defined, Webster's Third International Dictionary, 1966, as:

> "* * * to interrupt or delay an activity or an errand or a journey with or as if with aimless idle stops and pauses and purposeless distractions: fritter away time in the course of doing something or proceeding somewhere: take more time than is usual or necessary: be markedly or unduly slow in doing something or going somewhere: Dawdle, Linger: to remain in or near a place in an idle or apparently idle manner: hang around aimlessly or as if aimlessly: to be unnecessarily slow in leaving: fitfully put off leaving: hang back: stay around without real necessity: lag behind:"

In Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931) the court, in considering and holding a vagrancy statute unconstitutional, applied the following definition to the term of "loiter."

> "To consume (time) idly; with away, [sic] as, to loiter away the hours; to linger idly along the way; to spend time idly; to be dilatory; delay; to travel indolently with frequent intermissions."

It is clearly apparent that the ordinance condemns acts as criminal to which no reasonable person would attribute wrongdoing or misconduct.

In People v. Diaz, 4 N.Y.2d 469, 176 N.Y.S.2d 313, 151 N.E.2d 871 (1958), the Court of Appeals of New York held unconstitutional an ordinance of the City of Dunkirk providing that no person shall lounge or loiter about any street or street-corner in the City of Dunkirk. The court said:

> "It is the rule that for validity a criminal statute must be informative on its face (People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949, 146 N.E.2d 682) and so explicit [sic] that 'all men subject to their penalties may know what acts it is their duty to avoid' (United States v. Brewer, 139 U.S. 278, 288, 11 S.Ct. 538, 541, 35 L.Ed. 190; People v. Vetri, 309 N.Y. 401, 131 N.E.2d 568). While the term 'loiter' or 'loitering' has by long usage acquired a common and accepted meaning (People v. Bell, 306 N.Y. 110, 115 N.E.2d 821), it does not follow that by itself, and without more, such term is enough to inform a citizen of its criminal implications and, by the same token, leave it open to arbitrary enforcement."

In Goldman v. Knecht, 295 F.Supp. 897 (D.Colo.1969), a 3-judge federal district court considered the constitutionality of a vagrancy statute similar, in part, to the ordinance involved here. In declaring the statute unconstitutional, the court said:

> "The statute in question is subject to constitutional attack on several grounds, but its main deficiency (as has been noted) is its extreme breadth and vagueness. These qualities render it void on its face and, thus, in violation of the due process clause of the Fourteenth Amendment. Precision sufficient to give notice of proscribed conduct must be present, and this is especially so in a criminal statute affecting as it does constitutional freedoms. Aptheker v. Secretary of State, 378 U.S. 500, 514, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). It is, of course, a fundamental constitutional principle that a statute which forbids an act 'in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' The constitutional vice of a vague or indefinite statute is that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' Such a statute fails to establish reasonable stand-

ards for determining guilt or innocence thus licensing the police, jury and judge to create their own standards.

"The statute in question subjects to arrest, imprisonment and fine essentially every able-bodied citizen of Colorado who happens, at one time or another, to be 'doing' one of the inherently innocuous acts or things mentioned. Because of this, it fails to give a person of ordinary intelligence the slightest warning as to what behavior is prohibited or as to standards which are to be used in his arrest and conviction."

We have not overlooked Anderson v. Shaver, 290 F.Supp. 920 (D.N.M.1968), cited by defendants. However, the force and reasoning of recent decisions induce us to conclude that the ordinance is unconstitutional. Arnold v. City and County of Denver, Colo., 464 P.2d 515 (1970); Ricks v. United States, 134 U.S.App.D.C. 215, 414 F.2d 1111 (1968); Ricks v. District of Columbia, 134 U.S.App.D.C. 201, 414 F.2d 1097 (1968); Lazarus v. Faircloth, 301 F. Supp. 266 (S.D.Fla.1969); Smith v. Hill, 285 F.Supp. 556 (E.D.N.C.1968); Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C. 1969); Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967) and Fenster v. Leary, 20 N.Y.2d 309, 282 N.Y. S.2d 739, 229 N.E.2d 426 (1967).

The motion to dismiss was granted as to both the second and third causes of action. Both causes of action, so far as material here, allege that plaintiffs were arrested without probable cause, wrongfully, illegally and in violation of their constitutional rights. The date and place where each arrest occurred is specified.

In Manson v. Pucci, 7 F.R.D. 570 (W. D.Mo.1947) the court, considering the sufficiency of a complaint asserting false arrest, said:

"Rule 8(a) of the Rules of Federal Procedure, 28 U.S.C.A. following section 723c, in the Federal Courts specifies that a complaint 'shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.' It is familiar law that a false arrest may be made the basis of a suit for damages.

"In clear language the plaintiff says that on a specified date, at a specified place, he was arrested and detained at the instance of the defendant and that such arrest and detention were wrongfully made. This is sufficient."

The quoted portion of Rule 8(a) of the Rules of Federal Procedure is identical in language with Rule 8(a) (2), § 21-1-1(8) (a) (2). N.M.S.A.1953 (Repl.Vol. 4), of our Rules of Civil Procedure.

In our view the second and third causes of action state a claim for relief.

In holding as we do in this opinion, we do not consider defenses argued on the appeal which, at this point, have neither been pleaded nor presented to the trial court. We hold only that a claim has been stated. It is our view, however, that no claim for relief was stated under the third cause of action as against the City of Albuquerque. See Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

As to the City of Albuquerque, the trial court correctly dismissed the third cause of action. The order of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

482 P.2d 55

John Patrick WILLIAMS, a minor, by his father and next friend, Murel A. Williams, Murel A. Williams, individually, Plaintiffs-Appellants,

v.

Pieter VANDENHOVEN, Defendant-Appellee.

No. 9097.

Supreme Court of New Mexico.
March 8, 1971.

[redacted]

James L. Brown, Farmington, Willard F. Kitts, Albuquerque, for plaintiffs-appellants.

Tansey, Rosebrough, Roberts & Gerding, Farmington, for defendant-appellee.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of San Juan County, New Mexico, to recover damages arising out of alleged medical malpractice. Trial was to a jury, which returned a verdict in favor of defendant. Plaintiffs appeal.

In October 1965, plaintiffs filed a complaint against defendant, a practicing physician in Farmington, New Mexico, alleging malpractice in treating the minor plaintiff for a fracture of his right forearm in October 1962, when the boy was seven years of age.

Plaintiffs allege several grounds of negligence on the part of defendant and further allege that, as a proximate result of one or more of the alleged acts of negligence, the boy's arm became afflicted with a loss of circulation and gas gangrene, necessitating amputation of the right arm below the elbow. The fracture involved both the radius and the ulna of the right forearm. There was a small laceration adjacent to the fracture site on the underside of

the right forearm. The boy was taken to the hospital, where he came under the care of defendant.

After examination and x-raying, defendant performed a closed reduction of the fracture and the alignment of the bones was good. A full arm circular plaster cast was applied by defendant, which extended down to the lower part of the hand. During the short period of hospitalization, the boy suffered pain and the fingers and hand appeared to be swollen. He received medication therefor. The defendant saw the boy again on Wednesday evening, October 24, 1962, at about 7:00 p. m. at the defendant's office, approximately thirty-four hours after his discharge from the hospital. The defendant split or loosened the cast, cut a window therein and drained the lacerated wound. The arm had a noticeable odor. Some color was restored to the hand and the boy went home with his mother. At this time the hand again became dark. As the result of a call to defendant by the boy's mother, he was readmitted to the hospital under the care of Dr. Smith, an orthopedic surgeon. The arm was discovered to be gangrenous and an operation was performed in an effort to restore circulation, followed by additional treatments until November 14, 1962, when the boy was transferred to a hospital in Salt Lake City, Utah, where further attempts to treat the gangrene were unsuccessful. On November 20, 1962, the right arm was amputated just below the elbow.

Plaintiffs rely on two points for reversal. Under point I(A) and (B), they contend that the jury should not have been bound by medical testimony alone; and under point II, that defendant's testimony, stating that the boy's mother had made no complaints relative to defendant's treatment, was inadmissible and prejudicial to plaintiffs.

Plaintiffs submitted two requested instructions, Nos. 18 and 19, which were refused by the trial court, and in each of those instructions, among other things, plaintiffs requested the jury to be instructed that:

> "* * * [Y]ou are not bound by expert medical testimony only, but may consider all the surrounding facts and circumstances, while giving due consideration to expert medical opinion."

The court did, however, give instruction No. 3, which is U.J.I. 8.1, as follows:

> "In treating and/or diagnosing the plaintiff, John Patrick Williams, the doctor was under the duty to possess and apply the knowledge and use the skill and care that was ordinarily used by reasonably well qualified doctors of the same field of medicine as that of the Defendant practicing under similar circumstances, giving due consideration to the locality involved. A failure to do so would be a form of negligence that is called malpractice.
>
> "The only way in which you may decide whether the Defendant possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by physicians testifying as expert witnesses. In deciding this question you must not use any personal knowledge of any of the jurors."

It was admitted by counsel for plaintiffs in oral argument that requested instructions Nos. 18 and 19 are in conflict with the court's instruction No. 3 to which no objection was made.

Considering the instructions as a whole, and in the absence of proper objection, and reading each in the light of all of the others, we cannot say that the trial court erred in instructing the jury, as the instructions given adequately cover the law applicable in the instant case.

> "* * * [A]ll instructions must be read and considered together, * * * and if, when so considered together, they fairly present the issues and the law applicable thereto, they are sufficient. * * *"

Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967). Instruction No. 3 given by the court correctly states the general rule that ordinarily the

standard of care of a doctor, and whether he exercised such care, can be established only by expert testimony; however, we do not intend to infer that, in a proper case, the jury is prohibited from considering non-expert testimony and surrounding circumstances in conjunction with expert testimony in determining the question of negligence of the doctor. We are aware that some jurisdictions, notably California and Washington, allow the jury to consider non-expert testimony. Friedman v. Dresel, 139 Cal.App.2d 333, 293 P.2d 488 (1956); Norden v. Hartman, 134 Cal.App.2d 333, 285 P.2d 977 (1955); Olson v. Weitz, 37 Wash.2d 70, 221 P.2d 537 (1950).

To preserve error in instructions for review:

> "* * * (1) it is sufficient if a correct instruction has been tendered, if the court has not instructed on the subject matter; (2) if, however, the court has instructed erroneously on a subject, even where a correct instruction has been tendered, it must be clear in the record that the error has been called to the court's attention. Where the court has instructed erroneously, it is not a prerequisite to a right to complain of an instruction that a correct instruction be offered—rather the important question concerns the clarity with which the errors in the instruction given have been called to the attention of the trial court. * * *"

Baros v. Kazmierczwk, 68 N.M. 421, 362 P. 2d 798 (1961); Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960); State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953). See also, Pfleiderer v. City of Albuquerque, 75 N.M. 154, 402 P.2d 44 (1965). Plaintiffs failed in this important aspect.

Plaintiffs submitted to the court their requested instructions Nos. 18 and 19, which they claim were correct statements of the law, but the trial court gave its own instruction No. 3 and did not give those requested by the plaintiffs. Plaintiffs do not claim that they objected or excepted to the instructions given by the court, and the record fails to disclose any such objections or exceptions by plaintiffs to instruction No. 3 which was given. Beal v. Southern Union Gas Co., supra.

> "* * * [W]here the trial court *fails* to instruct on a certain subject, tendering of correct instruction is sufficient to preserve error, but to preserve error *where the court has given erroneous instruction,* specific vice must be pointed out to the trial court by proper objection thereto and correct instruction tendered."

Beal v. Southern Union Gas Co., supra. Rule 51(1) (i), Rules of Civil Procedure (§ 21-1-1(51) (1) (i), N.M.S.A., 1953 Comp. Repl.Vol. 4), and § 41-11-16, N.M.S.A., 1953 Comp.Repl.Vol. 6, are similar.

In Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964), this court held:

> "Before a physician or surgeon can be held liable for malpractice in the treatment of his patient, he must have departed from the recognized standards of medical practice in the community, or must have neglected to do something required by those standards. * * * The fact that a poor result is achieved or that an unintended incident transpired, unless exceptional circumstances are present, does not establish liability without a showing that the result or incident occurred because of the physician's failure to meet the standard either by his acts, neglect, or inattention. Such facts must generally be established by expert testimony. * * *"

See cases cited therein.

Plaintiffs did present expert testimony which was in conflict with other medical experts' testimony, and the jury, as the trier of the facts, apparently believed the testimony of the medical experts who testified in defendant's behalf.

Where there is a conflict in the testimony of certain witnesses, it is the duty of the trier of the facts (the jury) to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements, and say where the truth

lies. All disputed facts are resolved in favor of the successful party, and all reasonable inferences indulged in support of the verdict. Nor does the fact that there may have been contrary evidence introduced at trial, capable of supporting a different verdict, permit us to weigh the evidence. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970).

Under point II, plaintiffs contend that the trial court erred in allowing defendant to testify that, on a later visit to defendant's office for treatment of a condition not related to the arm, Mrs. Williams did not complain about defendant's treatment of the arm. When this testimony was elicited from defendant, counsel for plaintiffs objected, as follows:

> "Objection, the complaint was brought by Mr. Williams and the boy."

The above objection gave no valid ground or explanation as to why the question was improper. The objection, as worded, does not call the court's attention to the fact an admission may be involved. The objection is not explained and is insufficient.

In Ash v. H. G. Reiter Company, 78 N.M. 194, 429 P.2d 653 (1967), the court stated:

> "We have uniformly held that an objection to the introduction of evidence which does not specify the particular ground on which the evidence is objectionable does not call the trial court's attention to the matter to be decided, and on appeal will be treated as if no objection to such evidence had been made. * * *"

We do not deviate from the above rule of law. See, State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970).

The judgment is affirmed.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

482 P.2d 58

Edward SCHMIDER, Plaintiff-Appellee,

v.

Ben SAPIR, Defendant-Appellant.

No. 9090.

Supreme Court of New Mexico.

March 8, 1971.

Keleher & McLeod, John B. Tittmann, Albuquerque, for appellant.

Julius Wollen, Mary C. Walters, Albuquerque, for appellee.

OPINION

STEPHENSON, Justice.

This action for damages for waste was filed in the District Court of Bernalillo County by the plaintiff-appellee as landlord on February 25, 1965. The case was tried to the court, sitting without a jury, on December 31, 1969. The court entered judgment in favor of appellee for $6,593.00. Appellant moved for a new trial or remittitur, following the denial of which this appeal was taken.

The question presented for our consideration involves the trial court's refusal to grant appellant a new trial and to hear his evidence.

A review of the record reveals that the second count of the first amended complaint, upon which the judgment was based, alleged various items of damage and waste and sought judgment for their total sum of $6,593.00, punitive damages of $25,000.00 and reasonable attorney's fees. Appellant filed an answer. Notice of the trial, set for December 31, 1969, was given in September, 1969. On the appointed day, appellee announced he was ready, but appellant's counsel said that neither appellant nor his counsel was ready; that although appellant had been advised of the hearing, he had been called to New York on an emergency; that counsel had reached him by phone the preceding afternoon but appellant had said he could not be in Albuquerque until the following week; that another attorney in the same firm had been handling the case but due to "a New Year's Eve conflict" counsel had learned only the day before that he would have to appear; and that he had attempted to reach appellee's counsel regarding these problems the day before without success. Counsel for appellant moved for a continuance or, in the alternative, if the court decided to proceed, a few days indulgence to permit appellant to testify the following week.

There was no compliance with § 21-8-7 and 21-8-8, N.M.S.A., 1953, which provide, respectively:

> "All applications for a continuance shall be supported by oath unless the facts be within the knowledge of the court, in which case it shall be so stated on the record."

And

> "The motion for continuance must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered; and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, the motion shall be made

and determined as soon as the court opens after the next ordinary adjournment."

The motion was denied and appellee proceeded with his evidence. Counsel for appellant remained throughout and participated fully in the proceedings, making objections, entering into stipulations, and cross-examining appellee's witnesses. At the conclusion of appellee's case, counsel again requested an opportunity to put his client on the stand the following week. This request was denied and the court heard the arguments of counsel, at the conclusion of which he announced his ruling.

Appellant's motion for new trial or remittitur seeks to excuse appellant's absence and says that had he been present, evidence would have been introduced to refute appellee's claims, and then outlines such evidence. The motion was supported by affidavits which were in turn supported by various exhibits. Appellee filed a counter-affidavit.

Appellant now asserts that because the trial court refused to grant defendant a week's delay within which to appear and produce his evidence, granted judgment in the exact amount prayed in the complaint, and refused to grant a remittitur based upon the affidavits submitted, in truth and practical effect, the judgment was by default; that, therefore, the rules of law relative to granting relief from default judgments should apply.

We cannot agree that the judgment was by default.

An answer had been filed. The trial court did not grant judgment as prayed in the complaint. There was no award of either punitive damages or attorney's fees.

The bill of exceptions, certified in proper manner and form by the trial judge and showing no objections by appellant, states at the onset that this case "came on for trial on the merits." The preamble of the judgment recites that the matter had come before the court "for trial on the merits." Further recitations cover the appearance of counsel, the taking of testimony and the examination of evidence. The judgment bears the signature of counsel for both parties, by which we take it that both attorneys approved the judgment as to form.

"In a strict sense a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is now usually applied where default occurs after appearance as well as before, * * *." 49 C.J.S. Judgments § 187 (1947). Such subsequent omissions forming the basis for entry of judgment by default may consist of failure to appear at the trial or some other failure "* * * to take some step required by some rule of practice or some rule of court." Id.; Leahy v. Rohnert, 144 Mich. 304, 107 N.W. 1060, 115 Am.St.R. 443 (1906). "* * * [A] judgment goes by default whenever between the commencement of the suit and its anticipated decision in court either of the parties omits or refuses to pursue, in the regular method, the ordinary measures of prosecution or defense." Bettcher v. State ex rel. Attorney General, 140 Colo. 428, 344 P.2d 969 (1959). A judgment by default does not involve the merits of the case. It is based "* * * solely upon the fact that, whatever case the party had, he did not appear at the proper time to present it." In re Stillman, 28 R.I. 298, 67 A. 4 (1907).

A succinct definition of a judgment by default is implicit in Rule 55, which relates to that subject. [§ 21-1-1(55), N.M.S.A., 1953]. Subsection (a) directs the clerk to enter default for a party against whom the judgment is sought when he has "failed to plead or otherwise defend as provided by these rules." The definition of a default judgment which we have said is implicit in the rule quoted seems to have achieved acceptance. It is stated in 3 W. Barron and A. Holtzoff, Federal Practice and Procedure, § 1212 (rev. ed. C. Wright 1958), in

speaking of the procedural prerequisites for the entry of a default by the clerk:

"Certain elements must be present for this to be done. There must be a claim for affirmative relief and a failure to plead or otherwise defend on the part of the opposing party."

The "default" referred to in the rules and in the last quotation is a statement in appropriate form by the clerk as to the state of the record. It serves to invite the attention of the court to a party's omission to plead or otherwise defend, and to the fact that the case is ripe for the entry of judgment by default.

Obviously, the judgment entered in this case of which complaint is made, was not a "default" judgment. The appellant had appeared and answered and his counsel had participated fully in the trial and the other proceedings in the manner that we have described. Having concluded that the judgment was not by default, Rule 55(c) [§ 21–1–1(55) (c), N.M.S.A.1953] regarding setting aside default judgments has no application.

In truth, it seems to us that the real gist of appellant's position simply involves the propriety of the court's ruling in refusing to grant a continuance. Notwithstanding appellant's arguments predicated upon the judgment being by default, the appellant stated in the brief in chief:

"Under all of the circumstances, the court abused its discretion and committed error in refusing to allow defendant additional time to produce evidence * * *."

The granting or denying of continuances is a matter within the sound discretion of the trial court, and such actions will be reviewed only where palpable abuse of discretion is demonstrated. This has been the rule from the earliest days in New Mexico. Territory v. Ortiz, 1 N.M. 5 (1852); Waldo, Hall & Co. v. Beckwith, 1 N.M. 182 (1857); Thomas v. McCormick, 1 N.M. 369 (1866); Beall v. Territory, 1 N. M. 507, rev'd on other grounds, 83 U.S. (16 Wall.) 535, 21 L.Ed. 292 (1871). The same rule has consistently been applied down to modern times. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (1970); Tenorio v. Nolen, 80 N.M. 529, 458 P.2d 604 (1969); Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

We see no abuse by the trial court of its discretion in denying the continuance. Accordingly, the judgment should be affirmed.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

482 P.2d 61

STATE of New Mexico, Plaintiff-Appellee,

v.

Roy Horace ARMSTRONG, Defendant-Appellant.

No. 9128.

Supreme Court of New Mexico.

March 8, 1971.

Stephen F. Grover, Farmington, for defendant-appellant.

David L. Norvell, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

TACKETT, Justice.

Defendant was charged by information dated June 28, 1968, in the District Court of San Juan County, New Mexico, of the crime of first degree murder. Pending arraignment, defendant was transferred to the New Mexico State Penitentiary as a parole violator. On January 29, 1969, defendant was transferred to the New Mexico State Hospital for psychiatric evaluation and treatment. Defendant was given a hearing to determine his competency to stand trial, and on February 14, 1969, the court found defendant mentally incompetent to stand trial. He remained in the State Hospital until April 3, 1970, when a second competency hearing was held. After the hearing, the court entered an order declaring the defendant competent to stand trial. Defendant was tried by jury on April 22, 1970, convicted of first degree murder, and sentenced to life imprisonment. Defendant appeals. We affirm.

In point I, it is contended that the court erred in finding defendant competent to stand trial. It is well established in New Mexico that the defendant in a criminal case has the burden of proving, by a preponderance of the evidence, that he is too mentally unsound to stand trial. State v. Garcia, 80 N.M. 466, 457 P.2d 985 (1969). The test, as to whether the accused is competent to stand trial, is:

> "'Has the defendant capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense?'"

State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955). In the instant case, a detailed hearing was held to determine defendant's competency. Dr. Thomas Lowry, director of psychiatry at the New Mexico State Hospital, testified that defendant was legally sane and able to stand trial. Since all of the medical testimony indicates that defendant was mentally competent to stand trial, the court did not err in so ruling. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Defendant's second point contends that the court erred in admitting his confession into evidence. Essentially, the contention hinges on the requisite voluntariness of the confession. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct.App.1967), correctly states the rule as quoted from the United States Supreme Court decision in Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961):

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two

hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. * * *."

It is apparent that the trial court fully performed its preliminary duty of inquiring into the voluntariness of the confession prior to submitting it to the jury. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964). The trial court then submitted the confession to the jury under proper instructions, which imposed upon the jury the duty to determine the credibility of the testimony respecting the voluntariness and the mental capacity of the defendant to make a confession.

Defendant's point III contends that "The State failed to prove the sanity of the defendant beyond a reasonable doubt and therefore failed to prove a necessary element of the crime." It is clear that the sanity of the defendant was a necessary element of the crime and if not proved, the State's case must fail. In State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969), we find:

"One accused of a crime is presumed to be sane. However, if the defendant introduces competent evidence reasonably tending to support insanity at the time of the alleged offenses then an issue is raised as to the mental condition of the accused. It then becomes the duty of the jury to determine the issue from the evidence independent of the presumption of sanity. However, if the jury disbelieves the evidence as to defendant's claimed insanity, then the presumption stands. * * *"

The court's instruction No. 2 imposed the duty upon the jury to "determine * * * whether or not the defendant was sane or insane at the time of the commission of said offense." The jury found that the defendant was sane and its finding shall stand.

In defendant's point IV, it is contended that "There was insufficient evidence for the jury to make a finding of guilty." In the recent case of Groff v. Stringer, 82 N.M. 180, 477 P.2d 814 (1970), we discussed substantial evidence in depth and determined that the well established rule is that "where there is substantial evidence to support the findings of the trial court they will not be disturbed on appeal." See, Stewart v. Barnes, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969). Substantial evidence is "relevant evidence acceptable to a reasonable mind." Groff v. Stringer, supra; Martinez v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970).

"* * * Further, * * * we do not lightly overturn the judgment of the trial court and must search the record for substantial evidence to support its findings. * * *"

Groff v. Stringer, supra; Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970). This has been done. Appellant's contention is without merit.

The judgment is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

482 P.2d 63

CITY OF ALBUQUERQUE, New Mexico, a municipal corporation, Plaintiff-Appellant,

v.

Margaret M. ACKERMAN, a single woman, Mary Louise Denison, a widow, and First National Bank in Albuquerque, Defendants-Appellees.

No. 9010.

Supreme Court of New Mexico.

March 8, 1971.

Perry S. Key, Albuquerque, for plaintiff-appellant.

Modrall, Seymour, Sperling, Roehl & Harris, Leland S. Sedberry, Albuquerque, for defendants-appellees.

OPINION

STEPHENSON, Justice.

In this condemnation proceeding filed by the City of Albuquerque (appellant), the District Court of Bernalillo County entered judgment on a jury verdict for $105,180.00 in favor of appellees. Following denial of appellant's motion for a new trial, this appeal was taken in which appellant advances a variety of grounds for reversal.

Appellant first mounts an attack on the sufficiency of the evidence. On appeal, all disputed facts are resolved in favor of the successful party, all reasonable inferences indulged in support of the verdict, all evidence and inferences to the contrary disregarded, and the evidence is viewed in the aspect most favorable to the verdict.

The tract taken in condemnation, owned by both appellees, was the site of sixteen apartment units. All of the structures and all of the land except for a long, triangular shaped strip at the rear was taken. Adjoining appellees' property to the rear was a parcel on which were situated eleven apartment units owned by the Appellee Denison only, none of which was taken. The apartments on both tracts were operated in conjunction with each other as a unit, having one manager and other aspects of commonality.

Appellant asserts that Appellee Denison was not qualified to express an opinion as to the value of the property taken, and that her testimony on this subject cannot be regarded as substantial evidence. An owner of real property is presumed to have special knowledge as to its value by reason of ownership and is therefore competent to testify to value. State ex rel. State Highway Comm. v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969). New Mexico Uniform Jury Instructions, Inst. No. 7.13, having been given without objection, furnishes another complete answer to appellant's assertion.

It was appellees' theory that the value of the rear tract owned by Mrs. Denison was lessened (severance damages) in that unit costs of management and the like were increased by the severance. Appellant contends that since there was no unity of ownership between the condemned tract and the undisturbed tract adjoining it, it was error to admit evidence regarding severance damages to the latter. Appellant cites and discusses respectable authority tending to sustain its position.

Counsel for the appellees in his opening statement said that he would seek to prove severance damages. Appellee Denison, the first witness, explained the ownership of the two tracts and, during the appellees' case, there was testimony, both on direct and cross examination, on the subject of severance damage to the property owned by Mrs. Denison only, all without objection by appellant. In fact, appellant sought to show benefits to the rear tract during its case. Appellant did nothing to call the claimed error to the attention of the trial court thereby preserving it for review. Indeed, this theory was not even included in appellant's motion for a new trial following the entry of judgment. None but jurisdictional questions shall be first raised in the Supreme Court. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct.

App.1970); Barnett v. Cal M, Inc., 79 N. M. 553, 445 P.2d 974 (1968); N.M. Supreme Court Rule 20(1) [§ 21-2-1(20) (1), N.M.S.A., 1953].

Finally, so far as appellant's attack on the evidence is concerned, based upon an ingenious selection and juxtaposition of items of evidence, appellant argues that the largest award which could be sustained is $90,550.00. We disagree. Entirely apart from the testimony of Appellee Denison, there was substantial evidence of damage in excess of the amount actually awarded, introduced through appellees' expert, both on the replacement cost approach and the income approach.

Appellant's next three points involve claimed misconduct of a juror said to have taken notes during trial. Appellant claims that the taking of notes by a juror and the taking of the notes to the jury room constitutes reversible error.

The flaw in appellant's positon is its factual basis, which is primarily a sworn statement by one of the jurors on the subject of making notes, taking the notes to the jury room and the use made of them there. Affidavits of jurors tending to impeach or vitiate verdicts by showing misconduct on their part will not be received or admitted. Goldenberg v. Law, 17 N.M. 546, 131 P. 499 (1913). The Goldenberg ruling, supra, a case of first impression, set forth cogent, if not absolutely compelling reasons for its conclusions, and has been consistently followed. Scofield v. J. W. Jones Construction Company, 64 N. M. 319, 328 P.2d 389 (1958); Sena v. Sanders, 54 N.M. 83, 214 P.2d 226 (1950). "They [jurors] simply are not competent witnesses." State v. Embrey, 62 N.M. 107, 305 P.2d 723 (1957). See also Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966) and other cases there cited. In view of the sheer volume of case law in New Mexico, all consistent in upholding the same simple, absolute rule, it is curious that counsel continue to come forward with affidavits of jurors impugning their verdicts. Here, the affidavit of the juror will not be received or considered for any purpose. It is as though the affidavit never existed. With the removal of this keystone, appellant's factual structure collapses.

Another affidavit indicates that a spectator saw a juror writing. There is an affidavit of counsel for appellant which is mainly hearsay (see State v. Analla, 34 N. M. 22, 276 P. 291 (1929) and an affidavit by a bailiff which, after extracting the hearsay, says there were pieces of paper with writing on them in the jury room after the trial. See Talley v. Greear, 34 N.M. 26, 275 P. 378 (1928).

Thus, the factual assertions of appellant on the subject of misconduct of the jury or of a juror which are properly before us, even considered on a basis of disregarding hearsay contained in the affidavits as distinguished from disregarding affidavits which contain hearsay in their entirety, fall short of constituting proof of misconduct and indeed, amount to evidence of nothing at all.

Appellant next asserts that the court erred in refusing, on its motion made after trial, to permit its counsel to examine the papers in the possession of the court and discovered in the jury room by the bailiff. Since there was nothing properly before the court indicating any misconduct on the part of the jury in arriving at its verdict, we see no abuse of discretion by the trial court in declining to permit inspection of the papers, whatever they may have been.

In conclusion, on the taking of notes by jurors, appellant claims error based upon the trial court's not having appropriately instructed the jury on this subject. It is true that the court did not, in compliance with Rule 51(1) (b) [§ 21-1-1(51) (1) (b), N.M.S.A., 1953] give the jury Uniform Jury Instruction 1.2. UJI 1.2, in pertinent part, would have told the jurors that they were not permitted to take notes during the trial. Appellant did not object or except to the trial court's omission, or otherwise bring it to the trial court's attention until its motion for new

trial filed after entry of judgment. Appellant asserts that Rule 51(1) (b) is a mandatory direction to the trial court to give appropriate portions of UJI 1.2 near the outset of the trial. This is obviously true, but to say that the direction is mandatory and to hold that failure to comply with it constitutes reversible error in a situation where no prejudice is shown or the complaining party did not reserve the omission for review, are two entirely different things.

Specifically in regard to failure to give a mandatory instruction contained in UJI, in Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970), we held that omission to give UJI 17.1, which reads:

> "Faithful performance by you of your duties is vital to the administration of justice."

absent any showing of prejudice, did not constitute reversible error. Here, as we have said, appellant has failed to demonstrate any prejudice.

Appellant asserts that the raising of the question in its motion for new trial was timely. We disagree. Generally speaking, errors in respect to instructions are to be invited to the attention of the court before retirement of the jury. Rule 51(1) (i) [§ 21-1-1(51) (1) (i), N.M.S.A., 1953]. The reasoning behind the rule is stated in Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949). In that case, the court said:

> "The orderly administration of law and the expeditious trial of cases require definite rules of procedure in appellate practice, and that they be enforced without favor. Unless the trial court's attention is called in some manner to the fact that it is committing error, and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the trial court, if they had been called to its attention. In the hurry of trial work such errors are common, and one who is not satisfied with a ruling of the trial court should call to its attention the fact that it may be committing error, thus giving an opportunity to correct the ruling, if, in the light of the objection or exception, it should conclude that such ruling was error."

See also State v. James, 76 N.M. 376, 415 P.2d 350 (1966); New Mexico-Colorado Coal & Mining Co. v. Baker, 21 N.M. 531, 157 P. 167 (1916).

The raising of errors in respect to instructions for the first time by motion for new trial is not timely. It is not helpful to the trial court to invite such matters to its attention after the jury has concluded its work and departed the scene. New Mexico-Colorado Coal & Mining Co. v. Baker, supra.

We hold, in accordance with long settled practice in New Mexico, that error in failure to give incidental instructions, even from UJI, and even though mandatory, must be brought to the attention of the court in timely fashion if it is to be preserved as error, at least as to instructions which do not cover the fundamental law applicable to the facts in the case, thereby falling within the scope of Rule 51(1) (a) [§ 21-1-1(51) (1) (a), N.M.S.A., 1953]. Gerrard v. Harvey & Newman Drilling Company, 59 N.M. 262, 282 P.2d 1105 (1955).

Appellant next complains of the court's exclusion of testimony by its expert witness regarding general and special benefits to the remaining property as a result of the completion of the improvements in connection with which this condemnation occurred. The witness testified that there were general benefits to the entire neighborhood. An objection was made to the answer, which was sustained, but the answer was not stricken, nor the jury instructed to disregard it. He also testified that there were special benefits to "this property," but the court sustained an objection to a question calling for a specification of the type of special benefits that would occur without placing a monetary value on them. On cross examination he said there were no benefits he could

"prove." Appellant made a tender of proof through the witness regarding benefits. The witness testified that benefits would occur and described them, but placed no monetary value on them though requested to do so. The tender was refused.

The testimony, as to the exclusion of which appellant complains, dealt in mere generalities. We are by no means persuaded that the trial court erred in excluding it. If error occurred, inasmuch as no monetary values were mentioned in the excluded testimony, it is difficult to see how appellant was prejudiced. Harmless error in the exclusion of evidence cannot be the basis for a new trial. Rule 61 [§ 21–1–1(61), N.M.S.A., 1953].

Finally, appellant complains of the trial court having given UJI 7.11 relative to comparable sales on the asserted ground that there was only hearsay evidence as to values and no substantive evidence to warrant such an instruction. The record fails to reveal an objection timely made to the giving of the instruction now said to be objectionable. Based upon the authorities we have cited, this point must be also determined adversely to appellant.

Appellant, two days after the trial, moved for leave to state into the record its objections to Instruction 7.11 of which it now complains, citing mistake, inadvertence and excusable neglect. The motion was denied, and appellant complains of this ruling. In an effort to excuse its failure to object prior to retirement of the jury as required by Rule 51(1) (i), or perhaps to minimize the seriousness of this omission, appellant seems to argue that its failure to timely object was, from a practical standpoint, without significance, since the trial judge would not have been present at the time of stating the objections in any case. The trial judge, at the time of denial of the motion, stated that it was his practice, if a timely request were made to dictate formal objections into the record, to always grant such requests.

We will not engage in idle speculation as to who would have been present at an evolution which never occurred, but we are certainly unwilling to assume that the trial judge would have been absent.

We have stated numerous times that the reason for requiring proper objections to erroneous instructions is to draw the court's attention to errors in time to correct them. Such is the purpose of Rule 51(1) (i). It is the policy of these principles to avoid error, concluding cases at the trial court level free from error. The time of stating objections to instructions is a vital stage of the trial, affording, as it does, the last opportunity for the trial court to correct errors. How, we ask, can these objectives be accomplished in the absence of the trial judge? Obviously they cannot. We know of no phase of the trial proceedings when the presence of the trial judge is more vital. He had might as well be absent during reception of evidence.

The case should be affirmed, and

It is so ordered.

TACKETT and McMANUS, JJ., concur.

482 P.2d 68

David Wright STAFFORD, Petitioner-Appellant,

v.

The STATE of New Mexico, Respondent-Appellee.

No. 552.

Court of Appeals of New Mexico.

Feb. 19, 1971.

David W. Bonem, Clovis, for petitioner-appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

HENDLEY, Judge.

Defendant originally pleaded guilty to a charge of sexual assault. Thereafter, he filed a pro se "Writ of Habeas Corpus" which was treated as a motion for post-conviction relief pursuant to § 21-1-1 (93) N.M.S.A.1953 (Repl.Vol. 4). The motion was denied without hearing and defendant appeals giving three grounds for reversal. We affirm.

1. DEFENDANT'S HEALTH CONDITION.

Defendant contends that "Due to * * * my health conditions I do not feel like I received Justice." Appellate's counsel contends that because defendant lacked verbal eloquence, "the obvious intent of this averment was to indicate to the Trial Court that due to physical or mental disabilities, the petitioner's plea of guilty was not tendered of his own volition * * *"

Prior to sentencing trial counsel, in his argument for a suspended sentence, mentioned that defendant needed a prostate operation. Defendant also stated that he had been in a mental hospital for nine years and also that he was out on probation from Texas on a fondling charge.

The claim, as worded by defendant, is too vague to state a basis for relief. Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct. App.1970). The claim, as worded by counsel, goes to the voluntariness of the plea. The alleged facts—of a need for a prostate operation, time in a mental hospital and prior conviction on a "fondling" charge raise no issue as to an involuntary plea, rather they go to the question of competency to plead. Further, the record shows detailed questioning by the trial court as to voluntariness of the plea. None of the alleged facts in any way controvert the voluntariness shown by the record. The claim, as argued by counsel, is that the alleged facts raise a question as to competency to plead. They do not. They raise no issue as to competency to plead because none of

the alleged facts indicate incompetency at the time of the plea. See State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct.App.1970); State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct.App.1969); State v. Barefield, 80 N. M. 265, 454 P.2d 279 (Ct.App.1969); State v. Smith, 80 N.M. 742, 461 P.2d 157 (Ct. App.1969); compare State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct.App.1968); Hoffman v. State, 79 N.M. 186, 441 P.2d 226 (Ct.App.1968); State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct.App.1968).

2. REFUSAL TO PERMIT WITHDRAWAL OF GUILTY PLEA.

Defendant first pleaded not guilty. Later he changed the plea to guilty. His attorney then argued for a suspended sentence. The trial court stated that he would likely impose a prison sentence but felt he should have a pre-sentence report in view of counsel's argument for a suspended sentence. The trial judge then offered the defendant an opportunity to withdraw his guilty plea. This offer was rejected. Subsequently, the pre-sentence report was received and reviewed by defendant and his attorney. Defendant stated that some of the facts contained in the pre-sentence report were false. The trial judge stated that he had received a letter from defendant stating that if he was not going to receive a suspended sentence then he wanted to withdraw his plea of guilty. The Court refused to allow a change of plea.

The trial court has discretionary power in accepting a plea of guilty but if the defendant relates facts inconsistent with guilt then the plea should not be accepted. State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.1969). However, here we have a plea of guilty, entered into voluntarily and with a full and complete knowledge of rights and the consequences of his act. This is not a case of "plea bargaining." See State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967). Compare State v. Brown, 33 N.M. 98, 263 P. 502 (1927). This is a case of defendant being fully aware of his rights and the consequences of his acts and not getting the desired result. See State v. Leyba, supra.

3. FAILURE TO APPOINT COUNSEL TO PRESENT MOTION.

As pointed out under points 1 and 2 there were no factual allegations which would require a hearing. There is therefore no requirement for appointment of counsel. State v. King, 82 N.M. 200, 477 P.2d 1015 (Ct.App.) decided December 3, 1970.

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

482 P.2d 70

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard LUCERO, Defendant-Appellant.

No. 480.

Court of Appeals of New Mexico.

Feb. 19, 1971.

See also 81 N.M. 578, 469 P.2d 727.

Paul "Pablo" Marshall, Socorro, Jack Love, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Mark B. Thompson, III, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant appeals his conviction of rape. He raises three points for reversal, namely, (1) jurisdiction of the State to try the crime, (2) failure to give a tendered instruction, and (3) failure of the trial court to honor an affidavit of disqualification.

We affirm.

JURISDICTION OF THE STATE TO TRY THE CRIME.

Defendant contends that the crime occurred on the Isleta Pueblo and since the State failed to prove that Indians were not involved the court was without jurisdiction to try the crime. Even assuming that defendant accurately states the rule that the State has the burden of proving the non-Indian status of the defendant, after it has been shown that a crime occurred in Indian Country, there is no basis for application of the assumed rule in this case.

The police officer testified that he knew the scene of the crime was in Bernalillo County but he did not know whether it was on the Isleta Pueblo. The evidence is that the rape occurred in Bernalillo County but there is no evidence that the rape occurred on lands of the Indian reservation. Absent some showing that the crime occurred on Indian land, there is no basis for considering the legal claim raised by defendant.

Further, it is a fundamental rule that the burden of demonstrating want of jurisdiction rests upon the party asserting such want, particularly where the challenge is applied to a court exercising general jurisdiction as is the case here. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct.App.1967). Defendant failed in his burden of demonstrating want of jurisdiction.

DEFENDANT'S REQUESTED INSTRUCTION.

Defendant's requested instruction was denied. It stated:

> "You are further instructed that the Court takes judicial notice of the laws of nature and the scientific facts connected with the human anatomy and this Court takes judicial notice of the fact that a female, who has never previously had intercourse and whose maidenhood has never before been penetrated, will ordinarily hemorrhage and bleed to a

considerable extent, after indulging her first act of sexual intercourse, and you, as jurors, are bound to accept this scientific fact as true in weighing the evidence in this case."

Defendant cites neither medical nor legal authority to support the instruction. Novak v. Dow, 82 N.M. 30, 474 P.2d 712, (Ct.App.1970).

Further, a medical witness refused to substantiate defendant's theory proposed by the instruction. The court could not take judicial notice of a fact on which the medical evidence did not show the medical profession to be in unanimous accord. Rozelle v. Barnard, 72 N.M. 182, 382 P.2d 180 (1963); State v. Moore, 42 N.M. 135, 76 P.2d 19 (1938).

AFFIDAVIT OF DISQUALIFICATION.

Section 21-5-9, N.M.S.A.1953 (Repl. 1970) requires that the affidavit of disqualification be filed not less than ten days before the beginning of the term of court, if the case is at issue. Defendant concedes that the affidavit was not timely filed and that the case was at issue but asserts that there is no longer a sound basis for the arbitrary rule as long as the affidavit is filed in time for another judge to take the case since there are now multi-judge districts in New Mexico. Whatever merit there may be to this argument is a matter for legislative consideration. The Legislature provided the time for filing the affidavit of disqualification in § 21-5-9, supra. Our duty is to uphold that law. Not having taken precaution to preserve his right, defendant cannot now complain. State v. Baca, 81 N.M. 686, 472 P.2d 651 (Ct.App.1970) cert. denied 81 N.M. 721, 472 P.2d 984.

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

482 P.2d 72

Terry SANCHEZ and Herman Sanchez, her husband, Plaintiffs-Appellants,

v.

SHOP RITE FOODS, d/b/a Piggly Wiggly Food Market, Defendant-Appellee.

No. 569.

Court of Appeals of New Mexico.
Feb. 19, 1971.

James I. Bartholomew, Albuquerque, for appellants.

Clarence R. Bass, Shaffer, Butt & Bass, Albuquerque, for appellee.

OPINION

WOOD, Judge.

This is a slip and fall case. The trial court entered summary judgment in favor

of the defendant grocery store. The dispositive issue of plaintiffs' appeal is whether there was a sufficient basis for a summary judgment. We hold there was not and reverse.

At the summary judgment hearing, the trial court considered two items—the deposition of Mrs. Terry Sanchez and the affidavit of Rod Sanchez, identified as the store manager.

According to the deposition, Mrs. Sanchez was in the store as a business invitee. She went to the produce section to get tomatoes. She saw water dripping onto the floor "* * * so I ducked from that little counter and I slipped on that tomato as I turned. * * *" She fell to the floor. She never saw the tomato before she slipped, and didn't know how long it had been there.

There had been other times that Mrs. Sanchez had seen produce items on the floor (lettuce, green chili, grapes), and "* * * other times that the floor hasn't been too clean." However, she had never slipped on substances on the floor prior to the tomato incident. She had shopped at the store about twice a week for several years, but couldn't recall having seen any mopping or sweeping of the floor in the produce section during that time. The accident happened about 5:45 p. m., the lights were on in the store and Mrs. Sanchez had no trouble in seeing.

It is contended the "* * * deposition does not show that there is any negligence whatsoever on the part of defendant * * *." We agree there are questions as to the sufficiency of the deposition to establish a prima facie case against defendant under either a "pattern of conduct" theory [Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969)], or a specific act of negligence theory [Williamson v. Piggly Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P. 2d 843 (Ct.App.1969)]. Such questions are not pertinent because plaintiffs, in initially opposing defendant's motion for summary judgment, did not have the burden of establishing a prima facie case. Barber's Super Markets, Inc. v. Stryker, 81 N.M. 227, 465 P.2d 284 (1970); Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). Until defendant made a prima facie showing that it was entitled to summary judgment, there was no requirement upon plaintiffs to show that a factual issue existed. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct.App.1970).

Defendant, the movant for summary judgment, had the burden of establishing the *absence* of a material issue of fact and that it was entitled to summary judgment as a matter of law. Barber's Super Markets, Inc. v. Stryker, supra; Kelly v. Montoya, supra. The deposition does not make a prima facie showing of an absence of a pattern of conduct or of an absence of a specific act of negligence. Compare Rekart v. Safeway Stores, Inc., supra.

The summary judgment must rest then on the affidavit of the store manager. Upon being informed of the fall, he went to the produce section. He states:

> "In the store, Delfino Quintana is in charge of this produce section, and as part of his duties, he sweeps the produce area floor four or five times per day; he is required to check the area throughout the day, and makes these checks approximately every fifteen minutes while he is on duty. In addition to Mr. Quintana, I also check the area when I pass through it, and the store also requires the sack boys to police the produce area when Mr. Quintana is not on duty."

The affidavit does not state that Quintana, the store manager or the sack boys performed their duties on the day that Mrs. Sanchez fell; it does not even state that Quintana was on duty that day. It says nothing about sweeping, cleaning or policing the produce section on the day of the accident. There is nothing indicating when the area was last cleaned before the fall; nothing to indicate the length of time the tomato had been on the floor. We agree

with plaintiffs; the affidavit is insufficient as a matter of law. Since defendant did not make a prima facie case entitling it to summary judgment, the summary judgment is reversed.

The case is remanded with instructions to set aside the summary judgment and reinstate the case on the docket.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

482 P.2d 74

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard Glenn BUHR, Defendant-Appellant.

No. 507.

Court of Appeals of New Mexico.

Feb. 19, 1971.

William W. Head, Jr., Denny, Glascock & McKim, Gallup, for defendant-appellant.

James A. Maloney, Atty. Gen., Ray Shollenbarger, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of second degree murder, defendant appeals raising two points for reversal. Defendant's first point is dispositive of the appeal because the instruction defining second degree murder is erroneous.

We reverse.

The questioned instruction states:

"* * * the unlawful killing of a human being done with malice aforethought but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of first degree murder. In practical application, this means that the unlawful killing of a human being with malice aforethought but without a deliberately formed and premeditated intent to kill is murder of the second degree when the killing results from an unlawful act the

natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another."

The first part of the instruction informed the jury that a person may be guilty of murder in the second degree without premeditation. This has been consistently held erroneous since the case of State v. Smith, 26 N.M. 482, 194 P. 869 (1921). See State v. Smith, 51 N.M. 328, 184 P.2d 301 (1947); State v. Sanchez, 27 N.M. 62, 196 P. 175 (1921).

The second part of the instruction discusses the "practical application" of the definition. The State contends that this case does not fall "* * * within the ruling of State v. Sanchez, [supra] in that all premeditated malice was not excluded from the definition of murder. Rather what the court excluded from its definition of murder in this case was the premeditated intent to kill. * * *" The above cases however, show that premeditation means "thought before hand." The "practical application" part of the instruction removed premeditation from the definition and is therefore erroneous. State v. Smith, supra, State v. Sanchez, supra.

Although erroneous, defendant did not object to the instruction. However, the instruction requested by defendant was also erroneous in that it also removed premeditation from the definition. In this situation, ordinarily defendant is in no position to complain of the error. Defendant, however, contends, and the State concedes, that the error is jurisdictional and thus may be raised for the first time on appeal.

We agree that jurisdictional error may be raised for the first time on appeal. State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct.App.1969). We do not necessarily agree, however, that the instruction in this case presents a jurisdictional question. In State v. Walsh, supra, the instruction omitted an essential element of the crime charged and this omission was jurisdictional. Here, the instruction includes premeditation when it requires second degree murder to have been committed with malice aforethought, State v. Sanchez, supra, but after stating this requirement, it then tells the jury that premeditation is not required. What we have here is a confusing instruction which first includes, then excludes, premeditation. We do not have a total omission of an essential element of the crime; rather, we have uncertainty as to those elements. Whether this uncertainty is a jurisdictional defect, we do not decide.

The issue as to the erroneous instruction may be raised in this court for the first time because fundamental error, or due process, requires that there be certainty applied to the definition of the crime. In so holding, we are aware that in State v. Smith, 51 N.M. 328, 184 P.2d 301, supra, our Supreme Court said they would not invoke the doctrine of fundamental error in affirming a conviction of second degree murder when premeditation had been excluded from the definition of the crime. The reasoning was that "substantial justice" had been done. We fail to see how there is substantial justice in affirming a conviction when we have no way of knowing, because of an erroneous instruction, whether the conviction was or was not on the basis the killing was premeditated. This uncertainty is fundamental error. State v. Garcia, 19 N.M. 414, 143 P. 1012 (1914), in the opinion upon rehearing, laid down the rule of fundamental error in New Mexico when it stated:

"There exists in every court, however, an inherent power to see that a man's fundamental rights are protected in every case. Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done."

The conviction and sentence is reversed. Defendant is to be awarded a new trial.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

482 P.2d 237

STATE of New Mexico, Plaintiff-Appellee,

v.

Leroy ALLEN, Defendant-Appellant.
No. 9114.

Supreme Court of New Mexico.
Feb. 15, 1971.
Rehearing Denied March 23, 1971.

David F. Boyd, Jr., Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Roy G. Hill, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

TACKETT, Justice.

An information filed in 1962, in the District Court of Bernalillo County, New Mexico, charged the defendant with the crime of second degree murder, to which he entered a guilty plea. He was sentenced to the State Penitentiary for a period of not less than three nor more than fifty years.

Defendant filed several motions and habeas corpus petitions to vacate judgment and sentence, the last being on January 22, 1970, which motion was denied. The sentencing judge, however, in the order denying post conviction relief, did amend the sentence from that as originally imposed to a new sentence of not less than three years nor more than life imprisonment. The defendant was not before the court when the amended sentence was imposed. In this aspect the trial court erred, as this court held in State v. Verdugo, 78 N.M. 372, 431 P.2d 750 (1967):

> "* * * When a sentence has been set aside, the defendant's presence is as necessary at resentencing as it was at the time of the original sentencing. * * *"

We agree.

Defendant contends that the order amending the sentence placed him in double jeopardy, contrary to the Fifth Amendment of the United States Constitution and Art. II, § 15, New Mexico Constitution. Increasing a sentence, after a defendant has commenced to serve it, is a violation of the constitutional guarantee against double jeopardy. United States v. Sacco, 367 F.2d 368 (2d Cir. 1966). The United States Supreme Court, in Ex Parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), in speaking of the scope of the double jeopardy guarantee, stated:

> "* * * [T]here has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

Here defendant has served a substantial portion of the original sentence, as he has been incarcerated for over eight years.

There being double jeopardy, we concur in the statement of the United States Court of Appeals in Sullens v. United States, 409 F.2d 545 (5th Cir. 1969) that:

> "* * * This Court has rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.' * * * The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. * * *"

Defendant further contends that the amended sentence was illegal, since he was then serving a valid sentence. We have held that the law, at the time of the commission of the offense, is controlling. Williams v. State, 81 N.M. 605, 471 P.2d 175 (1970). The controlling statute at the time of the commission of the offense in 1962, Laws 1939, ch. 49, § 1, (repealed 1963), provided:

> "* * * Every person convicted of murder in the second degree shall be punished by imprisonment in the state penitentiary for *any period of time not less than three [3] years*; * * *." (Emphasis added.)

Defendant concedes that the statutory language "any period of time not less than three [3] years" permits the imposition of life imprisonment as a maximum sentence. State v. Turnbow, 81 N.M. 254, 466 P.2d 100 (1970). In Williams v. State, supra, the defendant was sentenced to not less than twenty-five years nor more than thirty-five years for conviction of second degree murder. The court held this was a permissible sentence.

Although the trial court could have sentenced defendant in the original instance to not less than three years nor more than life imprisonment, it did not. Clearly, it cannot do now what it should have, or at least could have, done in 1962. The original sentence was in fact valid and we concede the correctness of the holding in State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968), that:

> "There is considerable authority to the effect that a trial court is without power to set aside a valid sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment. A judgment which attempts to do so is void, and the original judgment remains in force. * * *"

We remand to the trial court with direction to have the defendant present in court for resentencing to not less than three years nor more than fifty years, as the original sentence was valid.

In view of the remand, there is no necessity for further discussion.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

482 P.2d 239

Clemente MARTINEZ, Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF the VAUGHN MUNICIPAL SCHOOLS, Defendant-Appellant.

No. 9134.

Supreme Court of New Mexico.

March 15, 1971.

James A. Maloney, Atty. Gen., E. P. Ripley, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellant.

Donald A. Martinez, Las Vegas, for plaintiff-appellee.

OPINION

McMANUS, Justice.

Defendant Vaughn Municipal School Board appeals from judgment for plaintiff Clemente Martinez in an action for breach of a school bus operator's contract. At issue is the effect of § 77–14–5, N.M.S.A. (1953 Comp.) on the transportation contract between the parties.

Defendant alleges that § 77–14–5(C) became a part of the contract between the parties and gave them the right to terminate the contract when the number of pupils on the route fell below ten. The section states:

> "The state board shall hold a hearing on the written protest and may modify or change any school bus route if it determines the modification or change will be beneficial to the school district affected. *However, no school bus route serving less than ten [10] students shall be established or maintained.*" (Emphasis ours.)

Plaintiff agrees that the statute became a part of the contract although not expressly set out therein. Compare Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P. 2d 865 (1952). However, he argues that § 77–14–5, supra, was applicable only at the time of the making of the contract and the establishment of the bus route.

The language of § 77–14–5, supra, is clear and unambiguous. It pertains not only to the establishment, but also the maintenance of school bus routes by the state transportation division of the department of education, with provision for protest by local school boards through § 77–14–5(A), which states:

> "A local school board may file a written protest with the state board objecting to a school bus route established by the state transportation division. The written protest shall contain the objections of the local school board to the school bus route."

There is also provision for modification or change of established school bus routes. Section 77–14–5(D) provides:

> "No school bus route shall be modified or changed in any manner inconsistent with the provisions of an existing school bus service contract unless the proposed modification or change is consented to by the state transportation director."

However, the defendant did not follow the proper administrative channels. The defendant unilaterally revoked the contract in question without recourse to the requisites of § 77–14–5(D), supra, which clearly requires that recourse be had through the state transportation director.

The judgment of the lower court is hereby affirmed.

It is so ordered.

TACKETT and STEPHENSON, JJ., concur.

482 P.2d 241

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike POLSKY, Defendant-Appellant.

No. 9218.

Supreme Court of New Mexico.

March 9, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 522, 82 N.M. 393, 482 P.2d 257 be and the same is hereby returned to the Clerk of the Court of Appeals.

482 P.2d 241

STATE of New Mexico, Appellee,

v.

Mike ARCHULETA, Appellant.

No. 9209.

Supreme Court of New Mexico.

Feb. 22, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 511, 82 N.M. 378, 482 P.2d 242 be and the same is hereby returned to the Clerk of the Court of Appeals.

482 P.2d 241

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnny GONZALES, Defendant-Appellant.

No. 9208.

Supreme Court of New Mexico.

Feb. 22, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 528, 82 N.M. 388, 482 P.2d 252 be and the same is hereby returned to the Clerk of the Court of Appeals.

482 P.2d 242

STATE of New Mexico, Appellee,

v.

Mike ARCHULETA, Appellant.

No. 511.

Court of Appeals of New Mexico.
Dec. 31, 1970.
Rehearing Denied Jan. 21, 1971.
Certiorari Denied Feb. 22, 1971.

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[redacted]

[redacted]

Anthony F. Avallone, Las Cruces, for appellant.

James A. Maloney, Atty. Gen., Justin Reid, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Judge.

Convicted of twelve charges of fraud, § 40A-16-6, N.M.S.A.1953 (Repl.Vol. 6), defendant appeals. The issues discussed are: (1) whether the crimes were committed in New Mexico; (2) compelled handwriting exemplars; (3) asserted denial of a preliminary hearing; (4) denial

of a motion for bill of particulars; (5) admission of defendant's confession; (6) asserted loss of trial court jurisdiction; (7) denial of a motion to sever; (8) admission of exhibits; and (9) instructions, both given and refused.

Were the crimes committed in New Mexico?

Section 40A–16–6, supra, reads in part:

> "Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations."

Defendant was tried on an amended information. Count I of the amended information reads:

> "On or about November 14, 1968, in Dona Ana County, New Mexico, Mike Archuleta, intentionally misappropriated and took $991.10 belonging to Farmers Insurance Group by means of fraudulent conduct, practices and representations, contrary to Section 40A–16–6, NMSA, 1953 Compilation."

The other eleven counts are identical except for dates and the amounts involved.

Defendant concedes that fraud, as defined in § 40A–16–6, supra, took place. We quote from the brief in chief a general outline of the fraud:

> "From the proof adduced, the defendant had possession of blank loss drafts of the Farmers Insurance Group. He had authority to sign those drafts and deliver them to either insureds with claims or body shops performing work. * * The files of the Farmers Insurance Group maintained in Colorado Springs, Colorado, contained papers supporting claims submitted by the defendant. * * However, the claims were false."

It is defendant's contention that the fraud was not committed in New Mexico. It is undisputed that each draft issued by defendant in payment of the false claims was drawn on a bank in Colorado Springs, Colorado, and was paid by that bank when presented. Defendant contends the misappropriation or taking occurred when the checks were paid and this was in Colorado, not New Mexico.

Defendant relies on State v. Faggard, 25 N.M. 76, 177 P. 748 (1918). There it was charged that Faggard had an arrangement with a St. Joseph, Missouri company by which Faggard would purchase cattle in Eddy County, New Mexico, and mortgage them to the Missouri company in an amount sufficient to finance the purchase. This was to be done by a draft on the company. Attached to the draft was to be a bill of sale for the cattle and Faggard's promissory note and mortgage. It was charged that Faggard did draft on the company pursuant to the arrangement but attached a bogus bill of sale and executed a chattel mortgage on non-existent cattle. The charge against Faggard was obtaining money by false pretenses. The opinion states:

> "* * * if the St. Joseph Cattle Loan Company parted with its money in Eddy county, then the venue was properly laid in that county; on the other hand, if the money was parted with in St. Joseph, Mo., then the venue was there. The law is that a crime must be prosecuted in the jurisdiction where it is committed, and a prosecution for criminal false pretenses must be had in the county, district, or state where the offense was consummated by the obtaining of the property, even though the inducing pretenses were made elsewhere, and the consummation by delivery of the property was effected through the instrumentality of an innocent agent, without the personal presence of the principal." (Citation omitted)

Seeking to avoid State v. Faggard, supra, the State relies on § 40A–1–15, N.M.S.A. 1953 (Repl.Vol. 6). According to the State, § 40A–1–15, supra, "* * * shows a legislative intent to give jurisdiction over a crime to the court of a county 'in which a material element of the crime was committed.'" The language is taken out of

context. The material portions of § 40A–1–15, supra, read:

"* * * In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. In the event death results from the crime, trial may be had in the county in which any material element of the crime was committed, or in any county in which the death occurred. In the event that death occurs in this state as a result of criminal action in another state, trial may be had in the county in which the death occurred. In the event that death occurs in another state as a result of criminal action in this state, trial may be had in the county in which any material element of the crime was committed in this state."

The appeal does not involve a situation where material elements of a crime were committed in different counties within New Mexico. Section 40A–1–15, supra, applies only in a limited sense to a situation where a material element of the crime occurs outside New Mexico—where death is involved. Section 40A–1–15, supra, does not cover the contention advanced by defendant. Compare State v. Harrington, 260 A.2d 692 (Vt.1969); People v. Zayas, 217 N.Y. 78, 111 N.E. 465 (1916).

Since § 40A–1–15, supra, is not applicable to defendant's contention, we do not avoid State v. Faggard, supra. Rather, we apply the *Faggard* statement that prosecution for the crime must be in the state where the offense was consummated. The consummation of defendant's fraud occurred at the place where defendant misappropriated or took money belonging to Farmers Insurance Group. Defendant's contention that the misappropriation or taking did not occur until the drafts were paid in Colorado directs attention to only one portion of the transaction; it ignores what defendant had done previously. Specifically, it ignores the fact that defendant issued the drafts.

Throughout the proceedings the instruments issued by defendant in payment of the false claims were referred to as both checks and drafts. At one of the hearings where defendant sought a bill of particulars, the State made it clear that it was relying on these instruments. A charge of misappropriation of money may be established by a showing that drafts or checks were misappropriated. Section 41–6–21, N.M.S.A.1953 (Repl.Vol. 6); State v. Peke, 70 N.M. 108, 371 P.2d 226 (1962).

Two New Mexico cases support the view that defendant misappropriated the drafts or checks (the money) when he issued them in Dona Ana County, New Mexico.

The maker of a check died after the check was delivered to the payee but before it had been paid by the bank on which the check was drawn. There was nothing showing that either the bank or the payee had notice of the maker's death at the time the bank paid the check. The administrator of the maker's estate sued the payee for the amount of the check, claiming the bank's authority to pay the check was revoked upon the death of its maker. In Elgin v. Gross-Kelly & Co., 20 N.M. 450, 150 P. 922, L.R.A.1916A, 711 (1915), it was held that upon issuance of a check for value there was an assignment pro tanto of the funds of the drawer on deposit in the bank on which the check was drawn. The fact that the check was for value was material as to the issues between the parties. *Elgin* recognizes that under the statute then existing [the present statute is § 50A–3–409, N.M.S.A.1953 (Repl.Vol. 8, pt. 1)], there was no assignment so far as the depository bank was concerned. However, as between the maker and the payee, there was such an assignment.

Here, as between the State and a defendant who had authority to issue the drafts, defendant made a pro tanto assignment of funds of Farmers Insurance Group when he issued the drafts. That assignment was a misappropriation of funds on which he was authorized to draw.

The second case is Territory v. Hale, 13 N.M. 181, 81 P. 583 (1905). The defendant was charged with embezzling funds of Mora County. The funds were on deposit in a bank in San Miguel County. The opinion approves the view that the "* * embezzlement is accomplished by the drawing of a check upon a bank where such money is deposited." (Citations omitted)

An issue in Territory v. Hale, supra, was where the embezzlement occurred. The opinion states:

> "* * * every act of the defendant in connection with the crime charged was performed in Mora county * * *. He drew the checks there, and either sent them by mail or delivered them personally to the respective payees. All things which were afterwards done were the result of instrumentalities which he, in Mora county, had set in motion. * * *

Although the checks were paid in San Miguel County, the opinion states "* * the crime was clearly committed in Mora County * * *."

Although the funds of Farmers Insurance Group were on deposit in a bank in Colorado, under Territory v. Hale, supra, the misappropriation occurred when defendant issued the drafts.

Finally, under this issue, it is pointed out that § 40A-16-6, supra, requires a misappropriation or taking of a thing of value which belongs to another. The suggestion is that although the misappropriated drafts were a thing of value, they were not the property of Farmers Insurance Group. The reasoning is that the drafts indicated an obligation owing by Farmers Insurance Group, that such an obligation belongs to the creditor and not the debtor. Under this view, no property was misappropriated until the drafts were paid in Colorado.

One answer to this contention is that the drafts at the time of issuance, did not represent any indebtedness on the part of Farmers Insurance Group. The evidence shows that the drafts were issued in payment of false claims. There was no creditor when the drafts were issued. A second answer is that under Elgin v. Gross-Kelly & Co., supra, funds of Farmers Insurance Group were assigned when the drafts were issued. A third answer, under Territory v. Hale, supra, is that the misappropriation occurred when drafts were issued. Whose drafts? Those of Farmers Insurance Group. Those drafts represented money. The misappropriation was of property belonging to Farmers Insurance Group.

We hold that defendant misappropriated drafts of Farmers Insurance Group in Dona Ana County, New Mexico, that those drafts were things of value and that the crimes were committed in New Mexico. Compare Commonwealth v. Welch, 345 Mass. 366, 187 N.E.2d 813 (1963).

Compelled handwriting exemplars.

Over defendant's objection, the trial court ordered defendant to furnish handwriting "exemplars and samples."

Defendant contends that the order, which he obeyed only after being cited to show cause why he should not be held in contempt, violated his privilege against self-incrimination. Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), held that a handwriting exemplar, in contrast to the content of what is written, like the voice or the body, is an identifying physical characteristic outside the protection of the privilege against self-incrimination. We have examined the exemplars. Their content was neither testimonial nor communicative matter; they were handwriting samples only. Defendant's privilege against self-incrimination was not violated by furnishing the exemplars.

Defendant also contends that the trial court had no authority to require him to furnish the exemplars, that in ordering him to do so the court forced defendant to become a witness against himself. This contention goes to the fact that defendant was compelled to furnish the exemplars. Since the exemplars themselves did not violate his constitutional privilege, the com-

pulsion in furnishing the exemplars also did not violate the privilege. Compare Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), where, in discussing the taking of a blood sample from an unconscious person, it is stated: "* * * the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; * * *" As stated in Lewis v. United States, 127 U.S.App.D.C. 269, 382 F.2d 817 (1967), cert. denied 389 U.S. 962, 88 S.Ct. 350, 19 L.Ed.2d 377 (1967): "* * * Appellant's writing could have been compelled on pain of contempt at any stage after he was before the Court." That was what was done here. There was no error in compelling the defendant to furnish the exemplars.

Denial of a preliminary hearing.

Since defendant was charged by an information, he had a constitutional right to a preliminary examination. N.M.Const., art. II, § 14. Defendant had a preliminary examination and was bound over to district court. An information was filed. Defendant attacked the sufficiency of the information. Apparently as a result of this attack an amended information was filed. Defendant was tried on the basis of this amended information.

After the filing of the amended information, and prior to trial, defendant moved that the trial court order another preliminary examination. Defendant's argument to the court in support of this motion shows that he wanted to obtain more knowledge as to the State's theory of the ownership of the property defendant had allegedly obtained by fraud. The trial judge indicated from the bench that defendant had had an adequate preliminary hearing but that defendant could properly have a further preliminary examination as to the ownership of the money. We note, however, that no preliminary examination was ordered. Instead, a witness was called to the stand, sworn, and testified concerning the ownership of the money.

In spite of this unusual procedure, acquiesced in by defendant, he now claims that he was entitled, under our constitution, to another preliminary examination because of the amended information. We do not decide this issue on the basis of the procedure followed. Rather, we consider the relationship of the preliminary examination to the amended information on which defendant was tried.

What is the purpose of a preliminary hearing? State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968), states:

> "* * * The preliminary hearing is to determine whether a crime has been committed, the connection the accused has with it thereby informing him of the nature and character of the crime charged, to perpetuate testimony, and to establish bail, if the offense is bailable." (Citations omitted)

No issue is raised as to the sufficiency of the preliminary examination on the "* * * charge that was placed before the magistrate." In arguing to the trial court for an additional preliminary examination, defendant agreed that the preliminary hearing concerned § 40A–16–6, supra, and that the amended information involved the same section.

It appearing that defendant had a preliminary examination on the charge brought by the amended information, defendant's constitutional right to a preliminary examination was not denied. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945); State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct.App.1969). In *Melendrez* and *Vasquez* there was an issue as to the conformity between the preliminary proceedings and the information. No such issue exists here; the preliminary hearing and the amended information pertained to the same statutory charge. Considering the purpose of a preliminary hearing, defendant's effort to obtain additional discovery of the State's case through a second preliminary hearing had no constitutional basis.

Denial of motion for bill of particulars.

Defendant's motion for a bill of particulars as to the amended information was denied. He claims that this denial deprived him of due process of law. He asserts that the information sought by the motion was to enable him to prepare an adequate defense, and inferentially contends that by denial of the motion he could not properly prepare his defense.

State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965), states:

> "The object of a bill of particulars in criminal cases is to enable the defendant to properly prepare his defense, State v. Graves, 73 N.M. 79, 385 P.2d 635, and, to achieve that fundamental purpose, it must state as much as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged, State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1. However, the district attorney is not thereby required to plead evidence, * * *"

Section 41-6-8(2), N.M.S.A.1953 (Repl. Vol. 6), provides that in determining what facts should be furnished the defendant "* * * the court shall consider the whole record and the entire course of the proceedings against the defendant." The trial court did consider the record and the course of proceedings. This included a transcript of the preliminary hearing consisting of 172 pages plus 11 exhibits. The court asked defendant what information he desired that was not included in the record of the preliminary hearing. Defendant never directly answered the court's question. Instead, his response shows that what defendant sought was the details of the evidence on which the district attorney would rely.

Thus, there are two answers to this issue. First, while the record of the preliminary hearing is not before us, nevertheless the trial court was of the opinion that the preliminary hearing transcript afforded reasonable information as to the nature and character of the crime charged. Nothing in the record before us shows the view of the trial court to be in error. Second, the record does show that defendant sought to require the district attorney to plead evidence. He was not required to do so. State v. Mosley, supra. There was no error in denying the motion for a bill of particulars.

Admission of defendant's confession.

Defendant's written statement was admitted into evidence over his objection. The statement was, in effect, a confession as to several of the counts. Defendant was not given the warnings set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966) before making the statement. Defendant claims error in the admission of the statement because of the absence of the *Miranda* warnings.

Miranda states:

> "* * * the prosecution may not use statements, * * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * *"

See also, Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).

The above quotation shows that the prohibition on the use of statements, obtained when the *Miranda* warnings were not given, applies to statements made to law enforcement officials as the result of custodial interrogation.

Defendant's statement was not obtained by law enforcement officers nor was it obtained as the result of a custodial interrogation. Defendant made his statement to employees of Farmers Insurance Group who had been directed by their superior to investigate claims submitted by defendant. Defendant attempted to show that the Farmers Insurance Group em-

ployees, to whom he made the statement, were agents of or acting on behalf of the district attorney. His attempt was unsuccessful. There is no evidence that the employees who took the statement were agents of or acting on behalf of the district attorney. Even though the *Miranda* warnings were not given, the trial court did not err in admitting defendant's statement.

Asserted loss of jurisdiction.

State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964) holds that the jurisdiction of the trial court in a criminal case may be lost by failure of the trial court to remand for a preliminary examination when its absence is timely brought to the attention of the district court. Generalizing from State v. Vaughn, supra, defendant asserts that defendant was deprived of his constitutional rights, that as a result of this alleged deprival the trial court lost jurisdiction and that the charges against defendant should be dismissed.

Even if we assume that defendant's generalization is correct, there still is no merit to the contention. The constitutional rights which defendant claims were denied have been discussed. There was no denial of constitutional rights in the claims presented; therefore, no basis for defendant's contention.

Denial of the motion to sever.

For purposes of trial, defendant moved that each of the twelve counts be severed. Relying on State v. Paschall, 74 N.M. 750, 398 P.2d 439 (1965), defendant claims the trial court erred in denying the motion to sever. State v. Paschall, supra, seems to indicate that where the various crimes charged were in the execution of a general fraudulent scheme, joinder of the charges for trial purposes is proper. That is the situation here. The dates involved in the counts extend from September 7, 1968 to January 21, 1969. The method of defendant's operation in each count was identical. In each instance it was the property of Farmers Insurance Group that was misappropriated or taken. In our opinion, State v. Paschall, supra, supports the trial court's action in denying the motion.

Further, the decisions are to the effect that there is no automatic rule to be applied by the trial court in ruling on a motion for severance. The trial court must consider the danger of prejudice to defendant, but also must consider problems which would result from a severance. Specifically, the trial court must consider the special circumstances of each case and in the exercise of its discretion, sustain or deny the motion. The trial court's ruling will be sustained on appeal unless an abuse of discretion is shown which results in prejudice to the defendant. State v. Brewer, 56 N.M. 226, 242 P.2d 996 (1952); State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App. 1970); State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct.App.1970).

Here, defendant claims prejudice because the confession related to four of the counts and "its spreading effect is obvious." Since there was evidence of the false claims under each of the counts, we do not agree that it was "obvious" that defendant was prejudiced by the failure to sever the four counts identified in the confession from the other counts. In addition, this claim was not presented to the trial court; there, defendant contended that each of the counts should be severed. Accordingly, this claim is not before us for review. See State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970).

On the claim that was presented to the trial court, we hold that defendant has not shown prejudice from denial of the motion to sever.

Admission of exhibits.

Seventy-four exhibits, taken from the records of Farmers Insurance Group, were admitted over defendant's objection. Defendant claims that a foundation for admissibility had not been laid under business records act. Section 20-2-12, N.M. S.A.1953 (Repl.Vol. 4). The record shows, however, that such a foundation was laid.

Defendant also claims the exhibits should not have been admitted because their relevancy was not established. To the trial court he asserted: "* * * until there has been a basis established that relates that [the business records] to the defendant, the papers themselves are irrelevant." The exhibits were documents submitted by defendant to Farmers Insurance Group. The exhibits were grouped as to each of the counts, as to each group of papers there was testimony that they were received from defendant. At least one paper in each group bore the signature of defendant. The record fully establishes relevancy.

Instructions—given and refused.

Defendant's attack on the instructions given and refused, and our answers, follow.

(a) Instructions given.

(1) Instruction 4 stated the material allegations of each count which the State was required to establish beyond a reasonable doubt before defendant could be found guilty as to that count. Defendant claims the instruction was "confusing" because it referred to venue, identified the crime charged as a felony and stated that the crime could be committed by either a misappropriating or a taking. We see no "confusion" in telling the jury the crime must have been committed in Dona Ana County, see N.M.Const., art. II, § 14, or in identifying the crime charged as a felony, see § 40A–16–6, supra. No objection was raised to the trial court concerning charging in the alternative as to misappropriating or taking; therefore, it will not be considered. State v. Hatley, 72 N.M. 280, 383 P.2d 247 (1963). However, as to the propriety of the alternative instruction, see State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct.App.1969).

(2) Instruction 7 defined "anything of value." Defendant objected that this term was "* * * nowhere included in the case since the Information relates to sums of money, * * *" He claimed that the instruction introduced the idea that a draft is a thing of value. Accepting defendant's interpretation of the instruction, the instruction was proper. Section 40A–16–6, supra, refers to "anything of value" and we have previously pointed out that a draft may be considered as money.

(3) Instruction 14 defined an "aider or abettor." Defendant objected, claiming that any question of defendant being an aider or abettor was beyond the issues of the case. He is not correct. The evidence implicates others in the various counts of fraud and fairly raises the question of whether defendant was an aider or abettor.

(4) Instruction 15 pertained to circumstantial evidence. Defendant's objection to this instruction is that another instruction on circumstantial evidence, requested by the State and adopted by defendant as one of his requests, should have been given. Instruction 15 informed the jury that it could consider both direct and circumstantial evidence in deciding the case. It was a proper instruction. As the other instruction defined circumstantial evidence, it would not have been error to have given it in addition to instruction 15. However, that is not what the defendant requested of the trial court. Defendant wanted the other instruction given and wanted the court not to give instruction 15. Thus, since instruction 15 was a correct instruction, the court properly refused to substitute the other instruction in place of instruction 15.

(5) Instruction 17 told the jury, generally, that neither the prosecution nor the defense were required to call as witnesses all persons who were shown to have been present at any of the events involved and that neither side was required to produce all the exhibits that may have been referred to or suggested by the evidence. Up to this point, defendant had no objection to

the instruction. On the basis of the foregoing generalized statement, the last sentence of the instruction told the jury not to favor or prejudice either party because of the failure of either party to call a witness or produce an exhibit.

Defendant contends the last sentence of the instruction is an incorrect statement of law. He claims the jury could draw an inference unfavorable to the State because of the State's failure to call as a witness the payee named in the drafts issued by defendant. Even if such an inference is proper, a point we do not decide, such an unfavorable inference could not be drawn in this case because the basis for drawing such an inference is not in the record. See State v. Soliz, 80 N.M. 297, 454 P.2d 779 (Ct.App.1969). Since defendant's objection was incorrect as a matter of law, the trial court did not err in giving the instruction over the objection made to it. Further, the last sentence was proper in the light of the part of the instruction to which defendant had no objection.

(b) Instructions refused.

(1) Four of the refused instructions were on the theory that defendant could not be convicted unless defendant misappropriated or took money from Farmers Insurance Group in Dona Ana County. As used in these requested instructions, money meant dollars and cents. At least twice in this opinion we have pointed out that money included the drafts. Defendant improperly sought to limit the meaning of money by these requested instructions.

(2) Neither side requested an instruction as to voluntariness of defendant's confession and the jury was not generally instructed as to how they were to treat the confession. However, defendant requested two instructions which pertained to the confession. One would have told the jury not to consider the confession unless they found a crime had been committed in Dona Ana County. The other would have told the jury they were not bound to believe the confession solely because the court had ruled it to be admissible. Defendant's objection to the refusal of these two instructions was that they "* * * are correct statements of the law and are not otherwise covered in these instructions."

We do not discuss the obvious incompleteness of the two requests in failing to inform the jury as to how they were to consider the confession. We do not do so because the issues to which they were directed were adequately covered by instructions given. As to where the crimes were committed, the material elements of the crimes were defined and the jury was told the proof, beyond a reasonable doubt, must be that these elements were committed in Dona Ana County. Concerning what the jury was to believe, the jury was instructed they were the sole judges of the facts, they were to determine the credibility of the witnesses, and it was for them to determine what part of the evidence was true. It was not error to refuse the two requests which attempted to apply the concept of the general instructions to a particular item of evidence—the confession. See State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969).

The judgment and sentence as a result of the convictions is affirmed.

It is so ordered.

HENDLEY, J., concurs.

SPIESS, Chief Judge (dissenting).

I am unable to agree that the New Mexico court had jurisdiction of the offence involved here. The statute, § 40A-16-6, N.M.S.A.1953, creates an offence denominated "FRAUD." Fraud is defined by the Act as consisting of "* * * the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations."

The jurisdictional question here is, "Where was the property obtained?" The facts are undisputed. Defendant falsely represented the existence of liabilities of his employer, Farmers Insurance Exchange, and drew drafts in payment of such nonexistent liabilities upon his employer payable at a bank located in Colorado. These drafts were delivered to a New Mexico bank to be presented for payment in Colorado and the drafts were honored in Colorado. The New Mexico bank was defendant's agent in effecting collection. § 50A-4-201, N.M.S.A.1953. Consequently, the money was obtained in Colorado by defendant's agent, the New Mexico bank.

In my opinion, it is settled that the prosecution for obtaining property by false pretenses must be laid in the jurisdiction where the offence was consummated by the obtaining of the property. State v. Faggard, 25 N.M. 76, 177 P. 748 (1918); Updike v. People, 92 Colo. 125, 18 P.2d 472 (1933); Connor v. State, 29 Fla. 455, 10 So. 891 (1892); Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899); State v. Smith, 162 Iowa 336, 144 N.W. 32 (1913); State v. Simone, 149 La. 287, 88 So. 823 (1921); Bates v. State, 124 Wis. 612, 103 N.W. 251 (1905); State v. Devot, 66 Utah 319, 242 P. 395, 43 A.L.R. 532 (1925); See Anno. 43 A.L.R. 545.

In my opinion the majority view would be sustainable had New Mexico, by an appropriate statute, provided for the punishment of a person committing a crime in whole or in part within the state. See People v. Zayas, 217 N.Y. 78, 111 N.E. 465 (1916); State v. Moore, 189 Wash. 680, 66 P.2d 836 (1937).

While it is apparent that a crime was committed, in my opinion it was not committed against the State of New Mexico and the courts of this state, consequently, had no jurisdiction to try the defendant, or impose sentence upon him.

I, accordingly, respectfully dissent.

482 P.2d 252

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnny GONZALES, Defendant-Appellant.

No. 528.

Court of Appeals of New Mexico.

Jan. 22, 1971.

Certiorari Denied Feb. 22, 1971.

[redacted]

OPINION

WOOD, Judge.

Convicted of burglary, § 40A–16–3, N.M.S.A.1953 (Repl.Vol. 6), defendant appeals. The issues concern: (1) denial of motion to quash jury array; (2) sufficiency of the evidence; and (3) refusal of a requested instruction concerning lack of intent due to intoxication.

Motion to quash jury array.

In a prior criminal trial at the same term of court, the jury returned a verdict of not guilty. The trial judge excused the members of that jury from further service because they "* * * found a verdict of not guilty where there was no conflict of any consequence in the evidence by the State, and no witnesses whatever, were offered for the Defendant. * * *"

Prior to selection of the trial jury in this case, defendant challenged the jury array, claiming the members of the jury panel "* * * were not selected substantially in accordance with law * * *" Section 19–1–16, N.M.S.A.1953 (Repl.Vol. 4). Defendant asserts: (a) there was no good cause for the discharge of the jurors; (b) in the absence of a showing of good cause or in the absence of a request by a juror, the trial court was without authority to discharge the jurors; and (c) the discharge of the jurors because the trial court disagreed with their verdict deprived defendant of due process and equal protection of the law.

Prior to the enactment of Laws 1969, ch. 222, defendant's contentions had been answered. State v. Martinez, 52 N.M. 343, 198 P.2d 256 (1948); State v. Leatherwood, 26 N.M. 506, 194 P. 600 (1920); see State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966). These decisions followed the view that a defendant could not acquire a vested right to have a particular member of a jury panel sit as a trial juror until the juror had been accepted and sworn. All that defendant had a right to was a fair and

Rufus E. Thompson, Roswell, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, James C. Compton, Jr., Asst. Atty. Gen., for plaintiff-appellee.

impartial jury. If defendant had such a trial jury, the fact that a prospective juror had been improperly excused did not amount to reversible error.

Defendant does not claim that his trial jury was unfair or partial. His claims are based on the 1969 law compiled as §§ 19–1–1 through 19–1–16, N.M.S.A.1953 (Repl.Vol. 4). Contrary to the prior law, held to be directory in State v. Leatherwood, supra, he asserts the new law is mandatory and this mandatory new law did not permit the trial court to discharge the twelve jurors because it disagreed with their verdict.

Our disposition of this issue does not require a decision as to whether §§ 19–1–1 to 19–1–16, supra, are directory or mandatory. Assuming, for this case only, that the statute is mandatory, nothing in the statute prohibits the action taken by the trial judge.

Sections 19–1–1 through 19–1–11, supra, provide generally for selecting, summoning and qualifying jurors; they deal with who is eligible to become a member of a jury panel and who may be excused or exempted from being listed on a jury panel. These sections do not cover the situation here—jurors excused after becoming a member of a jury panel.

Sections 19–1–12 through 19–1–14, supra, pertain to petit jury panels and the selection and qualifying of trial jurors. Defendant does not claim that the members of the petit jury panel in his case, and the trial jurors selected from that panel, were selected and qualified in violation of these statutes.

Section 19–1–16, supra, permits a challenge to "* * * the jury panel on the ground that the members thereof were not selected substantially in accordance with law. * * *" Defendant does not attack the selection of those who were members of the panel; his attack is based on the fact that prior members of the panel had been excused.

The only provision in §§ 19–1–1 through 19–1–16, supra, which pertains to the fact situation in this case appears in § 19–1–12, supra. That section authorizes the district judge, with time limitations not applicable here, to determine "* * * the length of time jurors are retained for service. * * *" The trial court has authority to excuse jurors under this provision.

Since the trial court has authority, under the allegedly mandatory statute, to excuse jurors, the question is whether the trial court properly exercised that authority. The statute does not state the manner in which the authority is to be exercised. In State v. Rodriguez, 23 N.M. 156, 167 P. 426 (1917), LRA 1918A, 1016 (1918), our Supreme Court, without reference to any statutory provision, adopted the rule of law applied in State v. Martinez, supra, and State v. Leatherwood, supra. Thus, we assume, but do not decide, that the trial court excused the twelve jurors for an insufficient reason. This does not amount to reversible error because defendant had no vested interest in having a particular member of a jury panel sit as a trial juror before being accepted and sworn. Since defendant does not claim that the members of the trial jury were unfair or partial, the alleged error by the trial court in excusing the twelve jurors is not a basis for a new trial, and defendant has neither been deprived of due process nor of equal protection of the law.

Sufficiency of the evidence.

The following is undisputed. Defendant, Ramirez, Sanchez and Marquez rode around in a pick-up truck from 10:00 p. m. until 2 or 3:00 a. m. Throughout this time they were drinking. The four then went to defendant's house where they drank and talked. They were drinking beer and vodka. Only the amount Ramirez drank is identified; there is no evidence as to the amount defendant drank. At defendant's house, someone (unidentified) brought up the question of breaking into a package liquor store. The idea was opposed by Ramirez. Nevertheless, all four got into the pick-up truck and drove to the liquor store, with the intent of breaking into the store. Upon arriving at the store, one of

the men took a sledgehammer from the pick-up.

About 4:30 a. m. the alarm in a package liquor store was activated. Responding to the alarm, police officers went to the store. They observed broken windows on the north and northeast side of the store; liquor bottles scattered (some broken) inside the store; one liquor bottle broken outside one of the broken windows; and drops of blood near one of the broken windows. The officers saw two persons running from the scene; both were apprehended. One was Sanchez who, when apprehended, had two liquor bottles. A broken liquor bottle was nearby. The other person was defendant. Defendant had no liquor on him when caught. When apprehended, defendant gave his name as Herrera. The manager of the liquor store testified as to items "missing" from the store and as to items that had been "broken."

There is a conflict in the evidence as to whether it was defendant or Sanchez who had a cut on his thumb when caught.

Ramirez testified that he was pretty drunk and that defendant was intoxicated. He testified that he "thought" that defendant opposed the idea of breaking into the store during the discussion at defendant's house. He testified that he was uncertain as to whether defendant got out of the pick-up when the four arrived at the liquor store. He admitted to prior testimony to the effect that defendant, Sanchez and Marquez got out of the truck upon arrival at the store. Ramirez admitted that when he saw the officers he drove off, and at that time he was alone.

Defendant claims: (1) there is no evidence of unauthorized entry and (2) there is no evidence that defendant committed the burglary. On this basis he contends the trial court erred in denying his motion for an acquittal because of insufficient evidence.

The rules applicable to these two claims are: we view the evidence in the light most favorable to the State; we also resolve conflicts in the evidence and indulge all permissible inferences in favor of the verdict. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct.App.1969). Under these rules, defendant's claims as to the sufficiency of the evidence are without merit.

Defendant's claim of no evidence of unauthorized entry is based on the failure of the store manager to testify whether the entry was authorized or unauthorized. While there is no direct testimony of unauthorized entry, there is circumstantial evidence which shows an unauthorized entry. It is: going to the store with the intent of breaking in; the sledgehammer; the broken windows; the flight from the scene; and the "missing" bottles of liquor. Circumstantial evidence may be used to establish an unauthorized entry. See State v. Slade, 78 N.M. 581, 434 P.2d 700 (Ct.App. 1967). The circumstances here point unerringly to an unauthorized entry and thus meet the requirements of proof by circumstantial evidence.

Defendant's second claim, that there is no evidence that he committed the burglary, has two points. First, he asserts the only direct evidence against defendant is that he was present at the scene and presence alone is insufficient for conviction. See State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970). Second, he contends the circumstantial evidence is insufficient to sustain his conviction as an aider and abettor. See State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct.App.1970); State v. Harrison, supra.

Arguing in support of this second claim, defendant reviews the evidence in a light most favorable to defendant. This is an improper approach; we review the evidence in the light most favorable to the State. State v. Parker, supra; State v. Kennedy, supra. A proper review of the evidence shows that defendant went to the liquor store in the group which intended to break in; he left the pick-up with Sanchez and Marquez when they arrived at the store; he fled when the officers arrived;

and he gave a false name when apprehended. This is not direct evidence that defendant committed the crime. It is circumstantial evidence that he committed the crime.

Defendant claims the circumstantial evidence is insufficient because it fails to exclude every reasonable hypothesis other than his guilt. State v. Hardison, supra. We disagree. Defendant's flight indicates a consciousness of guilt. State v. Beachum, (Ct.App.), 82 N.M. 204, 477 P.2d 1019, decided November 6, 1970. This flight, together with the circumstances that defendant came to the store with intent of breaking in, and gave a false name when arrested, absent an explanation of his reasons or motive, permits an inference of guilt. State v. Rodriguez, supra; see State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App. 1969). The circumstances exclude every reasonable hypothesis other than defendant's guilt and are sufficient to sustain the conviction.

Apart from the question of defendant having committed the burglary, there is also evidence that defendant was an aider and abettor to the others who committed the burglary. Aiding and abetting is established by evidence of a community of purpose; a shared criminal intent in the unlawful undertaking. State v. Harrison, supra. The evidence shows aiding and abetting if it shows that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known "* * * that commission of an offense already undertaken has the aider's support or approval. * * *" State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937). The circumstantial evidence reviewed above shows, at the least, that defendant encouraged the burglary by going with the others to the store with an intent to break into the store and, upon arrival, left the pick-up with Sanchez and Marquez, one of whom had the sledgehammer.

There being sufficient evidence to sustain defendant's conviction, the trial court did not err in denying the motion for acquittal.

Refused instruction concerning lack of intent due to intoxication.

Defendant requested an instruction concerning his intent to commit the burglary. The instruction would have told the jury to acquit defendant if he "* * * did not have the intent to commit the unlawful act of burglary as a result of intoxication, * * *" He claims the refusal of this requested instruction was error.

Intoxication may be shown to negative the existence of the required intent. Where defendant claims an absence of intent due to intoxication, the issue of intent is for the jury. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967). We assume, but do not decide, that under the facts of this case, defendant would have been entitled to an instruction concerning a lack of intent. See State v. Lujan, 82 N.M. 95, 476 P.2d 65 (Ct.App.1970).

The requested instruction as to lack of intent was, however, properly refused because of its wording. It would have told the jury to consider "* * * the fact that the accused was intoxicated * * *" Whether defendant was intoxicated, under the evidence, was not a fact to be declared by the court; rather, it was for the jury to determine whether defendant was intoxicated. Compare State v. Lujan, supra. "In order to preserve error for review because of the failure of the trial court to instruct upon a specific issue or defense, the defendant must tender a proper instruction on the issue. * * *" State v. Williams, supra. As worded, the requested instruction was not proper because it would have required the jury to accept, as a fact, a matter which was for the jury to decide. Accordingly, the trial court did not err in refusing the instruction.

The judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and LA FEL E. OMAN, Justice, Supreme Court, concur.

482 P.2d 257

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike POLSKY, Defendant-Appellant.

No. 522.

Court of Appeals of New Mexico.

Feb. 5, 1971.

Certiorari Denied March 9, 1971.

H. Gregg Privette, Privette & Privette, Las Cruces, for appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

OMAN, Judge.

Defendant appeals from his conviction of unlawfully selling a narcotic drug, to wit, heroin, in violation of § 54-7-14, N.M.S.A. 1953 (Repl. 8, pt. 2, 1962). We affirm.

Defendant relies upon four stated points and numerous sub-points for reversal. We shall consider them in the order of their presentation in his brief in chief.

He argues his first two points together under two sub-points, or divisions, which he has entitled "Speedy Trial" and "Denial of Discovery." His contention, in his brief in chief under "Speedy Trial," is that he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States, made applicable to the states through the Due Process clause of the Fourteenth Amendment [Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)], and Art. II, § 14, Constitution of New Mexico. However, in his reply brief he asserts that if the prejudice he claims to have suffered was not a deprivation of his right to a speedy trial, then it was a denial of due process as guaranteed by Amendment XIV, § 1, Constitution of the United States, and Art. II, § 18, Constitution of New Mexico.

The substance of his complaint, pertinent to his argument under "Speedy Trial," is that he was prejudiced by the intentional delay of the State in not arresting him until May 5, 1969, for the offense he was charged with having committed on March 26, 1969, when the State had all its evidence against him as of the date of the commission. He contends that by reason of this delay he was deprived of the testimony of certain witnesses at his preliminary hearing on June 16, 1969, which would have been available to him had his arrest not been delayed to coincide with the arrest of some twenty-seven other persons also charged with narcotic drug violations.

His position is that the State had planned undercover narcotic investigations at New Mexico State University from September 1968, and had planned to make mass arrests in May of 1969. These mass arrests were referred to as the "May bust." Defendant and some of the others arrested were students at the University, and others of them apparently just associated with students and spent time about the University. The spring semester at the University terminated some time during the latter part of May or first part of June. The exact date of this termination does not appear in the record, but it was after May 5, the date of the arrests, and before June 9, the date of the preliminary hearing of one of the others arrested, and at which preliminary hearing were present the witnesses defendant contends were lost to him. He claims immediately after the preliminary hearing on June 9 the witnesses began to scatter and he was unable to locate them or get them as witnesses on his behalf at his preliminary hearing on June 16.

It appears from the record that defendant's contention in the trial court related solely to his claimed denial of a speedy trial, and, as already stated, in his brief in chief he relies entirely upon this constitutional right. In the trial court and in this appeal he has consistently taken the position that his "* * * argument is not with the time which elapsed between date of arrest and the trial, * * *" but with the time which elapsed between the date of the commission of the alleged offense, to wit, March 26, 1969, and the date of the filing of the criminal complaint in the magistrate court and his arrest, to wit, May 5, 1969.

The State takes the position the constitutional guarantee of a speedy trial has no application until after the formal institution of the prosecution, which in this case was May 5, by the filing of the complaint and the arrest of defendant. It

relies upon the following cases in which it was held the right of a speedy trial arises, or comes into application, only upon the initiation of the formal prosecution proceedings, and with which holdings we agree. McConnell v. United States, 402 F.2d 852 (5th Cir. 1968), cert. denied, 394 U.S. 933, 89 S.Ct. 1208, 22 L.Ed.2d 464 (1969); Foley v. United States, 290 F.2d 562 (8th Cir. 1961), cert. denied, 368 U.S. 888, 82 S.Ct. 139, 7 L.Ed.2d 88 (1961); State v. French, 104 Ariz. 359, 453 P.2d 505 (1969); State v. Trotter, 203 Kan. 31, 453 P.2d 93 (1969). See also the following cases which have so held: Parker v. United States, 252 F.2d 680 (6th Cir. 1958), cert. denied, 356 U.S. 964, 78 S.Ct. 1003, 2 L.Ed.2d 1071 (1958); Nickens v. United States, 116 U.S.App.D.C. 338, 323 F.2d 808 (1963), cert. denied, 379 U.S. 905, 85 S.Ct. 198, 13 L.Ed.2d 178 (1964); State v. Saiz, 103 Ariz. 567, 447 P.2d 541 (1968); People v. Jordan, 45 Cal.2d 697, 290 P.2d 484 (1955); State v. LeVien, 44 N.J. 323, 209 A.2d 97 (1965); Click v. Eckle, 174 Ohio St. 88, 186 N.E.2d 731 (1962). Therefore, the State urges that since defendant complains only of the delay in initiating the prosecution on May 5, and since the constitutional guarantee of a speedy trial has no application to the time and events prior thereto, defendant must fail.

There is merit to the State's position, but because of the nature of defendant's claim and his arguments in support thereof, we are inclined to consider his claim as raising a due process issue, which we feel is more properly the area within which an issue such as presented by him properly falls. See Ross v. United States, 121 U.S. App.D.C. 233, 349 F.2d 210 (1965); Woody v. United States, 125 U.S.App.D.C. 192, 370 F.2d 214 (1966); United States v. Deloney, 389 F.2d 324 (7th Cir. 1968); United States v. Evans, 385 F.2d 824 (7th Cir. 1967); United States v. Lee, 413 F.2d 910 (7th Cir. 1969); United States v. Stanley, 422 F.2d 826 (9th Cir. 1969).

However, we recognize there are authorities which have held, or seem to suggest, the right to a speedy trial has application to, or embraces, times and events which precede the initiation of formal charges by the State. Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); State v. Baca, (Ct.App.), 82 N.M. 144, 477 P.2d 320, decided November 13, 1970; United States v. Rivera, 346 F.2d 942 (2d Cir. 1965); Scott v. State, 84 Nev. 530, 444 P.2d 902 (1968); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968).

As already stated, we agree with the jurisdictions which have clearly and expressly passed upon this question, and which have held the constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. Pre-arrest, or pre-formal prosecution, delays may, however, constitute a denial of due process. State v. Baca, supra; Ross v. United States, supra; Woody v. United States, supra; United States v. Lee, supra; United States v. Deloney, supra; United States v. Evans, supra; United States v. Jones, 403 F.2d 498 (7th Cir. 1968), cert. denied, 394 U.S. 947, 89 S.Ct. 1280, 22 L.Ed.2d 480 (1969); United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967); Powell v. United States, 122 U.S.App.D.C. 229, 352 F.2d 705 (1965).

The trial court, in denying defendant's motions directed toward his claim of prejudice, observed that the State had a substantial public interest in the effectiveness of undercover police work and was not bound to immediately arrest defendant after his commission of the offense on March 26, and thereby destroy the effectiveness of its planned police work in apprehending a number of other narcotics law violators. The undercover police investigation was apparently concluded in late April or early May, and defendant was arrested very shortly thereafter.

Certainly the delay of forty days between the commission of the offense and the arrest was not in itself suggestive of prejudice. State v. Baca, supra. There is not here involved any questionable identification of defendant, or any question of incapacity on the part of defendant, the

undercover agent, or the police officer, who accompanied the undercover agent until shortly before the agent made the purchase of heroin from defendant, to recall the time, place and events surrounding the sale by defendant. Defendant denied making the sale, but he testified clearly and without hesitation concerning his meeting with the undercover agent at the time and place of the consummation of the sale. The undercover agent and the other officer also testified clearly as to the events on the evening of the sale.

As already stated, defendant relies entirely upon his claim of prejudice because the "May bust" closely coincided with the termination of the spring semester at the University, and his claim that he was thereby deprived of the presence of witnesses at his preliminary hearing on June 16. The circumstances here are not such as to bring defendant within the principles announced in either Ross v. United States, supra, or Woody v. United States, supra, upon which he primarily relies.

Certainly, after he was charged and arrested on May 5, he knew he would be called upon to resist the charges. He employed an attorney within two or three days after his arrest to represent him in resisting the charges. Although the date when the semester ended is not shown by the record, defendant testified his arrest and subsequent incarceration for four or five days preceded the week of final examinations. The record reflects in one of his tenders of proof that he was arrested two weeks before the semester ended, and there are references in the record to the semester having ended in the latter part of May or first part of June. In any event, it is conceded all the witnesses he claims were unavailable to him on June 16 were present at the preliminary hearing of another defendant on June 9. Defendant's attorney had received notice by letter dated May 27 that defendant's preliminary hearing would be conducted on June 16, and the attorney was present at the preliminary hearing on June 9 when all the claimed witnesses were present.

Under these circumstances, we are unable to hold defendant's constitutional rights were prejudiced by any actions on the part of the State. The State was in no way responsible for defendant's failure to have available on June 16 some witnesses who may have been able to properly attack the undercover agent's general reputation for credibility. It is not contended any of the claimed absent witnesses had knowledge of or could testify to any of the circumstances surrounding the sale, or could in any way directly rebut the State's evidence in regard thereto. The most defendant could have accomplished by their presence would have been an indirect attack on the State's case by attacking the general credibility of the undercover agent. If defendant wished to make such an indirect attack on the State's case, he should have exercised reasonable diligence in preparing the attack.

Under "Denial of Discovery," defendant contends the trial court erred (1) in denying his "Motion for Dedimus Postestatum," by which he sought authority to take the sworn testimony of a Mr. Gaither, who lived in New York, and who defendant alleged had "personal knowledge of matters touching on the credibility * * *" of the undercover agent, and (2) in denying his motion to take the deposition of a Mrs. Zappia, who lived in Iowa, and who defendant alleged would testify to acts committed by the undercover agent which would discredit him as a witness. Defendant relies upon State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App.1970); Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969); State v. Tackett, 78 N.M. 450, 432 P.2d 415, 20 A.L.R.3d 1 (1967); State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963); Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). None of these cases are in point. The Turner, Mascarenas, Tackett and Jencks cases all dealt with the rights of a defend-

ant to have produced by the State exculpatory matters, or certain documents, from the State's files of the case. None dealt with the question of the taking of depositions in a criminal case. In the Armijo case it was stated that:

> "* * * there is no question but that under the common law, the defendant had no right to perpetuate the testimony or to take depositions of witnesses, either for or against him. In New Mexico, we have no statute nor any rule of court which authorizes the taking of depositions in a criminal case, and, therefore, the common law is still in effect on this subject."

Defendant, however, seeks to avoid the effect of the quoted language from the Armijo case and to bring himself within the embrace of the following language taken from the opinion in the Turner case:

> "* * * Discovery is accorded where to deny it deprives a defendant of a constitutional right, see Mascarenas v. State, supra, and where a particularized need has been demonstrated, State v. Tackett, 78 N.M. 450, 432 P.2d 415, 20 A.L.R.3d 1 (1967); cert. denied, 390 U.S. 1026, 88 S.Ct. 1414, 20 L.Ed.2d 283 (1968). * * *"

Defendant argues that the delay of forty days between the commission of the alleged offense and his arrest constituted a deprivation of his constitutional rights, and "* * * The particularized need was to present witnesses in his defense, lost to him by the State's action." He must fail in this argument because, as above shown, he was not deprived of his constitutional rights, and the witnesses were not lost to him by any action of the State.

In his third point relied upon for reversal, defendant asserts the evidence was insufficient to support the verdict, and the errors committed by the trial court were such as to constitute cumulative error requiring reversal.

The responsibility of an appellate court is to review the trial proceedings, consistent with principles of appellate review, for the purpose of making sure the accused had a fair trial, consistent with applicable principles of law and rules of procedure. In making this review, the appellate court must affirm a conviction unless the record reveals a very real possibility of a miscarriage of justice. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App.1969).

In determining whether there is substantial evidence to support a conviction, the appellate court must view the evidence in the light most favorable to the State, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate support for a conclusion. State v. Encee, 79 N.M. 23, 439 P.2d 240 (Ct. App.1968). The fact that there were conflicts in the evidence does not make the State's evidence insubstantial. State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct.App. 1970). The appellate court may not properly substitute its judgment for that of the jury as to credibility of the witnesses or the weight to be given the evidence. Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968); State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967); State v. Tafoya, 80 N.M. 494, 458 P.2d 98 (Ct.App.1969); Rein v. Dvoracek, 79 N.M. 410, 444 P.2d 595 (Ct.App.1968).

Defendant argues that the undercover agent was impeached as a matter of law. He cites no authority for his position. However, our review of the record convinces us otherwise.

He also urges the trial court erred in not permitting him to read to the jury as evidence certain criminal statutes. His claim is the evidence showed the undercover agent had committed violations of these statutes, and, therefore, he was entitled to read the statutes to the jury as evidence that the agent was a criminal and was not to be believed. His offer ob-

viously did not comply with the proof required to establish the witness' conviction of a crime as provided in § 20–2–3, N.M.S.A.1953 (Repl. 4, 1970). The reading of the statutes was not essential to proof of bad moral character, if this is what defendant was seeking to accomplish. Section 20–2–4, N.M.S.A.1953 (Repl. 4, 1970). The witness was not on trial for violations of these tendered statutes, and the jury in this case could not properly have determined his guilt or innocence of any such violations. The trial court did not err in refusing the tender.

Defendant refers to the undercover agent as an informer, and we shall so consider him for the purpose of defendant's attack upon the sufficiency of the evidence to support his conviction, although the undercover agent was a police officer. Defendant takes the position that this court should qualify its decision in State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970), that a defendant may be convicted on the uncorroborated testimony of an informer. He argues that we should adopt the rule relative to the necessity for corroboration of the testimony of an accomplice and of a victim of rape. As to the necessity for corroboration of the testimony of an accomplice, defendant is in error. State v. Gutierrez, 75 N.M. 580, 408 P.2d 503 (1965); State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960); State v. Maes, supra. As to the extent of the corroboration required, and the reasons for requiring corroboration of the testimony of an alleged rape victim, see State v. White, 77 N.M. 488, 424 P.2d 402 (1967); State v. Shouse, 57 N.M. 701, 262 P.2d 984 (1953); State v. Walton, 43 N.M. 276, 92 P.2d 157 (1939); State v. Shults, 43 N.M. 71, 85 P.2d 591 (1938); State v. Ellison, 19 N.M. 428, 144 P. 10 (1914); State v. Carrillo (Ct.App.) 82 N.M. 257, 479 P.2d 537, decided December 11, 1970. Even if we were to modify the holding in State v. Maes, supra, so as to make it conform to the rule requiring coroboration in rape cases, the evidence would still be sufficient to sustain defendant's conviction. However, we reaffirm the rule announced in State v. Maes, supra, that a defendant may be convicted on the uncorroborated testimony of an informer.

Defendant next contends the trial court erred in permitting a Miss Halliday to testify. She had been convicted at a prior trial for making a sale of heroin to the undercover agent about thirty minutes prior to the sale made to this agent by defendant. As we understand defendant's position, he is claiming error because the convictions of Miss Halliday and defendant arose "* * out of the same set of facts. * * *" He cites no authority for his position, and we need consider his contention no further, because the convictions did not arise "* * out of the same set of facts. * * *"

His concluding argument, as to the insufficiency of the evidence to support the verdict, is that the evidence shows a break in the chain of custody of the substance sold by defendant to the undercover agent, and supports a clear inference that the FBI expert, who testified the substance was heroin, did not examine the same substance forwarded for examination by the Las Cruces City Police Officer, or there had been a tampering with the package containing the same. We disagree.

The testimony of the Las Cruces City Police Officer was that he received the two plastic vials or containers from the undercover agent, and he packaged them with a slip of yellow paper and mailed them to the FBI laboratory for analysis. These vials and the slip of yellow paper were marked as State's Exhibit No. 1, and identified by the police officer as the materials he had mailed to and subsequently received back from the FBI. The FBI expert who made the analysis identified Exhibit No. 1 as the materials he received from the Las Cruces Police Department. He testified he chemically examined the contents of the vials; determined from his examinations that it was heroin; replaced the unused portions of the contents in the vials; repackaged the

vials and the yellow slip of paper; and then mailed the same to the Las Cruces Police Department, attention of the officer who had mailed the exhibit to him. The exhibit was then offered and received into evidence without objection on the part of the defendant. Compare State v. Lujan, 82 N.M. 45, 476 P.2d 65 (Ct.App.1970); State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970).

Under his third point, defendant also urges that the many errors he claims were committed by the trial court were cumulative and require reversal. The doctrine of cumulative error may be raised as an issue on direct appeal. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App.1967). However, defendant must fail in his contention here because (1) the trial court did not commit the many errors he claims were cumulative, and (2) because a reading of the entire record demonstrates he did receive a fair trial.

Defendant's final point relied upon for reversal is that: "A mistrial should have been declared because of the improper inflammatory and prejudicial actions of the prosecutor during the course of trial and in final argument."

By way of preface to what he says were "* * * five areas of repeated misconduct by the district attorney * * *", defendant stated he "* * * would show this Court but one example of the numerous acts calculated to inflame the jury. * * *." He then referred to alleged parading of a highly prejudicial mug shot of him before the jury. The record fails to support his contention. The mug shot was not received into evidence.

Defendant claims prejudice by reason of the district attorney's reference to the belief by Miss Halliday that defendant was a drug addict. Miss Halliday was questioned without objection about having seen defendant use heroin, about having taken heroin from him to prevent him from using it, and about a disagreement they had over her returning heroin to defendant on the date of the offense for which he was convicted. In his closing remarks the district attorney stated:

> "If I remember her testimony correctly, she took this heroin from Mike Polsky because she thought he was addicted and he was hooked and she didn't want to give it back and they had an argument and as a result she gave him the heroin on the very day in question. * *"

There was support for the argument in the evidence, and no objection was made to the argument. Thus, if error was committed, it was not preserved for review. See State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969); State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967); State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct.App.1968).

Defendant also complains of the district attorney's reference to defendant's hospitalization for infectious hepatitis. On cross-examination defendant was questioned about a recent hospitalization in New York City, and he stated he had been hospitalized for infectious hepatitis. When asked if infectious hepatitis could be contracted by the use of needles, objection was made and sustained to the question, and shortly thereafter the trial court instructed the jury to "* * * disregard entirely the questions in regard to hepatitis * *"

In his closing argument the district attorney remarked:

> "* * * One thing is the hesitancy of the defendant to reveal this hospitalization that the defendant had, other than the fact that it was infectious hepatitis. Infectious hepatitis, how do you get infectious hepatitis? I will ask you that. I will ask you if you remember Billie Halliday testified to you that she had seen Mike Polsky injecting himself with heroin."

It could reasonably be concluded from these remarks that the district attorney was suggesting defendant contracted the infectious hepatitis from injecting himself with heroin. In view of the court's ruling and admonition to the jury on the question of the cause of infectious hepatitis,

the district attorney's argument was improper. However, considering the manner of the phrasing of the remarks, the court's prior admonition to the jury, and the fact that defendant made no objections to the remarks, we are of the opinion the impropriety of the argument did not amount to reversible error, and no error was preserved for review. See State v. Hudson, supra. Nothing said in State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966), requires us to hold otherwise.

The next area of claimed misconduct on the part of the district attorney relates to his comments upon the taking of the Fifth Amendment by a witness. Her testimony, on direct examination, was that she had been a student at the University, had met the undercover agent in December 1968 or January 1969; had on one occasion seen him smoking a marijuana cigarette on the University campus; and he had supplied the cigarette and offered it to her, but she had declined the offer.

There was no evidence connecting defendant with the incident testified to by Miss Sunderland and there was no evidence in any way connecting Miss Sunderland with the offense for which defendant was convicted. It is apparent her testimony was offered by defendant solely upon the question of the agent's credibility.

On cross-examination she was asked the following questions and made the following answers without objection:

"Q. Have you ever used marijuana?

"A. I would like to plead the Fifth Amendment.

"Q. Have you ever possessed marijuana?

"A. The same.

"Q. The same what?

"A. Plead the Fifth Amendment.

"Q. Have you ever taken any other drugs other than marijuana?

"A. Plead the Fifth Amendment.

"Q. Have you ever sold any drugs?

"A. Plead the Fifth Amendment."

No instruction was given or requested to the effect that the failure of the witness to answer questions on the ground her answers would tend to incriminate her—or on her plea of the Fifth Amendment—could not be made the basis of any inference by the jury, favorable to either the prosecution or the defendant, which is a generally accepted rule of law. Billeci v. United States, 87 U.S.App.D.C. 274, 184 F.2d 394 (1950), 24 A.L.R.2d 881 (1952); Beach v. United States, 46 F. 754 (C.C.Cal. 1890); Annot., 24 A.L.R.2d 895 (1952), and cases cited therein.

As above indicated, other than the denial by defendant of having made the sale of heroin, his entire defense was directed at the credibility of the State's witnesses, and particularly the credibility of the undercover agent. In his opening argument to the jury, the district attorney strongly stressed the frankness with which the agent had admitted certain misconduct on his part, elicited by questions from defense counsel, and the difficulties under which the agent had been required to work to accomplish the undercover police purposes. As a part of his closing argument in defense of the integrity of the agent, the district attorney stated:

> "* * * when somebody comes in before this Court and says that Kelly Hagen [the agent] did this, we say now, Mrs. Sutherlin, [apparently meaning Miss Sunderland] what did you do, I take the Fifth Amendment, I'm not going to tell * * * I didn't hear, Ladies and Gentlemen of the Jury, the Fifth Amendment mentioned once by Kelly Hagen, Mike Gonzales, [or] Billie Halliday [the State's witnesses] * * *"

Defense counsel, in his closing argument, made a long and extremely strong attack upon the agent's morals, character and integrity. He repeatedly referred to the agent as a liar, to answers made by the agent as lies, to the difficulties counsel had in getting answers from the agent, and to unfair and prejudicial acts on the part of

the State. He closed his argument with the following:

"One last comment, that none of these witnesses for the State took the Fifth Amendment. They didn't have to, they just lied. This little girl from Albuquerque [Miss Sunderland], now consider her on this witness stand. She came down here and she testified and she knew when she got on that stand what kind of questions were going to be asked of her and she knew it wasn't going to be pleasant and she could have lied very simply she could have pulled a Kelly Hagen. Have you ever used marijuana, she could have said no, sir. Would any one of you really questioned that girl, I think you would have bought her lie, not several, but bang, bang, bang, and she took the Fifth. Incidentally, the true meaning of the Fifth Amendment, it isn't quite as the district attorney stated to you, it is a statement that I refuse to answer on the grounds that what I say might tend to incriminate me, not that it will incriminate me. There is a big difference between who has got a hammer, the district attorney, over her. Consider the man that prosecutes, then bear that in mind when you remember how these witnesses testified. * * *"

In his rebuttal closing argument, the district attorney stated:

"He [defense counsel] talked about Miss Sunderland taking the Fifth Amendment. I think, if I am not mistaken here, he had cautioned her that she could take the Fifth and how she could take it. Ladies and Gentlemen of the Jury, our witnesses came here, Kelly Hagen bared his soul to you. * * *"

We agree that when a witness, other than the accused, declines to answer a question on the ground his answer would tend to incriminate him, the refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. Perhaps the only way of protecting against an improper inference being drawn by the jury is for neither counsel to comment on invoking the Fifth Amendment and for the court to give a proper cautionary instruction thereon. However, it is apparent to us that the remarks of both counsel in this case as to the Fifth Amendment related solely to the question of the credibility of Miss Sunderland and the State's witnesses, and particularly as to the credibility of the undercover agent. We are of the opinion that under the facts of this case, and in the light of the remarks of both counsel, no impermissible inference as to defendant's guilt was likely to have been drawn by the jury from the remarks of the district attorney or from the refusal of Miss Sunderland to answer the questions asked of her. Compare State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969). As already stated, no instruction to the jury on the issue was requested by either side.

Defendant next claims misconduct on the part of the district attorney by his remarks concerning the conviction of Miss Halliday, to which reference is above made. Miss Halliday was called as a witness by both the State and defendant, and her testimony as to her conviction was received without objection. Defendant now claims a continuing objection was made to her appearance as a witness. We do not so understand the record. His objection at a pretrial hearing, as we understand it, was simply that the witnesses he claimed he had lost, by reason of the State's delay in arresting him, would testify not only as to the credibility of the undercover agent, but also as to the credibility of Miss Halliday. Even if we were able to distort this into a continuing objection to her testimony at trial, as now claimed by defendant, he must still fail for the reason that we have above ruled against his claim of prejudice by reason of the delay in charging and arresting him.

The district attorney did make remarks in his closing arguments concerning the testimony of Miss Halliday, and he expressed sorrow over her imprisonment, which he felt was due to her being "vic-

timized" by defendant. However, defendant made no objections to any of these remarks, and in his closing argument referred to her testimony as having been coerced by the State and the district attorney, who held a hammer over her. He cannot now be heard to say he was prejudiced by remarks to which he made no objection. Heald v. United States, 175 F.2d 878 (10th Cir. 1949); State v. Hudson, supra; Grandbouche v. People, 104 Colo. 175, 89 P.2d 577 (1939). The annotation in 48 A.L.R.2d 1016 (1956), and cases cited therein, upon which defendant largely relies, are not in point. As above stated, defendant and Miss Halliday were not convicted of the same offense or of offenses arising out of the same facts or circumstances. Defendant was not convicted because Miss Halliday had also been convicted of selling heroin. The record before us does not disclose the evidence upon which she was convicted, but only that she was convicted for selling heroin. In any event, defendant was convicted upon the evidence adduced as against him.

The next acts of claimed misconduct are that the district attorney vouched for the credibility of Miss Halliday and the undercover agent, and made inflammatory remarks. Numerous comments by the district attorney are relied upon by the defendant for these claimed errors. None of them, however, amount to a direct vouching by the district attorney for the credibility of either of the said witnesses. Some of the remarks may properly be construed as suggesting confidence by the district attorney in the credibility of the witnesses, and some of them approach the outside limits of permissible argument, if in fact they did not transcend the realm of propriety. Compare Taylor v. United States, 134 U.S. App.D.C. 188, 413 F.2d 1095 (1969). We appreciate a prosecutor is given reasonable lattitude in his closing arguments, and the trial court has wide discretion in controlling the scope of such arguments. State v. Pace, supra. See also United States v. Lewis, 423 F.2d 457 (8th Cir. 1970); State v. Gonzales, 105 Ariz. 434, 466 P.2d 388 (1970); State v. Hanson, 287 Minn. 317, 176 N.W.2d 607 (1970); Conyers v. Wainwright, 309 F.Supp. 1101 (S.D.Fla.1970). However, a prosecutor must exercise good faith and reasonable caution to avoid unfairness. This does not mean, however, that the entire burden is on the prosecutor to make certain his remarks may not possibly be given an improper construction. If a defendant is of the opinion remarks by the prosecutor exceed the bounds of propriety, the burden is on him to make objection and call the objectionable matter to the attention of the trial court. State v. Hudson, supra. Defendant failed to do so here, and, thus, failed to preserve the error, if error was committed. Defendant cannot excuse his failure to object on the ground that to have done so would have magnified the error in the minds of the jury. Nothing said in Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960), or in Handford v. United States, 249 F.2d 295 (5th Cir. 1957), upon which defendant relies for his failure to object, suggests he had no duty to object to preserve the error he now claims, if error there was. Jurors are generally sincerely interested in adhering to the trial court's instructions and admonitions and in accomplishing justice, and they are not nearly so emotional, so given to prejudice, or so incapable of deciding issues fairly, as some attorneys and some courts seem to feel.

Defendant finally claims misconduct on the part of the district attorney in stating a personal belief in defendant's guilt. We disagree with defendant's interpretation of the district attorney's remarks, and we also disagree with his contention that the case of Hall v. United States, 419 F.2d 582 (5th Cir. 1969) is directly in point. It is true the conviction of Hall was reversed because of remarks made by the prosecutors in their arguments, but the remarks there made were far more prejudicial than the remarks made by the district attorney in the present case.

Again, defendant made no objection to the remarks he now claims were so prejudicial to him, and, therefore, preserved no error for review.

It is true the district attorney commented on his duty to prosecute "* * * those people who have violated the laws of the State * * *" and that was why they were all present in court. This may be construed as a belief by the district attorney in defendant's guilt, but the very fact that the district attorney files an information, and then forcefully prosecutes the defendant thereunder, is subject to the same construction. Jurors are informed as to the position occupied by the district attorney, as well as that occupied by defense counsel, and they are instructed as to the presumption of innocence with which the accused is clothed, the burden which the State must bear in securing a conviction, that a verdict of conviction must find support in the facts as found by them from the evidence, and that statements of counsel are not evidence. We are not impressed that jurors disregard these instructions, merely because something said or done by the prosecutor is subject to a construction which may not be in complete accord with the court's instructions. In any event, the error, if any, was not preserved for review. State v. Montoya, supra.

It follows from what has been said that the judgment of conviction should be affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

482 P.2d 913

SOUTHERN UNION GAS COMPANY,
Petitioner-Appellee,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Respondent,

United States of America, Proposed Intervenor-Appellant.

No. 9171.

Supreme Court of New Mexico.
March 22, 1971.

Victor R. Ortega, U. S. Atty., Stephen L. Reveal, Asst. U. S. Atty., Albuquerque, L. Patrick Gray, III, Asst. Atty. Gen., Robert V. Zener, Walter H. Fleischer, Dept. of Justice, Washington, D. C., for appellant.

Montgomery, Federici, Andrews, Hannahs & Morris, Seth D. Montgomery, Santa Fe, Strasburger, Price, Kelton, Martin & Unis, A. S. Grenier, Dallas, Tex., for appellee.

OPINION

TACKETT, Justice.

This action was brought in the District Court of Santa Fe County, New Mexico, by Southern Union Gas Company, designated "Company," requesting review of an order of the New Mexico Public Service Commission, designated "Commission," which denied Company's application for a rate increase. The appellant United States of America, designated "U.S.," sought to intervene as a party in support of the Commission's order. The U.S. appeals the order denying intervention. The district court did, however, allow the U.S. to appear as amicus curiae.

There are two questions before the court in the instant case: (1) Is the U.S. a "person" under § 68-3-2, N.M.S.A., (1953 Comp., 1969 Pocket Supp.)? (2) Did the court err in denying the motion of the U.S. to intervene? Both questions are answered in the negative.

Section 68–3–2(D), supra, reads as follows:

"'Person' means individuals, firms, partnerships, companies, rural electric co-operatives * * * corporations, and lessees, trustees or receivers appointed by any court whatsoever. It shall not mean any municipality as herein defined unless such municipality shall have elected to come within the terms of the Public Utility Act * * *. In the absence of such voluntary election by any municipality to come within the provisions of the Public Utility Act, as amended, such municipality shall be expressly excluded from the operation of said act, and from the operation of all its provisions, and no such municipality shall for any purpose be considered a public utility;"

With respect to the intervention question, this court is certainly in accord with the statement contained in Algonquin Gas Transmission Co. v. Federal Power Commission, 201 F.2d 334 (1st Cir. 1953), in which we find the following:

"The Court does not propose that our hearing and consideration of the limited issues above stated shall be bogged down by arguments on various motions for leave to intervene which have been submitted, and by oral arguments and briefs on behalf of the numerous would-be intervenors. We have decided to deny all the pending motions for leave to intervene, * * *."

United Gas Pipe Line Company v. Louisiana Public Service Commission, 241 La. 687, 130 So.2d 652 (1961), held:

"* * * that the interest required to authorize intervention must be a direct one by which the intervenor is to obtain immediate gain or suffer immediate loss by the judgment which may be rendered between the original parties. The interest must be closely connected with the object in dispute and founded on some right, lien, or claim, either conventional or legal. * * *"

We do not perceive the U.S. has such an interest in the case before us.

The U.S. cannot be considered a "person" as that word is used in the Civil Rights Act. Broome v. Simon, 255 F. Supp. 434 (W.D.La.1965). Neither is the U.S. a "person" under the Bankruptcy Act, nor under the Sherman Antitrust Act. See, United States v. Cooper Corporation, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941). Also see, United States v. Far East Conference, 94 F.Supp. 900 (T.D.N.J.1951).

There are many statutes in which neither the U.S. nor States of the Union are considered as a "person." When the legislature has wanted to include sovereigns or other governmental bodies in its statutes, it has known how to do so. For example, see the following state statutes which have specifically included the U.S: Administrative Procedures Act, § 4–32–2(F), N.M.S.A., (1953 Comp., 1969 Pocket Supp.) "governmental subdivision or public or private organization of any character other than an agency;" Gross Receipts and Compensating Tax Act, § 72–16A–3(H) (2), N.M.S.A., (1953 Comp., 1969 Pocket Supp.) "the United States or any agency or instrumentality thereof, the state of New Mexico or any political subdivision thereof;" Human Rights Act, § 4–33–2(A), N.M.S.A., (1953 Comp., 1969 Pocket Supp.) "the state and all of its political subdivisions;" Rural Electric Co-operatives Act, § 45–4–31(B), N.M.S.A., (1953 Comp., 1969 Pocket Supp.) "federal agency, state or political subdivision or agency thereof or any body politic;" Uniform Disposition of Unclaimed Property Act, § 22–22–2(G), N.M.S.A., (1953 Comp., 1969 Pocket Supp.) "government or political subdivision, public corporation, public authority."

The case of Davis v. Pringle, 1 F.2d 860 (4th Cir. 1924), held:

"The failure to include the United States and the states in the definition could not have been inadvertent. The United States and the several states of the Union are not persons, and are not commonly thought of as persons, and if

it had been intended that 'persons' should have such a comprehensive and unusual meaning as to include them, the framers of the definition would have said so."

By the same token, the legislature, under § 68–3–2(D), supra, did not see fit to include or even mention the United States or governmental agencies. United States v. Biloxi Municipal School District, 219 F.Supp. 691 (S.D.Miss.1963).

Section 68–3–2(D), supra, has been re-enacted three times since 1941, the last time in 1967, and each re-enactment has resulted in a definition identical to the original. Thus, the legislature has had three opportunities to change definitional language and expand it, if it cared to do so.

The meaning of a statute is to be ascertained primarily from its terms and where they are plain and unambiguous, such as in § 68–3–2(D), supra, there is no room for construction. "Hence, the oft repeated maxim that 'a statute means what it says.'" Hendricks v. Hendricks, 55 N.M. 51, 226 P.2d 464 (1950); Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

"* * * 'the words "person or corporation" do not in their ordinary signification mean a sovereign government' * * *."

In Re McLaughlin's Estate, 174 N.E.2d 644 (Ohio Prob.1960). See also, In Re Shepard's Succession, 156 So.2d 287 (La.App. 1963).

Ordinarily, a person cannot appeal from a judgment unless he has a particular interest therein and is aggrieved or prejudiced thereby. His interest must be immediate and pecuniary. Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970).

"* * * The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. * * *"

City of Milwaukee v. Public Service Commission, 11 Wis.2d 111, 104 N.W.2d 167 (1960). The U.S. was not aggrieved or prejudiced in the instant case as the Commission's order was in favor of the U.S.

The fact that the U.S. was allowed to intervene in the Commission's hearing does not necessarily give the U.S. standing to intervene in the judicial review. United Gas Pipe Line Company v. Louisiana Public Service Commission, supra.

The U.S. relies heavily on the cases of Cotton v. United States, 52 U.S. (11 Howard) 229, 13 L.Ed. 675 (1850), and United States v. Coumantaros, 165 F.Supp. 695 (D.Md.1958), in support of its contentions. These cases are easily distinguishable and do not afford the U.S. any comfort. We do, however, find in United States v. Coumantaros, supra, the following:

"'* * * Whether the word "person" or "corporation" includes a State or the United States depends upon its legislative environment. * * *'"

Under § 68–3–2(D), supra, we do not have a favorable environment for the position of the U.S.

We do not observe a constitutional question as being involved in the instant case, therefore, further comment is unnecessary.

The decision of the lower court will be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

482 P.2d 916

The STATE of New Mexico, Plaintiff-Appellee,

v.

Lester Ray DICKSON, Jr., Defendant-Appellant.

No. 509.

Court of Appeals of New Mexico.

March 5, 1971.

David W. Bonem, Clovis, for defendant-appellant.

James A. Maloney, Atty. Gen., Ray Shollenbarger, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

We reverse defendant's conviction of armed robbery. Section 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6), because the trial court improperly admitted defendant's incriminating statement.

Defendant was arrested in Oklahoma City and returned to Clovis, where he was tried. On the automobile trip to Clovis, he made incriminating statements. These statements were held inadmissible as evidence under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). Within two hours after arriving in Clovis, defendant made another incriminating statement which was tape recorded. Defendant's appeal involves the admission into evidence of portions of this later statement.

The tape recorded statement was made after defendant had shown officers where he had left some clothing in a field, and after defendant had been taken before a magistrate and apparently advised of his rights by the magistrate. The recorded statement was made in the presence of one of the officers who obtained the prior statements in violation of Miranda v. Arizona, supra.

In connection with this later statement, defendant signed a "Waiver of Rights." In this later statement, defendant acknowledges that he doesn't have to make a statement; that the statement is voluntary. Toward the end of the tape defendant states, "this is of my own free will," and acknowledges he had refused a lawyer. The statement's contents show defendant had had prior experience with law enforcement officers.

In admitting portions of the recorded statement, the trial court found there was

a sufficient lapse of time between the earlier statements and the recorded statement so that the violation of *Miranda* in connection with the earlier statements "* * * does not automatically make his later oral statement inadmissible in view of the proper warning given to him before his last statement at the Clovis Police station. Also, it appears from the—a portion of his later statement, which has been excised from the transcript [of the recorded statement], that this man had prior experience in matters of this sort that would have a bearing on whether or not he understood his rights under the situation that obtained. * * *"

Subsequently, the record shows:

"MR. BONEM: So that the record is clear, the defendant has not waived his previous objection to the confession as a fruit of the poison tree * * * we are objecting to it also on the grounds that it was taken following a statement taken in violation of the Miranda ruling.

"THE COURT: I understand, but there has been no evidence to support this contention that I know of. * * *"

In our opinion the rule to be applied in this situation—where the earlier statements are inadmissible and a later statement has been made—appears in State v. Chaves, 27 N.M. 504, 202 P. 694 (1921). In that case, where the first confession was involuntary, the New Mexico Supreme Court stated:

"* * * [I]f a confession has been made under circumstances rendering it involuntary, a presumption exists that a second confession is the result of the prior influence, and this must be overcome before the second becomes admissible. * * *"

Applying *Chaves* to this case, the later incriminating statement may not be used unless it is established that the later statement was not the exploitation of the earlier illegally obtained incriminating statements, and unless the later statement was obtained under circumstances sufficiently distinguishing to purge it from the taint of the earlier illegal statements. See Commonwealth v. Banks, 429 Pa. 53, 239 A.2d 416 (1968); Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204 (1967). Specifically, in the circumstances of this case, defendant's later statement was presumptively inadmissible, and the State had the burden of establishing its admissibility. Compare State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967).

The trial court's ruling that there was no evidence establishing the later statement as "fruit of a poisoned tree" is not pertinent. Even without such an affirmative showing, the later statement, taken after statements had been obtained illegally, was presumptively inadmissible.

Further, in considering the circumstances pertaining to obtaining the recorded statement, the trial court appears to have proceeded on the basis that defendant understood his rights "under the situation that obtained." That is insufficient. Once the circumstances established the relationship of the later statement to the earlier illegally obtained statements, the fact that defendant may have understood his rights at the time of the later statement does not make the later statement admissible. For the later statement to be admissible, it must also be established that the later statement is *not* the exploitation of the prior illegal statements and that burden is on the State.

The evidence that the trial court considered in admitting portions of the recorded statement is insufficient to overcome the presumption of inadmissibility. The trial court refers to the lapse of time between the illegal statements and the recorded statement. The record does not show exactly when the illegal statements were obtained; only that they were obtained sometime on the ride from Oklahoma City to Clovis. The lapse of time between the later recorded statement and the earlier illegal statements may have been as little as one hour forty-five minutes, or it may have been more. We do not know.

The trial court referred to the advice of rights form signed by defendant and the fact that defendant had been "properly advised" of his rights before making the recorded statement. It also referred to the contents of the recorded statement. Therein defendant declares that the statement was his free will and voluntary; that he knew what he was doing and had rejected a lawyer. Further, the trial court referred to defendant's prior experience. These items do not show that the recorded statement was *not* the exploitation of the earlier illegally obtained statements. The State did not meet its burden of overcoming the presumptive inadmissibility of the recorded statement. Compare State v. Chaves, supra.

The case is reversed and remanded with instructions to grant defendant a new trial.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

483 P.2d 292

Attila CSANYI, Plaintiff-Appellant,

v.

Teresa CSANYI, Defendant-Appellee.

No. 9174.

Supreme Court of New Mexico.
March 29, 1971.

Ray Tabet, Albuquerque, for plaintiff-appellant.

Sutin, Thayer & Browne, Paul G. Bardacke, Charles T. Dumars, Legal Aid Society, Albuquerque, for defendant-appellee.

OPINION

McMANUS, Justice.

A divorce action was filed in the district court of Bernalillo County by the plaintiff against the defendant. An Ex Parte order was first obtained by plaintiff concerning custody of two children. After service by publication, the decree was granted to plaintiff along with a grant of child custody. A motion and special appearance was filed by plaintiff on or about the date of the final decree. The court then vacated the final decree and on an Ex Parte basis later awarded temporary custody to the defendant. Thereafter, the whole matter was tried to the court, resulting in a final decree of divorce being granted to defendant along with child support, alimony and attorney fees. This appeal followed.

Plaintiff urges reversal on the ground that defendant had entered a special appearance attacking the jurisdiction of the New Mexico court. The defendant did contest the jurisdiction of the court in her motion applying for a special appearance. However, the consent to the jurisdiction became complete when defendant participated with plaintiff in the trial on its merits and invoked a judgment of the court. Hammond v. District Court of Eighth Judicial District of New Mexico, 30 N.M. 130, 228 P. 758 (1924); Field v. Field, 31 N.J.Super. 139, 105 A.2d 863 (1954).

It should be pointed out here that orders involving custody of the subject children were erased by an order of the court entered April 2, 1970. The last paragraph of this order reads, as follows:

> "2. That this cause proceed as though such decree had not been entered and all pleadings in aid of such default decree be and hereby are set aside."

After this, an order was entered giving defendant custody until the trial of the case on its merits. On May 28, 1970, the case was heard.

Reviewing the findings of the trial court, it is apparent that the court considered it to be in the best interests of the children to be with their mother, based upon substantial evidence presented it, including the testimony of the children, contrary to plaintiff's witnesses, that they preferred to be with their mother. Further, the concept that the award of custody of children shall be for their best interests is a basis of the trial court's discretion in such matters, and there exists no legal requisite that the language of the trial court's findings must be couched in the exact phraseology "in the best interests of the children," as the plaintiff would allege.

Plaintiff would argue that the New Mexico Rules of Civil Procedure were not followed inasmuch as an answer was not filed by the defendant. Beginning with Valdez v. Archuleta, 3 N.M. 296, 5 P. 327 (1885), and through Garvin v. Gordon, 36 N.M. 304, 14 P.2d 264 (1932), this Court has held:

> "A party may not, after consenting to litigate an issuable defense, not pleaded, later, and upon failing to sustain the issue through want of proof, insist that the defense was not available because not pleaded."

Here, plaintiff never objected to litigating any of the issues tried before the court.

Complaint was made concerning the participating by two attorneys for defendant and a restriction on examination by plaintiff's counsel. The record again indicates no objection by plaintiff during the trial. The so-called restriction of examination by counsel was strictly within the trial judge's discretion and was done to avoid repetition of questions and answers. The trial judge has a duty to guide a trial expeditiously to its conclusion. Judges need not sit as sphinxes on the bench, nor should they be mere umpires, but they should to a certain extent guide the course of a trial. Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948). We see no error here committed by the trial judge in his supervisory control over the trial.

The rulings of the trial judge as to these matters were not inconsistent with justice nor were the substantial rights of any party affected. See § 21-1-1(61), N.M.S.A. (1953 Comp.).

The allowance of alimony and attorney fees by the trial court was consistent with the evidence. Inasmuch as appellant posted no bond or made no request for a stay upon appeal, the trial court could enforce its order for alimony and allowances. Kearney v. Butt, 224 Ark. 94, 271 S.W.2d 771 (1954).

The judgment below is affirmed. It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

483 P.2d 293

Jack Anthony GULLO, Plaintiff-Appellant,

v.

Miriam Anne BROWN, Defendant-Appellee.

No. 9142.

Supreme Court of New Mexico.

March 29, 1971.

Hartley, Olson & Baca, Albuquerque, for plaintiff-appellant.

McAtee, Marchiondo & Michael, Pat Chowning, Albuquerque, for defendant-appellee.

OPINION

STEPHENSON, Justice.

This declaratory judgment action was filed in the District Court of Bernalillo County seeking an adjudication that a divorce decree obtained by appellee prior to a ceremonial marriage between the parties was void, having been procured by fraud. From an adverse summary judgment, this appeal was taken.

In 1947, appellee married John J. Brown. On February 17, 1951, a decree was entered by the District Court of Bernalillo County granting appellee a divorce from Mr. Brown. Because this decree and the manner in which appellee procured it are the root of this controversy, we will summarize the surrounding circumstances.

In July, 1950, appellee, a resident of the District of Columbia, was separated from Mr. Brown. Appellant brought her to Albuquerque, where they stayed for about two weeks, at his expense, for the purpose of establishing residence, looking toward the obtaining by appellee of a divorce in New Mexico from Mr. Brown and the marriage of the parties to follow. Follow-

ing correspondence between appellee and an Albuquerque lawyer, appellee filed suit for divorce on January 15, 1951.

In mid-February, 1951, appellee traveled by air from the District of Columbia to Albuquerque, went directly from the airport to the courthouse, there conferred with her attorney, attended her hearing and procured her divorce. The decree was entered February 17, 1951, whereupon appellee returned to the District of Columbia. Appellee was never a resident of New Mexico. She testified that appellant paid for the February, 1951 travels and the legal services, which was denied by appellant, although he admitted that he knew and understood the purpose of the trip and was agreeable that appellee make it. The parties were married on April 28, 1951.

In the fall of 1960, the marriage between the parties was breaking up; they had separated; and on November 16, 1960, appellee filed suit for divorce in the Circuit Court of Fairfax County, Virginia, where they then resided.

At that juncture, appellee commenced advancing a contention that by reason of appellee having procured the New Mexico divorce decree by fraud, the divorce was void, and the subsequent marriage between the parties was hence void and should be annulled. This legal chimera has been pursued by appellant through trial and appellate courts in the District of Columbia, Virginia, and now in New Mexico, with uniformly unfavorable results, but with a single minded purpose and persistence that is truly remarkable. For a summary of intervening litigation between these parties which is as concise as its tangled and convoluted nature permits, we will adopt and approve the language of the District of Columbia Court of Appeals in Gullo v. Hirst, 207 A.2d 662 (D.C.App.1965) [Appellee having married Mr. Hirst in 1961]. The court said:

"The parties to this appeal were married in 1951 in the District of Columbia, and will be hereafter referred to as husband and wife. In November 1960 the wife filed suit against the husband in the Circuit Court of Fairfax County, Virginia, alleging that the parties 'were lawfully married' and seeking an absolute divorce. To this complaint the husband filed an answer which denied the allegation that the parties were lawfully married, and he also filed a 'plea for annulment of marriage,' alleging that at the time of their marriage the wife was then lawfully married to one Brown. This allegation was based on the claim that a divorce obtained by the wife from Brown in New Mexico was void for lack of jurisdiction.

"Portions of the transcript of the Virginia proceedings, included in the record, show that the circumstances of the New Mexico divorce were thoroughly inquired into by the Virginia court. At the conclusion of the trial the Virginia court on April 28, 1961, entered a final decree dismissing the husband's plea for annulment of marriage and granting the wife a divorce. The divorce was granted upon a specific finding that the parties were lawfully married in the District of Columbia.

"The husband then petitioned the Supreme Court of Appeals of Virginia for an appeal. When his petition was denied on October 10, 1961, he unsuccessfully sought a writ of certiorari from the Supreme Court of the United States.

"He then brought an action for annulment of marriage in the District of Columbia. Summary judgment went against him on the ground that the Virginia judgment was res judicata. He appealed to this court and we reversed on the ground that the trial court lacked jurisdiction because of the husband's lack of residence for the jurisdictional period.

"The husband's next move was to institute a suit in the United States District Court for the Eastern District of Virginia for declaratory relief, specifically asking the court to declare his marital status. In its memorandum opinion dismissing the action, the District Court on

September 11, 1963, ruled that the issues sought to be raised had been raised and decided in the prior proceedings in the Fairfax County Court. The husband appealed and the United States Court of Appeals for the Fourth Circuit affirmed, holding that the matter sought to be litigated in the District Court was res judicata.

"While the litigation in the Virginia federal court was pending, the husband brought the action which is now before us. His complaint for annulment of marriage raised the same issues concerning the validity of the New Mexico divorce which had been raised and litigated in the Fairfax County Court and which he had attempted to relitigate in the federal court. Despite the rulings of the District Court and the Circuit Court of Appeals that the matter was res judicata, the husband brought the present action to trial in September 1964. The trial court, after hearing, dismissed the complaint on the ground that the judgment of the Circuit Court of Fairfax County was res judicata as to all issues here raised. The husband then brought this appeal."

Obviously, the application of the doctrine of *res judicata* bars appellant from obtaining the relief that he seeks. In support of such a conclusion it must be a rare circumstance when a court may rely on opinions of two other appellate courts specifically so holding in appeals involving the identical issues between the same parties. That opportunity being available to us here, we will not let it pass. In Gullo v. Hirst, 332 F.2d 178 (4th Cir. 1964) the United States Court of Appeals, Fourth Circuit, in affirming the United States District Court for the Eastern Division of Virginia held that the matter which appellant (in that case and in this one) sought to litigate was *res judicata*. In Gullo v. Hirst, supra, the District of Columbia Court of Appeals, after the summarization of prior litigation that we have quoted, said:

"The mere recitation of the foregoing facts shows that the trial court's action was correct. No citation of authority is needed for the proposition that an issue once finally litigated by the parties in a court of competent jurisdiction cannot be relitigated by the parties in that court or in any other court. Otherwise there would be no end to litigation."

Entirely apart from the doctrine of *res judicata*, it is clear that appellant lacks standing to attack the decree in the divorce case. He was not a party to it and had no right which was affected by it at the time of its entry. deMarigny v. deMarigny, 43 So.2d 442 (Fla.1949); Mumma v. Mumma, 86 Cal.App.2d 133, 194 P.2d 24 (2d Dist. Ct.App.1948); Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Kirby v. Kent, 172 Miss. 457, 160 So. 569, 99 A.L.R. 1303 (1935); Tyler v. Aspinwall, 73 Conn. 493, 47 A. 755, 54 L.R.A. 758 (1901); See generally Ferret v. Ferret, 55 N.M. 565, 237 P.2d 594 (1951).

Having held that the appellant is barred from relief both by the doctrine of *res judicata* and his want of standing to attack the divorce decree, we would ordinarily say no more regarding the merits of this case. But appellant raises one important question upon which we feel obliged to express ourselves. Appellant asserts that under our decision in Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967), the divorce decree obtained in this case by the appellee was utterly void and a complete nullity, and that we are bound to so hold lest, by failure to do so, we give substance to a nullity which we said in Heckathorn we would not do.

It is true that there is a certain similarity between the facts in Heckathorn and here, with the notable differences that in Heckathorn the attack on the divorce decree was waged by one who was a party to the divorce action and, so far as the opinion shows, did not participate in procuring the decree. In Heckathorn we held that residence for the period required by statute is a jurisdictional prerequisite to divorce in New Mexico, and that if the jurisdictional prerequisite is lacking, the de-

cree is a nullity. However, we do not reach the matter of the validity of the divorce decree in question here, since appellant is barred from raising this question by both *res judicata* and lack of standing to litigate the issue. Hence, nothing we have said modifies or departs from our holding in Heckathorn.

Appellee suggests that we should remand the case with directions to the trial court to allow attorney's fees because of the harassment of the appellee by the appellant by means of this vexatious litigation. She correctly points out that in Gullo v. Hirst, supra, the United States Court of Appeals remanded with directions to tax attorney's fees, and that in Gullo v. Hirst, supra, the District of Columbia Court of Appeals, in order to bring an end to vexatious litigation, taxed attorney's fees against the appellant for the appellee's legal services both in the trial court and on appeal. It may be that the viewpoint of these federal appellate courts is somewhat more detached than ours, but we find it difficult to overlook the fact that it was a New Mexico court upon which fraud was practiced in securing the divorce decree. We do not intend to be understood as condoning the acts of appellee in procuring the decree. To the contrary, we take a serious view of her actions. Indeed, the long, tangled and vexatious course of litigation, including this case, could be said to stem in large measure from the fraud practiced on the District Court of Bernalillo County in 1951. For that reason her circumstances excite little sympathy, stemming as they do, at least in part, from her own wrongful acts.

Accordingly, we leave the appellee as we found her on the subject of attorney's fees.

The summary judgment of the trial court should be affirmed, and,

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

483 P.2d 297

In the Matter of the Application of A. W. Langenegger, No. 646 and RA-1851, and Langenegger and Sons, No. 188 and RA-5379 Consolidated.

A. W. LANGENEGGER and Langenegger and Sons, Applicants-Appellants,

v.

CARLSBAD IRRIGATION DISTRICT, a Quasi-Municipal Corporation, Protestant-Appellee,

S. E. Reynolds, New Mexico State Engineer, Respondent-Appellant.

No. 9026.

Supreme Court of New Mexico.

March 29, 1971.

OPINION

OMAN, Justice.

Respondent-appellant, New Mexico State Engineer (hereinafter referred to as Engineer), after conducting a hearing, entered his decision approving the applications of appellant-applicants (hereinafter referred to as applicants), to supplement their rights to irrigation waters from the Pecos River, by diverting through wells, waters from the artesian aquifer of the Roswell Underground Basin. The protestant-appellee (hereinafter referred to as protestant), thereupon appealed the decision of the Engineer to the District Court of Chaves County, and the case was tried de novo by that court, as provided in Article XVI, § 5, Constitution of New Mexico.

The applicants and Engineer have now taken an appeal from a judgment entered by the District Court in favor of protestant and denying the applications. We reverse.

The following facts were found by the trial court, are supported by substantial evidence, and are not seriously disputed by applicants and the Engineer. Applicants are the owners of rights to waters from the Pecos River for the irrigation of 966.09 acres of farm lands in Chaves County. The rights for the irrigation of 316.09 of these acres have a priority date of July 25, 1908, and the rights for the irrigation of the remaining 650 acres have a priority date of March 22, 1912. The amount of water required to irrigate the 966.09 acres is approximately 2,900 acre feet per year.

The waters of the Pecos River, at the points of applicants' diversions thereof, consist of base flows and flood flows. The base flows are the waters which have passed through an aquifer before entering the river and its tributaries. The two aquifers here involved are: (1) the artesian aquifer of the Roswell Underground Basin, and (2) the shallow aquifer which is also referred to as the Valley Fill. In most of the basin, a formation known as the Chalk Bluff, or Red Beds, is encountered between the artesian aquifer and the shallow aqui-

James A. Maloney, Atty. Gen., Paul L. Bloom, Sp. Asst. Atty. Gen., Santa Fe, for S. E. Reynolds.

Hinkle, Bondurant, Cox & Eaton, Roswell, for Langenegger.

Walker & Estill, Carlsbad, for appellee.

fer. This formation is a semi-confining layer which slows leakage from the artesian aquifer to the shallow aquifer above, and, thus, contributes to the artesian conditions of the lower, or San Andres Limestone aquifer. See Templeton v. Pecos Valley Artesian Conserv. Dist., 65 N.M. 59, 332 P.2d 465 (1958), in which the structures of the basin are described.

The flood flows are waters resulting from falls of precipitation within the river drainage and which flow over the surface area thereof until their entry into the river.

During the months of April to September, inclusive, for the period 1906 to 1914, the base flow averaged 18% and the flood flow 82% of the total river flow. During these years the monthly average of the base flow ranged from 2% of the total river flow in August of 1908 to 98% thereof in April of 1910.

The base flow of the river, for the period 1905 to 1914, averaged 76,060 acre feet per annum, and for the period 1956 to 1965, this flow averaged 26,300 acre feet per annum. Approximately 70% of this base flow entered the river above applicants' points of diversion, and only aproximately one-third thereof reached these diversion points each year during the irrigation season, which is from April 1 through September 30.

During the irrigation season of 1908, the year within which the priority date of a portion of applicants' rights was fixed (July 25, 1908), only 9% of the river water available at applicants' points of diversion was base flow and 91% was flood flow. During the irrigation season of 1912, the year within which the priority date of the remaining portion of applicants' rights was fixed (March 22, 1912), the river water available at the points of diversion was 22% base flow and 78% flood flow.

All of the waters of the Roswell Underground Basin are now fully appropriated. There are rights to divert 88,775 acre feet of water per annum from the basin with priority dates earlier than July 25, 1908, and rights to divert 303,684 acre feet of water therefrom with priority dates subsequent to July 25, 1908.

There are rights to divert 160,712 acre feet of water per annum from the basin with priority dates earlier than March 22, 1912, and rights to divert 231,747 acre feet per annum with priority dates subsequent to March 22, 1912.

Withdrawals of water from the basin have substantially reduced the base flow reaching applicants' points of diversion, and this reduction has resulted in shortages of water for the irrigation of applicants' lands during recent years.

From the foregoing recited facts, the trial court concluded that to the extent applicants should be permitted to take more than 9% of their total water rights with the priority date of July 25, 1908, and more than 22% of their total water rights with the priority date of March 22, 1912, from the proposed wells, they would, in effect, be accomplishing a new appropriation from the waters of the Roswell Underground Basin and would thereby impair existing rights. We differ with this conclusion.

Except as above indicated by the recited facts, and as hereinafter discussed, the question of priorities was not involved in these proceedings. The base flow, at the points of applicants' diversions from the river, was at all times adequate to supply the rights of applicants.

It is apparent from the foregoing recited facts, and it is not disputed in the evidence thereon, that the base flow constitutes the relatively stable waters of the river. The flood flows constitute waters which fluctuate greatly in quantity from time to time. As shown by the above recited facts found by the trial court concerning the base flow for the months of August 1908 and April 1910, this base flow, and necessarily the flood flow also, fluctuated from 2% to 98% of the total river flow during the months of April through September, and this fluctuation is very largely, if not almost entirely, due to the fluctuation in the precipitation during these months in the river drainage area. However, as express-

ly found by the trial court, there has been a substantial reduction in recent years of the base flow into the river by reason of withdrawals from the basin. These withdrawals occur very largely during the irrigation season, and this reduction in the base flow has resulted in shortages of water for the irrigation of applicants' lands.

Applicants are appropriators of water from the mainstream or channel of the Pecos River, and, as such, are entitled, subject to the rights of other appropriators, to rely and depend upon all the sources which feed the main stream above their points of diversion, all the way back to the farthest limits of the water shed. Templeton v. Pecos Valley Artesian Conserv. Dist., supra; Richlands Irr. Co. v. Westview Irr. Co., 96 Utah 403, 80 P.2d 458 (1938). They are not limited to pursuing a particular portion or percentage of these waters which may have been accumulated in a particular body, rivulet, arroyo, etc., before being discharged into the main stream. To so limit them would be to deprive them of their rights to rely and depend upon all sources which feed the main stream from which their appropriations were made. They would also be deprived of their right to rely and depend upon all sources which feed the main stream, if every rivulet, arroyo, body of water, seepage, etc., through which waters are conducted to the main stream were measured and only the percentage proportion, which the waters from each thereof bore to the entire stream flow, were permitted to be taken from the source waters of each of said contributing conduits.

It is commonly known and understood that some contributing conduits of water to the main stream of a river may be diminished, or even dried up, either temporarily or permanently, by the varying patterns of precipitation throughout the river's water shed, by reason of other natural phenomena, or by reason of man-made structures or activities. A system, such as that adopted by the trial court, would require measuring and assigning to each appropriation a percentage contribution thereto from each contributing source on the priority date of each appropriation. The results of these computations could vary greatly as to each contributing source from appropriation to appropriation, as is evidenced by the differences reflected in the two appropriations of applicants from just two contributing sources. If the priority dates and the contributing sources were multiplied to correspond with the number and dates of all appropriations from, and all the separate, measurable, contributing flows into, the Pecos River, it is at once apparent that amounts and priorities of appropriations so determined would have little significance. The administration of the waters of the river under such a system would be practically impossible.

In addition to the foregoing recited facts, the trial court found that applicants had wholly failed to prove that any portion of the waters which came from the Roswell Underground Basin lying upstream from applicants' points of diversion from the river, "* * * flows evenly to the respective sites of the proposed well locations. To the contrary, the record yields uncontradicted expert testimony that the water that would be taken by the proposed wells never contributed to the water taken by the applicants and their predecessors in title at their respective points of diversion on the Pecos River, * * *"

There is substantial evidence to support these findings, except it appears uncontradicted from the testimony of protestant's expert, which is the only evidence directly on the matter of the direction of the base flow, that the waters to be intercepted and diverted from the artesian aquifer by applicants' proposed wells would be waters reaching the river both above and below the points of applicants' present diversions from the river. This is consistent with the position taken by protestant in its answer brief. From these findings, the court concluded that the granting of the applications would be to grant a new appropriation of water in which the applicants did

not previously have any rights. We disagree with this conclusion.

It is apparent from the record, from the language of these findings, and from the answer brief, that protestant and the trial court rely upon the following language from the opinion in Durand v. Reynolds, 75 N.M. 497, 406 P.2d 817 (1965):

> "Applicants did not prove that the water in the 'Nine-Mile Draw' area flows evenly to the site of the proposed well locations! To the contrary, the record yields expert testimony that certain amounts of the water that would be taken by the proposed wells never contributed to the water taken in the 'Nine-Mile Draw' area. Assuming such to be true, the effect of applicants' application, if granted, would be to grant a new appropriation to water in which they did not previously have any rights. * * *"

The Engineer and applicants argue this language is unsupported by any authority and is dictum. We agree the principle announced by this language was unnecessary to the decision of the issues presented on the appeal in the Durand case, and no authority was given in support thereof. However, the principle was apparently announced as an additional reason for reversing the trial court and as additional support for the finding by the Engineer that the granting of the application there involved "* * * would impair existing rights in and to the Pecos River and the Roswell Artesian Basin. * * *"

If this language found in the Durand decision means a change in point of diversion can legally be accomplished only if the waters to be taken from a proposed point of diversion are identical with the waters that have been taken from a presently established point of diversion, then there could be very few, if any, changes in points of diversion. Although there are undoubtedly some reasons for seeking changes in points of diversion other than the failure of the volume of the waters at existing points of diversion, this is the reason for the applications here involved and is the reason for many, if not the great majority, of the applications for changes in points of diversion. This was precisely the reason for the applications in Templeton v. Pecos Valley Artesian Conserv. Dist., supra. The facts of that case were that there had been a decline in the waters of the Rio Felix from which the applicants had diverted their water, just as there has been a decline in the waters of the Pecos River in the case now before us. In the Templeton case, appellants claimed the granting of the changes in points of diversion from the river to the shallow aquifer, or valley fill, would constitute a new appropriation. Both the trial court and this court rejected that contention, even though it was apparent the transfer of the points of diversion as applied for could not possibly have resulted in a recovery from the wells of the same or identical waters which had theretofore been diverted from the Rio Felix. It is true the trial court in that case found the source of the water from wells drilled into the shallow aquifer was the same as the source of the water diverted by applicants from the Rio Felix, to wit, the shallow aquifer. In the case now before us, it is true, as discussed above, that one of the sources of the water in the Pecos River is the artesian aquifer and will be the source of any water diverted through the proposed wells. As stated and discussed above, applicants have the right to pursue this source, as well as all the other sources which feed the main stream above their points of diversion from the river.

To interpret and apply the above quoted language from the Durand case, in the manner in which the trial court interpreted and applied it here, is to divide the artesian aquifer into two sources of the waters of the Pecos River, insofar as applicants are concerned, whereas in the Templeton case, the shallow aquifer was considered in its entirety as the one source of the waters of the Rio Felix.

Although the question of whether the shallow aquifer constituted two or more sources of the waters of the Rio Felix, within the principle subsequently announced in the Durand case and here applied by the trial court, probably was not raised in the Templeton case, the contention was made and rejected that the diversion of waters from the aquifer through the proposed wells constituted a new appropriation. In the present case the trial court reached exactly the opposite result by a division into two sources of the waters from the artesian aquifer which reach the Pecos River.

Inherent in a water right is the right to change the place of diversion, subject only to the requirement that the rights of other water users not be injured or impaired thereby. Durand v. Reynolds, supra; Clodfelter v. Reynolds, 68 N.M. 61, 358 P.2d 626 (1961); Application of Brown, 65 N.M. 74, 332 P.2d 475 (1958). If the principles of diversion, which the trial court adopted, at least in part, from the language in the Durand case, were applied to all appropriations of waters from the Roswell Underground Basin and the Pecos River, the result would necessarily be the denial to most appropriators of their rights to change the places of their diversions and their rights to pursue all sources which contribute to the waters of the basin, or to the waters of the river above their points of diversion.

In addition to the foregoing recited facts, the trial court found: "There was not, in 1908, and there has never been adequate water flowing in the Pecos River to serve the prior right of the Carlsbad Irrigation District and other appropriators from said river, having rights prior in time to said year."

It would appear the court's conclusion, that impairment to existing rights would result if the applications were granted, is predicated upon the court's conclusion discussed above, that the diversion of waters from the artesian aquifer through the proposed wells would amount to a new appropriation. However, appellants have asserted as their second point relied upon for reversal that: "The Court Erred in Holding That the Supplemental Wells Applied for Would Impair Existing Rights Because the Protestants' Rights are Prior in Time to Those here Sought to be Supplemented."

Protestant in response thereto has stated it "agrees wholeheartedly with appellants" that: "The fact that Applicants' rights are junior in time to certain rights of Protestants and others is absolutely immaterial."

This agreement of the parties would seem to dispose of Point 2. However, protestant then returns to the findings and conclusions attacked under the first point and again urges "* * * it is apparent that the granting of these applications would permit Applicants to enlarge their original appropriation to the injury of both junior and senior appropriators of the waters of the Pecos River * * *." The applicants did not seek, and the Recommendations of the Hearing Examiner, which were accepted and adopted by the Engineer, did not undertake to enlarge or increase applicants' original appropriations, but only sought and authorized applicants to follow the base flow to its source —the artesian aquifer—and to supplement therefrom the waters diverted by applicants from the river to the extent necessary to restore to applicants their original appropriations.

It is true the granting of the applications would effect some changes in the waters of the aquifer and also of the river, but change alone is not to be equated with impairment of the rights of others. The change, which has made it necessary for applicants to pursue the sources of the waters in which they have rights, as expressly found by the trial court, is the reduction in the base flow reaching applicants' points of diversion. This reduction in base flow has resulted from withdrawals of

water from the basin, and has also resulted at times in insufficient amounts of water in the river to irrigate applicants' lands. Applicants, as well as protestants and all other appropriators, have the right, subject to the rights of each other, to pursue to their sources the waters from which the appropriations were made, but protestant has acquired no right to keep applicants from realizing the benefits of their full appropriations by insisting on the perpetuation of a condition which has developed by reason of withdrawals by others from one of the principal and more stable sources of the waters in which applicants have rights.

If the diversions of waters from the basin, or from the river, become so great, in relation to the supply of these waters, that priorities must be asserted in order to protect the rights of senior appropriators, then the senior appropriators must enforce their rights in a proper manner, and, if necessary, in a proper proceeding. See in these regards Worley v. United States Borax and Chemical Corp., 78 N.M. 112, 428 P.2d 651 (1967). As above stated, the case now before us is concerned with applications to change points of diversion for a limited purpose, and, as agreed by the parties, the question of priorities is immaterial to a determination of the issues presented.

[redacted] It follows from what has been said that the judgment of the trial court must be reversed and the cause remanded with directions to enter judgment for the applicants, consistent with this opinion, granting to them the right to make diversions of waters from the artesian aquifer through the proposed wells in the amounts and in a manner sufficient to restore to them the waters to which they are entitled, without impairing the rights of other appropriators.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

483 P.2d 303

STATE of New Mexico, Plaintiff-Appellee,

v.

David TORRES, Defendant-Appellant.

No. 9078.

Supreme Court of New Mexico.

March 29, 1971.

[redacted]

Bruce C. Redd, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., Frank N. Chavez, Ray H. Shollenbarger, Jr., Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

McMANUS, Justice.

The defendant was charged with the crime of first-degree murder on December 20, 1961, by information duly filed. On February 20, 1962, defendant was granted a change of venue from San Juan County to McKinley County. A defense of not guilty by reason of insanity or mental defect was made. On March 2, 1962, the defendant was transferred to the Bernalillo County jail for a full and complete psychiatric examination. Again, on July 2, 1962, defendant was sent to the New Mexico State Hospital for the same examination. On December 5, 1962, an order was entered committing defendant to the New Mexico State Hospital. Defendant remained in the hospital until January 9, 1970, when a hearing was held in Santa Fe District Court. An order was entered finding the defendant was able to understand and participate and aid counsel in his own defense. The defendant was then tried on the charges and convicted of first-degree murder. On March 27, 1970, sentence was imposed on defendant that he be confined to the state penitentiary for the balance of his natural life. He was to be given credit for 8 years, 126 days, on said sentence. From this sentence the defendant appeals.

Basically, the defendant claims that there was not substantial evidence either for finding that he was sane at the time of the crime, or for justifying the charge of first-degree murder.

Certain lay witnesses testified on behalf of the State as to the normalcy of the defendant's conduct at times prior to and immediately after the crime. Furthermore, testimony of defendant's expert witnesses, and reasonable inferences deducible therefrom, does not point unequivocally to a finding of insanity. There was testimony that the defendant alternated between sanity and insanity by reason of uncontrollable impulses, and that at the time of the crime he could have been sane and did know right from wrong. Considering the testimony of both lay and expert witnesses, there was sufficient evidence to warrant a denial of the motion for a directed verdict of not guilty by reason of insanity. Compare State v. DiFraia, 250 A.2d 358 (R.I. 1969); State v. Johnson, 67 Wash.2d 671, 409 P.2d 655 (1965).

The defendant further alleges that the charge of first-degree murder should have been dismissed by the trial court. However, one of the expert witnesses, a psychiatrist, testified that the defendant told him that he had intended to rob the victim's drugstore and the shooting occurred while he was so engaged. This testimony was not objected to and was therefore properly before the jury. State v. Romero, 67 N.M. 82, 352 P.2d 781 (1960). Because there was evidence to the effect that the killing occurred while the defendant was in the commission of or an attempt to commit robbery, there was evidence from which the jury could have found that the homicide was committed while in the act of perpetrating a felony and the submission of the charge of first-degree murder became a statutory mandate. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969); State v. Ortega, 77 N.M. 7;

419 P.2d 219 (1966); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960).

Error is alleged by the defendant in the court's refusal to accept three requested instructions. The first requested instruction states:

"There has been testimony in this case that the Defendant David Torres was not of sound mind prior to the time of the incident in question here.

"If you believe that he was of unsound mind and insane prior to this incident the general presumption of sanity is dispelled, and a new presumption is raised that the insanity continued and that it existed at the time of the offense."

If error is to be claimed concerning a court's failure to give a requested instruction to a jury, such instruction must be a proper statement of the law. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966). The testimony referred to by the requested instruction does not raise a legal presumption at all, but only an inference of fact. Weihofen, Mental Disorder as a Criminal Defense, p. 230 (1954). Any evidence of prior insanity is admissible, but does not give rise to a presumption of continuing insanity and is merely another item for the jury's consideration.

The other two requested instructions read:

"The burden of proof is upon the state to prove that the defendant is sane beyond a reasonable doubt.

and

"The sanity of the accused must be proven by the State just like any other material fact necessary to prove the charges against the defendant.

"If you find that the State has not proven the defendant sane at the time the incident in question occurred and proven this by evidence that convinces you beyond a reasonable doubt then you must find the defendant not guilty of the charge by reason of insanity."

These instructions are also misstatements of the law. There is a presumption of sanity which must be rebutted by the defendant, whereupon the jury shall make its determination. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969). The instructions tendered by the defendant are wrong in that they would place the burden as to defendant's sanity on the State.

The trial court did issue instructions which stated that the defendant had entered a not guilty plea and that the jury was to determine whether he was sane or insane at the time of the commission of the offense and, if insane, he was to be found not guilty.

The judgment of the trial court is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

483 P.2d 305

Billy A. BROWN, as next friend of Robert L. Brown, Plaintiff-Appellee,

v.

SAFEWAY STORES, INC., and the Travelers Indemnity Company, Defendants-Appellants.

No. 521.

Court of Appeals of New Mexico.

Dec. 31, 1970.

Rehearing Denied Feb. 4, 1971.

Motion Granted March 5, 1971 re attorneys fee on rehearing.

Byron Caton, White & Caton, Farmington, for defendants-appellants.

James L. Brown and John R. Phillips, Jr., Farmington, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Plaintiff was awarded workmen's compensation benefits for an injury that rendered him totally and permanently disabled. Defendant raises four points on appeal. Three deal with the sufficiency of the evidence to support the trial court's findings that (1) the injury was latent, (2) the disability is total, and (3) the accident and injury were causally related. The fourth point states that the trial court erred in starting the period of compensation from the date of the injury since no duty to pay arises until after the employee gives notice to the employer of the injury. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955). The plaintiff concedes the merits of the fourth point.

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS?

In responding to a challenge to the sufficiency of the evidence to support the trial court's findings the appellate court

must view the evidence and inferences therefrom in the light most favorable to the party prevailing below. Gruschus v. C. R. Davis Contracting Company, 77 N.M. 614, 426 P.2d 589 (1967).

Applying that rule the record discloses the following. Plaintiff was employed by defendant on a part-time basis. The duties of his employment included sacking groceries and helping unload a grocery truck on one morning each week. One morning in March of 1968 plaintiff, while lifting a case of canned goods, experienced sudden pain in his back. He did not feel the injury was serious and continued his work for the remainder of the morning. That same evening he told his parents of the injury and assured them that it was not serious. The pain lasted about two days and then disappeared. Two weeks later plaintiff experienced pain in his left leg and as the pain lingered and intensified plaintiff sought medical assistance. The first treating physician diagnosed the problem as a blood clot in plaintiff's leg. When the treatment for the blood clot did not relieve the pain plaintiff went to another physician who thought plaintiff had strained a muscle in his leg. When plaintiff's leg problem again failed to respond to the treatment, he went to another physician who also suggested that he had strained a muscle in his leg. Plaintiff was then referred to an orthopedic surgeon who performed a myleogram and discovered two ruptured discs. It was during the treatment with the specialist that plaintiff first realized that there might be a causal connection between the injury at the store and the discomfort he was experiencing in his leg. The date of this realization was approximately August 9th, or approximately five months after the accident at the store. Plaintiff had stopped working for defendant on about August 9th. Plaintiff's father gave defendant notice of the possible claim on the 11th of August. At the trial it was disclosed that plaintiff's only work experience was as a grocery clerk and as a planter of cucumbers and potatoes. He was eighteen years old and had completed high school. He had had no specialized training for any particular occupation. The orthopedic surgeon testified that plaintiff, because of his back problems, should avoid any strenuous activity and that such activity might pose a hazard to plaintiff's health. The doctor also testified that based upon the medical history, medical examination, treatment and findings, as a medical probability plaintiff's back injury was caused by the work related accident.

WAS THE INJURY A LATENT INJURY?

The issue of latent injury has been discussed in several New Mexico decisions including Langley v. Navajo Freight Lines, Inc., 70 N.M. 34, 369 P.2d 774 (1962); Rohrer v. Eidal International, 79 N.M. 711, 449 P.2d 81 (Ct.App.1968) and Smith v. State, 79 N.M. 25, 439 P.2d 242 (Ct.App. 1968). This line of cases has established the rule that in the case of a latent injury the workman must give notice but only after he knew, or should have known by the exercise of reasonable diligence, that he had incurred a compensable injury by accident arising out of and in the course of his employment.

In resolving this question of "reasonableness" we not only have plaintiff's testimony that he did not realize the connection between his leg problem and the industrial accident until August 9th but we have medical testimony that it is not uncommon for a patient suffering a leg problem like plaintiff's to fail to connect the leg pain with a back injury. It would be difficult to rule as a matter of law that plaintiff was unreasonable in failing to connect the leg problem to the back injury when several experienced doctors failed to make the connection while treating plaintiff. Indeed, the evidence suggests that the only person who reasonably should make the connection between the two is an orthopedic surgeon. We must conclude that there was substantial evidence to support the finding. See Sanchez v. City of

Albuquerque, 75 N.M. 137, 401 P.2d 583 (1965).

WAS THE CAUSAL RELATION ESTABLISHED?

As noted earlier a medical expert testified that the back injury was caused by the industrial accident. Defendant challenges the competency of this opinion because he feels the foundation for this opinion differed from the facts revealed at trial. During defendant's cross-examination of this medical witness, defendant asked if the doctor's opinion would differ if he knew that plaintiff had been lifting weights during 1968. The medical witness was also asked if his opinion would differ if he knew that plaintiff had continued to work up until the time the orthopedic surgeon had discovered the disc problem. To each of these suggestions the doctor responded that he would be interested in such facts but did not suggest that his medical opinion would be any different. We feel this attack on the competency of the opinion did not go far enough to destroy the opinion and therefore the attack only amounted to an attack on credibility which is for the trial court to resolve. The appellate courts in New Mexico do not weigh conflicting evidence or credibility of witnesses. Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968). We conclude that there was substantial evidence to support the trial court's finding.

WAS THE PLAINTIFF TOTALLY DISABLED?

There is no suggestion that plaintiff was employable for any job for which he was suited by age, education, training, and general physical and mental capacity. There is evidence, as noted above, that plaintiff was eighteen years old, had a high school education, was trained to plant cucumbers and potatoes, and suffered from an injured back. Although it might be imaginable that plaintiff might be employed at something, there is nothing in the record that would support such a finding.

Defendant states: "The claimant has the duty of showing that he was disabled from doing any work for which he was fitted by age, education, training and previous experience." We agree that the proof of the disability is on the plaintiff, but after plaintiff has introduced evidence as to his age, education, training, and general physical and mental capacity, the burden of coming forward is on the defendant. It is much easier for the defendant to prove the employability of the plaintiff for a particular job than for plaintiff to try to prove the universal negative of not being employable at any work. If the defendant chooses to stand on the evidence introduced by plaintiff and not rebut the evidence, he may run a great risk since the issue may become one of substantial evidence, which is not a question of quantity but presence. Compare Adams v. Loffland Brothers Drilling Company, 82 N.M. 72, 475 P.2d 466 (1970).

In the present case there is substantial evidence to support the finding of total disability and this evidence is not overcome by the fact that the plaintiff is presently a university student. Defendant has cited no authority suggesting that being a student is being employed and we have found none.

The award of compensation is affirmed with an additional award to plaintiff of $1,250.00 for the services of his attorney in this appeal. Section 59-10-23(D), N.M. S.A.1953 (Repl. Vol. 9, pt. 1). The case is remanded for correction of the judgment so that the period for compensation will begin on August 11, 1968 rather than March 18, 1968.

It is so ordered.

SPIESS, C. J., and LaFEL E. OMAN, Justice, Supreme Court, concur.

WOOD, J., not participating.

ON MOTION FOR REHEARING

HENDLEY, Judge.

Defendant filed a Motion for Rehearing and plaintiff answered. Defendant's Mo-

tion for Rehearing was denied. Plaintiff now calls our attention for failure to award attorneys fees on the Motion for Rehearing pursuant to Kendrick v. Gackle Drilling Company, 71 N.M. 113, 376 P.2d 176 (1962).

We have considered plaintiff's Motion for Award of Attorneys Fees, and being sufficiently advised in the premises,

It is ordered that plaintiff be and is hereby awarded an additional sum of $250.00 as and for his attorneys fees on said Motion for Rehearing; said attorneys fees to be in addition to any other attorney fees which were heretofore awarded on the appeal.

It is so ordered.

SPIESS, C. J., concurs.

LaFEL E. OMAN, Justice, Supreme Court, dissents.

483 P.2d 309

George Paul WASHINGTON, Petitioner-Appellant,

v.

Felix RODRIGUEZ, Respondent-Appellee.

Leon AUSTIN, Petitioner-Appellant,

v.

Felix RODRIGUEZ, Respondent-Appellee.

No. 537.

Court of Appeals of New Mexico.

March 5, 1971.

Owen M. Lopez, Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for George Paul Washington.

Thomas A. Donnelly, Catron, Catron & Donnelly, Santa Fe, for Leon Austin.

James A. Maloney, Atty. Gen., Santa Fe, Thomas L. Dunigan, Asst. Atty. Gen., for respondent-appellee.

OPINION

SPIESS, Chief Judge.

Defendants Washington and Austin, by separate motions under Rule 93, [§ 21–1–1 (93), N.M.S.A. 1953 (Rpl.Vol. 4)] seek to vacate sentences which had been imposed upon them on April 14, 1961, following their conviction of the crime of sodomy under Chapter 78, Laws of 1955 (now repealed).

The motions were consolidated for hearing in the district court and are so presented here. Denial of the motions after hearing by the trial court resulted in this appeal. We affirm.

Separate briefs have been filed on behalf of each defendant and, as will be shown, certain of the points in each brief present the same questions while others require separate consideration.

The following are the relevant facts. Both defendants were charged with having committed the crime of sodomy while inmates of the penitentiary of New Mexico. They were jointly tried and convicted and each sentenced to a term of not less than one year; no maximum sentence was specified by the court. The sentences so imposed were to run concurrently with the sentences each of the defendants were then serving. It appears that prior to conviction of the crime of sodomy and after the act had allegedly been committed, defendants were both punished on account of the act by penitentiary authorities. The punishment consisted of solitary confinement, restricted diet, and the denial of certain privileges.

After serving a period of time in the penitentiary, both defendants were paroled; thereafter, parole was revoked as to each of them and they were returned to the penitentiary. At the time the motions were filed, which we are considering, both defendants were serving the sentences imposed for sodomy. Defendant Austin, however, at the time was also serving a sentence for the theft of an automobile.

The material portions of the sodomy statute involved follow:

Chapter 78, Laws of New Mexico 1955.

"Section 1. Sodomy consists of a person taking into his or her mouth or anus the sexual organ of any other person or animal or placing his or her sexual organ in the mouth or anus of any other person or animal. Any penetration, however, slight, is sufficient to complete the crime of sodomy. Both parties may be principals.

"Section 2. Any person convicted of the crime of sodomy, as defined in Section 1 of this Act shall be imprisoned for not less than one (1) year, or fined in any sum not less than one thousand dollars ($1,000.00), or both, in the discretion of the court."

At the time the sentences were imposed the Indeterminate Sentence Act, § 41–17–1, N.M.S.A.1953 (now repealed) was applica-

ble. The maximum penalty, although not specified by statute, (Sec. 2 above quoted) or pronounced by the court, was life imprisonment. State v. Frederick, 74 N.M. 42, 390 P.2d 281 (1964); Starkey v. Cox, 73 N.M. 434, 389 P.2d 203 (1964); See State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957); State v. Sisneros, 81 N.M. 194, 464 P.2d 924, (Ct.App.1970).

Both defendants take the position that the maximum penalty of life imprisonment constitutes cruel and unusual punishment prohibited by Article II, Section 13, of the Constitution of New Mexico and the Eighth Amendment to the Constitution of the United States.

This contention, in our opinion, is properly to be considered in the light of the Indeterminate Sentence Act, the purpose of which was rehabilitation of the convicted person, with his release by parole from the penal institution to which he was sentenced, between the minimum and maximum term. In McCutcheon v. Cox, 71 N.M. 274, 377 P.2d 683 (1963), the court, in commenting upon the objects and purposes of the Indeterminate Sentence Act, said:

> "* * * the principles of indeterminate sentence, probation, paroles and pardons, in varying degrees, have been adopted. "These advocate a break from the definite and fixed sentence in favor of an indeterminate period of punishment which would be proportioned to the progress of the prisoner toward rehabilitation. This is accomplished by making incarceration and its duration a matter within the discretion of competent parole authorities. In this manner the 'punishment' is made to fit the offender rather than the crime."

The objects and purposes of the Indeterminate Sentence Act, which form the basis for fixing the maximum penalty of life imprisonment, in our opinion, clearly preclude a determination that cruel and unusual punishment results from the sentence. See State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967). Authorities cited by defendants do not, in our opinion, support their contention when considered in connection with the Indeterminate Sentence Act. . .

Both defendants further contend that the sentence imposed by the court for sodomy amounts to double jeopardy because defendants had already been punished by the prison officials for the same offence. This contention, in our opinion, is without merit.

In People v. Eggleston, 255 Cal.App.2d 337, 63 Cal.Rptr. 104 (1967), considered a like contention involving the crime of possession of a knife while confined in a prison, and held:

> "* * * prison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline * * *"

This rule accords with the view expressed by the majority of courts which have considered the question. See State v. Vinson, 8 Ariz.App. 93, 443 P.2d 700 (1968) and authorities therein cited. We think this rule is properly applicable here.

Defendant Austin, by his final point, contends that the cumulative effect of sentencing him to a maximum term of life imprisonment, together with the imposition of administrative punishment, constitutes a violation of due process violative of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico. This contention is without merit because it is based upon the claimed points which we have specifically ruled upon and found to be without merit. See Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

The defendant, Washington, contends that consent on his part and that of Austin to the act of sodomy constitutes a complete defense to the crime charged. We are unable to determine from the record before us whether such defense, if it be so considered, was presented to the trial court at the time the trial was had upon

the charge involved. Assuming that such defense was presented, in our opinion, consent, under the statute, presents no defense. People v. Elder, 382 Ill. 388, 47 N.E.2d 694 (1943); State v. Langelier, 136 Me. 320, 8 A.2d 897 (1939). Force is not an element of the crime.

[redacted] Washington next attacks the constitutionality of the statute on the ground that it violates a right of privacy. We see nothing in the language of the Act which can reasonably be considered as violative of any constitutionally protected area, nor does the record disclose an unconstitutional application of the law in the particular instance. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), is relied upon by defendant in support of his attack upon the Act. In *Griswold* the constitutionality of a Connecticut statute which made the use of contraceptives and also the giving of information or advice respecting the use of contraceptives a criminal offence was challenged. The Supreme Court held the Act invalid as an unconstitutional invasion of the right of privacy of married persons. The area of conduct considered here was not involved in *Griswold*, nor could the right of privacy there considered be properly applied as between inmates of a penal institution so as to hold the statute unconstitutional as to such persons.

Defendant Washington, by Points V and VI, contends (a) that he was not advised of his constitutional rights at the time of his arrest. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and (b) that he was denied assistance of counsel at material stages of the proceedings. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

[redacted] Defendant Washington's conviction became final in 1961, which was prior to the decisions in *Escobedo* and *Miranda*. Neither decision is accorded retroactive effect. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Consequently, neither *Escobedo* nor *Miranda* will support a claim of error in this case.

Judgment of the trial court is affirmed. It is so ordered.

WOOD and HENDLEY, JJ., concur.

[redacted]

483 P.2d 312

STATE of New Mexico, Plaintiff-Appellee,

v.

Douglas R. THORN, Defendant-Appellant.

No. 547.

Court of Appeals of New Mexico.

March 12, 1971.

[redacted]

Fred T. Hensley, Portales, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Thomas L. Dunigan, Asst. Atty. Gen., for appellee.

OPINION

SUTIN, Judge.

Thorn pleaded guilty to possession of marijuana under § 54-7-13, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2). This is the general

narcotics law which contains a mandatory sentence provision. Under State v. Riley, 82 N.M. 235, 478 P.2d 563 (1970), and State v. Rendleman (Ct.App.) 82 N.M. 346, 481 P.2d 708, decided February 12, 1971, the conviction and sentence is reversed.

At the hearings, in connection with the above charge, the trial court expressed the point of view that the state had the option of proceeding under the general statute, or the special statute which is § 54–5–14, N.M. S.A. 1953 (Repl. Vol. 8, pt. 2). Thorn's appeal contends it was error to charge him under the general statute. We agree.

The rule fixed in *Riley* applies to the Thorn case.

The judgment and sentence of Thorn in the trial court is reversed. The cause is remanded with instructions to vacate the judgment and sentence and dismiss the charge under which Thorn pleaded guilty.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

483 P.2d 313

STATE of New Mexico, Plaintiff-Appellee,

v.

Demetrio Johnny HERRERA, Defendant-Appellant.

No. 519.

Court of Appeals of New Mexico.

March 12, 1971.

Rufus E. Thompson, Roswell, for defendant-appellant.

James A. Maloney, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of unlawfully selling or disposing of marijuana contrary to § 54–5–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2), defendant appeals. The issues concern: (1) venue; (2) jury array; (3) continuance; (4) challenge of a juror for cause; and (5) an instruction with a notation.

Venue.

Defendant's motion for change of venue was sufficient under § 21–5–3, N.M.S.A.1953 (Repl.Vol. 4) to require that venue be changed if not controverted and if no evidence was presented or required by the trial court. However, the trial court directed that a hearing be held. At the hearing, evidence was presented in support of the motion. The only evidence was copies of certain newspaper articles. The trial court denied the motion. In contending this ruling was error, defendant concedes that under Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969) and State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct.App. 1968), the trial court proceeded properly and, considering the evidence insufficient, could properly deny the motion. He claims, however, that these two cases should be overruled. This we decline to do since in our opinion they correctly decided this issue. See State v. Vaughn, 82 N.M. 310, 481 P.2d 98, decided February 1, 1971.

Jury array.

Defendant challenged the jury array because the trial judge, in a previous case, had dismissed twelve members of the petit jury panel. The identical issue was raised, discussed and decided in State v. Gonzales, 82 N.M. 388, 482 P.2d 252, decided January 22, 1971. We follow the Gonzales decision and hold the challenge to the jury array is without merit.

Continuance.

Defendant moved for a continuance asserting that any jury panel, during the current term of court, would be biased or prejudiced against any defendant in that a jury would be reluctant to return a not guilty verdict. The claim is based on the dismissal of twelve members of the jury panel and the resultant publicity.

As stated by defendant: "The trial court's dismissal of the twelve jurors on March 31, 1970, because of his disagreement with their verdict, caused much public excitement. In fact, various electronic

media widely circulated the story, and on April 2, 1970, the Roswell Daily Record carried the story on its front page. * * The public excitement continued and on April 7, 1970, the day before Defendant's trial, the Roswell Daily Record printed a 'Letter to the Editor' that would indeed make any juror hesitant to acquit the Defendant, * * * though all the evidence against him was conflicting, confused and filled with doubt."

Defendant's motion sought a continuance for "cause." Section 21-8-9, N.M.S.A. 1953 (Repl.Vol. 4). Such a motion is addressed to the discretion of the court. The court's ruling will not be reversed unless there was an abuse of discretion. State v. Burrus, 38 N.M. 462, 35 P.2d 285 (1934); see State v. Cochran, 79 N.M. 640, 447 P. 2d 520 (1968); State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969).

The record does not inform us of the story circulated by electronic media. Copies of the newspaper stories and the letter to the editor are in the record. Here, as in State v. Burrus, supra: "* * * We have carefully examined the record and the exhibits relating to the motion, and are unable to agree with counsel that the record shows anything which would justify us in holding that the trial court abused its discretion in denying defendant's motion. * * *" On the contrary, the record shows no abuse of discretion. The voir dire of the jurors shows they were questioned as to the effect upon them of the publicity concerning the discharged jurors and also as to any hesitancy to return a verdict of not guilty because it might subject them to unjust criticism. The jurors indicated they would not be influenced by these matters but would return a verdict on the evidence and in accordance with the instructions.

Challenge of a juror for cause.

The twelfth juror, Mrs. Cook, was called after defendant had exhausted his peremptory challenges. On voir dire, defense counsel asked, and Mrs. Cook admitted, that she had heard Officer Barrett testify in a prior trial. She denied that she would give "more credit" to the officer merely because she had previously heard him testify.

Defendant challenged Mrs. Cook for cause, stating: "* * * I believe that Mrs. Cook might have formed an opinion in other trials as to the reliability and veracity of Officer Barrett."

The legal rule for which defendant contends is based on the following quotation from Annot., 160 A.L.R. 753, at 769 (1946):

> "* * * it has been held that a defendant in a criminal proceeding does not receive a fair and impartial trial where it appears that some of the members of the jury at his trial previously served on the jury at the trial of another defendant charged with a similar but independent offense, and witnesses who testified for the prosecution at the first trial were also used to establish the guilt of the defendant at the second trial. Some courts have reasoned further that, the credibility of such witnesses at the first trial having been sustained, particularly where the main defensive matter is the incredibility of such witnesses, an avowal of impartiality by the jurors will not remove their disqualification. * *"

A view contrary to defendant's contention is stated in a footnote to United States v. Ragland, 375 F.2d 471, 476 n. 2 (2nd Cir. 1967), cert. denied 390 U.S. 925, 88 S.Ct. 860, 19 L.Ed.2d 987 (1968). See also Wilkes v. United States, 291 F. 988 (6th Cir.1923), cert. denied, 263 U.S. 719, 44 S.Ct. 181, 68 L.Ed. 523 (1924).

We do not decide which view should be followed in New Mexico. Not only is there nothing in the record to support counsel's "belief" that Mrs. Cook had formed an opinion as to Officer Barrett's veracity, Mrs. Cook's answers on voir dire are to the contrary. Further, the rule for which defendant contends has a factual basis and this factual basis is not supported by the record in this case. The record does not show that Mrs. Cook had served as a

juror at the trial of another defendant charged with an independent but similar marijuana offense; nor that the defendant had been convicted in the other case in which Mrs. Cook had served as a juror.

There being no factual basis for considering the legal rule on which defendant relies, we do not determine whether such rule is to be applied. Compare Harbold v. United States, 255 F.2d 202 (10th Cir.1958).

On the record presented, the challenge for cause was properly overruled.

An instruction with a notation.

The instructions were taken to the jury room by the jury. Instruction 2 states:

> "The defendant is on trial before you upon an information filed by the District Attorney charging him with the offense of Unlawfully Selling or Disposing of Cannabia (Marijuana), *as set out in Count II of the Information.* The plea of not guilty interposed by the defendant imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, as under the law a defendant is presumed to be innocent, and that presumption of innocence remains with him throughout the trial until his guilt of the crime charged is established by the evidence beyond a reasonable doubt." (Italics our emphasis).

The italicized phrase was handwritten. The rest of the instruction was printed or typed. Defendant objected to the handwritten part of the instruction "* * * for the reason that it calls attention to the fact that he is charged with other sales or other crimes in the same Information, * * *" and because the handwritten part "* * * calls attention to the fact that there are other counts in the Information." In overruling the objection, the trial court stated there were other counts in the information and the handwritten portion was added to make the record clear as to which count had been tried.

Defendant does not claim the handwritten portion unduly emphasizes that portion of the instruction. See Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966). His claim is that the handwritten portion calls "* * * special attention to the fact that there were other counts charging the Defendant with crime. * * *"

There were four counts to the information. They charged four separate marijuana offenses. Count II had been severed for purposes of trial. The issue to be decided by the jury was whether defendant was guilty of Count II. The handwritten portion did inform the jury there was at least one additional count. However, testimony at trial made reference, at least three times, to other marijuana sales by defendant. With this testimony before the jury, limiting the issue to Count II, not only in the quoted instruction but in the form of the verdict (where it was not handwritten), was proper. It was proper because it told the jury the only issue was Count II.

Defendant also contends the handwritten notation violates that portion of § 21–1–1(51) (2) (g), N.M.S.A.1953 (Repl.Vol. 4) which states: "* * * no instruction which goes to the jury room shall contain any notation." Defendant's objection did not call the trial court's attention to this asserted rule violation. Thus, the alleged error, not having been presented to the trial court for its ruling, it is not before us for review. State v. Ascarate, 21 N.M. 191, 153 P. 1036 (1915), error dismissed 245 U.S. 625, 62 L.Ed. 517, 38 S.Ct. 8 (1917); see Jasper v. Lumpee, 81 N.M. 214, 465 P.2d 97 (Ct.App.1970). Further, assuming, but not deciding that the handwritten portion of the instruction was a notation contrary to § 21–1–1(51) (2) (g), supra, defendant neither claims nor shows any prejudice from the alleged violation. Thus, if there was error, it was harmless. Scott v. Brown, supra.

The conviction, judgment and sentence is affirmed.

It is so ordered.

SPIESS, C. J., and LaFEL E. OMAN, Justice, Supreme Court, concur.

483 P.2d 317

NEW MEXICO NEWSPAPERS, INC., a New Mexico corporation, Appellant,

v.

BUREAU OF REVENUE, State of New Mexico and Franklin Jones, Commissioner of Revenue, Appellees.

No. 516.

Court of Appeals of New Mexico.

March 5, 1971.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Jeff Bingaman, Stephenson, Campbell & Olmsted, Santa Fe, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Mark B. Thompson III, Asst. Atty. Gen., for appellees.

OPINION

SPIESS, Chief Judge.

This appeal challenges an administrative decision and order of the Commissioner of Revenue assessing gross receipts tax [§§ 72–16A–1 through 72–16A–19, N.M.S.A. 1953 (Rpl. Vol. 10, pt. 2) (Supp. 1969)], against certain receipts of appellant-taxpayer which are derived from out-of-state advertising published in its newspaper.

Taxpayer bases its contention of non-taxability upon two alternative grounds:

I. The receipts in question are immune because taxation of them would be violative of the Commerce Clause of the United States Constitution.

II. Application of the tax to these receipts would be violative of the equal protection provisions of both state and federal Constitutions, as broadcasters similarly situated are tax exempt.

We affirm the decision and order of the Commissioner.

I.

VIOLATION OF COMMERCE CLAUSE

Stipulated facts relevant to taxpayer's first argument are:

(1) Taxpayer is a New Mexico corporation engaged in the publication of a newspaper in Farmington, New Mexico.

(2) Taxpayer maintains no office or other place of business outside New Mexico.

(3) Part of taxpayer's income is derived from printing advertisements which are part of national advertising campaigns by foreign marketers of goods and services.

(4) Taxpayer's receipts from advertisements as in (3) are received pursuant to contracts made outside New Mexico, between advertisers and solicitation representatives of taxpayer, neither of which are engaged in business in New Mexico.

(5) Receipts in (3) are for printing and publication only. All preparation of mats is done outside New Mexico by the advertising agency.

(6) Taxpayer receives payment in the following manner:

(a) Taxpayer prints the advertisement.

(b) Taxpayer presents a bill and proof of printing to Representative.

(c) Representative presents same to Agency.

(d) Agency presents bill to Advertiser, who pays Agency.

(e) Agency remits to Representative, retaining a percentage for its services.

(f) Representative remits to Taxpayer, retaining a percentage for its services. Thus, Taxpayer receives less than face value of its original bill.

Both parties to this appeal rely on Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1939), affirming Western Live Stock v. Bureau of Revenue, 41 N.M. 288, 67 P.2d 505 (1937). There are three cases bearing the name "Western Live Stock v. Bureau of Revenue." (1) that found at 41 N.M. 141, 65 P.2d 863 (1937), hereinafter referred to

as *"Western I"*, (2) that found at 41 N.M. 288, 67 P.2d 505 (1937), hereinafter referred to as *"Western II"*, (3) that found at 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1939), hereinafter referred to as *"Western III."*

The facts upon which the Western Cases were based are:

> "Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittance to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information, and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states." *"Western III,"* 303 U.S. at 252, 58 S.Ct. at 547.

It further appears that the transactions before the court involved representation by foreign advertising agencies.

> "* * * These foreign advertisements are obtained by plaintiff both through personal solicitation and through what are known as advertising agencies, located in states other than New Mexico. Some of these advertising contracts are made between plaintiffs and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiffs and an advertising agency, which advertising agency having a different and a separate contract with the manufacturer, and in such cases all dealings in connection therewith are between the plaintiffs and the agency." *Western I*, 41 N.M. at 143, 65 P.2d at 865.

[redacted] A. Is the tax in question violative of the Commerce Clause as an undue burden on interstate commerce? No.

It appears to us that each of the elements involved here was a subject of consideration by the Supreme Court of the United States in *Western III* and it was there held that tax was "not forbidden."

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. [citations omitted]. Hence, it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. [citations omitted]. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants." "Western III," 303 U.S. at 253, 58 S.Ct. at 547.

B. Is the tax forbidden because of the possibility of multiple taxation?

In *Western III*, the court considered multiple taxation with reference to the magazines' activities as a whole, including interstate distribution, and said:

> "* * * The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in

point of substance, of being imposed [citations omitted] or added to [citations omitted] with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce [citations omitted]. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which is the object of the commerce clause to remove." [citations omitted].

It is upon the basis of multiple taxation that taxpayer seeks to establish its claim of immunity from the taxation. The taxpayer argues that the possibility of multiple taxation which the Commerce Clause is intended to prohibit is present in the instant case in at least three distinct ways.

(First), since it is stipulated that the contracts between taxpayer and the national advertising agencies are made outside New Mexico, the state where the contracts are made could well impose a tax upon the receipts due under the contract.

(Second), the state where the advertiser lives could impose a tax upon the purchaser of the service for the amount of that service.

(Third), the state where the advertising agency resides could impose a tax upon the entire amount of the statement paid by the advertiser to the advertising agency, although the advertising agency retains only a percentage of the amount of the statement.

If compensation received under the contracts is not protected by the Commerce Clause, then, in our view, multiple taxation of these receipts would not bring them within such protection.

Should multiple taxation under these circumstances be treated as invoking protection of the Commerce Clause, the taxpayer, nevertheless, would have the burden of establishing his right to immunity from taxation. Norton Company v. Department of Revenue, 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517 (1951). Taxpayer has not shown that states other than New Mexico impose a tax upon any of the contracts or receipts which relate to, or are derived from, the sale of advertising space in taxpayer's newspaper. Taxpayer, as we have shown, contends only that a possibility of multiple taxation is present. In Northwestern States Portland Cement Company v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421, 67 A.L.R.2d 1292 (1959), the Supreme Court, in considering a net income tax as applied to receipts from interstate commerce, said, "While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here." 358 U.S. at 462, 79 S.Ct. at 364. Further, with respect to taxpayer's multiple tax contention, the court said:

"There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense." 358 U.S. at 463, 79 S.Ct. at 365.

There is no basis shown upon which multiple taxation can be considered, if it be applicable. See General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430, 439 (1964).

Further, in view of taxpayer's instate activities, as has been shown, we do not consider the tax upon the receipts involved to be violative of the commerce clause if taxpayer's activity be treated as falling within the Commerce Clause. In General Motors Corp. v. Washington, *supra,* the court, in considering a tax measured by gross receipts, said:

"* * * [I]t is well established that taxation measured by gross receipts is

constitutionally proper if it is fairly apportioned.

"A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for the aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. * * * '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'" 377 U.S. at 440, 84 S.Ct. at 1568.

Lee Enterprises, Inc., v. Iowa State Tax Commission, 162 N.W.2d 730 (Iowa 1968). The following statement in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (Ct.App.1970), we think is relevant to a consideration of the question presented here.

"* * * the taxpayer is a New Mexico corporation with its principal office in New Mexico, and the actual performance of all work in the production of the property provided for by the contracts here in question was accomplished within New Mexico. These in-state incidents are clearly sufficient as a basis for the levy by New Mexico of a gross receipts tax without doing violence to the interstate commerce clause of the federal constitution. * * *" 81 N.M. at 731, 472 P.2d at 994.

II.

VIOLATION OF EQUAL PROTECTION PROVISIONS OF STATE AND FEDERAL CONSTITUTION.

"The equal protection clauses of the United States and New Mexico Constitutions require that taxpayer be granted the same exemption from taxation for receipts derived from the sale of advertising space to advertiser not engaged in business in New Mexico as the radio and television broadcasters in the state are presently granted."

By reference to the stipulation of facts, taxpayer says that it derives its income partly from advertisements placed by advertisers not engaged in business in New Mexico. Radio and television broadcasters in New Mexico likewise derive their income partly from broadcasting programs supplied to them by national network broadcasting companies from outside New Mexico, under circumstances where the advertising sponsor is not engaged in business in New Mexico, and also from spot advertising programs supplied to the stations by advertisers and their agencies located outside the state. The Commissioner imposes gross receipts tax on taxpayer upon these receipts but does not impose such tax on the particular receipts of radio and television broadcasters.

Taxpayer argues that it and the radio and television broadcasters of the state are similarly situated in all respects pertinent to their tax liability, and are in direct competition with each other. Upon this basis, taxpayer contends that imposition of the tax upon its receipts, while the receipts of radio and television broadcasters are not taxed, constitutes arbitrary and discriminatory treatment or classification of the taxpayer in violation of the equal protection clauses of the state and Federal Constitutions. The taxpayer claims no discriminatory classification in the language of the statute. The discrimination claimed and violation of the equal protection clauses according to it rests in the interpretation and enforcement of the law by the Commissioner.

Section 72-16A-14.10, N.M.S.A.1953 (Pt. 2, Supp.1969) provides, in part:

"Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution."

The Supreme Court in Albuquerque Broadcasting Company v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416 (1947) held, with respect to programs and national spot advertising supplied by out of state broadcasting companies and advertisers, as follows:

"These programs are thus broadcast over sixteen states and parts of Canada and Mexico. They are communications directed to all persons listening to the broadcasts wherever they may be. This business is strictly interstate and we can discover no incident in connection therewith that could be classed as a 'taxable event.' The idea that there are means by which the state can lay a tax on these activities so that appellant will be required to pay 'its just share of state taxation' in return for the protection it receives, is either a delusion, or else we are unable to discover the means through which it may be required to respond, in view of Freeman v. Hewit, [329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946)]. We are of the opinion that the tax so laid and collected on the gross receipts from these broadcasts must be returned to appellant." 51 N.M. at 354, 184 P.2d at 430.

Taxpayer concedes that it is not entitled to question, and it does not question, the propriety of the exemption or immunity enjoyed by radio and television broadcasters. Consequently, for purposes of this review, we accept as correct the proposition that the receipts so derived by radio and television stations are not amenable to taxation by the state under the Commerce Clause.

It is our opinion that the Commissioner in granting the deductions to radio and television stations and denying a like deduction to newspapers was complying or undertaking to comply with the statute (§ 72-16A-14.10, supra) in relation to the classification inherent in the statute as a whole.

It is basic that there must be equality and uniformity in the levy of taxes. In Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969) the court commented as follows:

"In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such a violation of the Fourteenth Amendment places the burden on the one attacking to negative every conceivable basis which might support the classification. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

"Unless the classification is clearly arbitrary and capricious or void for uncertainty, as in Safeway Stores v. Vigil, [40 N.M. 190, 57 P.2d 287 (1936)] supra, we cannot substitute our views in selecting and classifying for those of the legislature. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct.App.1967), cert. denied January 31, 1968. * * *"

See also Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958). The Supreme Court of Iowa said:

"If there is any reasonable ground for the classification in a particular act, and it operates uniformly and equally upon all within the same class, this is uniformity in the constitutional sense. [citations omitted]. This is particularly true as to excise acts. Substantial equality and uniformity are all the law requires with reference to either a statute imposing an excise tax or an administrative rule with reference to such tax." [citations omitted].

Lee Enterprises, Inc. v. Iowa State Tax Commission, *supra.*

Granting a deduction, whether in accordance with statute or administrative regulations, of gross receipts which are not taxable by the state under the Commerce Clause, and denying such deduction, with respect to receipts which are subject to state taxation, although the receipts in each instance are produced by comparable activities, is a reasonable and proper basis for classification; it is not clearly arbitrary and capricious, or void for uncertainty. See New Yorker Magazine, Inc. v.

Gerosa, 3 N.Y.2d 362, 165 N.Y.S.2d 469, 144 N.E.2d 367 (1957).

If inequities are occasioned taxpayer which result from classification its remedy is with the Legislature. Edmunds v. Bureau of Revenue, *supra*.

In view of the conclusions we have reached, the decision and order of the Bureau of Revenue is affirmed.

It is so ordered.

HENDLEY, J., specially concurs.

PAUL F. LARRAZOLO, District Judge, concurs.

HENDLEY, Judge (specially concurring).

I concur in the result reached by the majority but I do not agree with the reasoning used to reach that result. I will not belabor the authorities as they have been cited in the majority opinion.

We could reach a thoroughly consistent and valid result by following the principles enunciated in General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430, 439 (1964) and our local cases. Once a "taxable event" or "local incidents" has been established, the Commissioner could enforce a tax based on gross receipts unless the tax results in either discrimination against or multiple taxation on interstate commerce. Bell Telephone Laboratories, Inc. v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966); Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (Ct.App.1970); Spillers v. Commissioner of Revenue, 82 N.M. 41, 475 P.2d 41 (Ct.App.1970).

483 P.2d 498

In the Matter of Donald Wayne Willoughby, D. V. M.

Donald Wayne WILLOUGHBY, D. V. M., Appellee,

v.

BOARD OF VETERINARY EXAMINERS, State of New Mexico, Appellant.

No. 9130.

Supreme Court of New Mexico.

March 29, 1971.

James A. Maloney, Atty. Gen., James C. Compton, Jr., Asst. Atty. Gen., Santa Fe, for appellant.

Sosa, Garza & Neumeyer, Las Cruces, for appellee.

OPINION

McMANUS, Justice.

This action was initially heard before the Board of Veterinary Examiners of the State of New Mexico. The appellee, Donald Wayne Willoughby, D.V.M., appeared before the Board at its request on the matter of suspending or revoking his license to practice veterinary medicine in New Mexico. After hearing, the Board suspended appellee's license for 180 days and placed him on probation for the 180 days following. This decision was appealed to the District Court of Dona Ana County. The court reversed the Board's decision. The Board appeals.

The complaints filed with the Board in the first instance concerned the professional conduct of the appellee. A number of witnesses were heard by the Board. The complaints ran from the failure of the doctor to communicate with the owners of animals he was treating; failure to inform animal owners of actual conditions concerning an animal; failure to inform owners of deaths of animals under his care; failure to administer timely treatment to animals; improper record controls on animals; failure to maintain clean and sanitary conditions at the animal hospital; lack of proper control over animals, and misrepresentation to the public that one of the members of his staff was a doctor of veterinary medicine.

Although the appellee complains of hearsay having been received into evidence by the Board, the applicable statute, § 67–26–11, N.M.S.A. 1953 (Repl. Vol. 10, pt. 1, 1961), clearly contemplates that a board may admit and consider hearsay evidence, if it is of a kind commonly relied upon by reasonably prudent men in the conduct of serious affairs. However, the revocation or suspension of a license to conduct a business or profession must not be based solely upon hearsay evidence, and other legally competent evidence, together with the hearsay evidence, must substantially support the findings upon which the revocation or suspension is based. Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969). Upon consideration of the entire record, we are of the opinion the Board's findings of fact are supported by substantial evidence.

Under the Uniform Licensing Act, § 67–26–20, N.M.S.A. 1953 (Repl. Vol. 10, pt. 1, 1961), the scope of review of the district court upon appeal from the board excludes evidence not offered at the hearing,

> "except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the board or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: in violation of constitutional provisions; or in excess of the statutory authority or jurisdiction of the board; or made upon unlawful procedure; or affected by other error of law; or unsupported by substantial evidence on the entire record as submitted; or arbitrary or capricious."

We hold that the trial judge substituted his own judgment in reversing the decision of the Board, rather than basing his reversal upon any of the grounds set forth in § 67–26–20, supra.

Appellee also refers to an incident where one of the board members was absent during part of the testimony and was apparently rounding up a witness to testify at the hearing. However, there is nothing to indicate that the Board as a whole was biased or prejudiced toward appellee. Compare McCaughtry v. New Mexico Real Estate Commission, 82 N.M. 116, 477 P.2d 292 (1970). Further, the appellee alleges that the language of § 67–11–20 (Supp., Repl. Vol. 10, pt. 1, 1961), in setting up certain grounds for revocation or suspension of a professional license, is too vague as to establish reasonable guidelines. This Court has previously held that a board need not specify by regulation or

rule those acts deemed unprofessional. See Young v. Board of Pharmacy, supra. It would seem logical that the above conclusion is due in part to general standards of ethics and practice which are adhered to in a profession. It is reflected that the Board complied with all of the prerequisites and requisites of the Uniform Licensing Act, §§ 67–26–1 to 67–26–28, 1953 Comp. (Repl. Vol. 10, pt. 1, 1961).

However, there is no language within the Uniform Licensing Act, §§ 67–26–1 to 67–26–28, supra, which gives the Board the power to place the appellee on probation after the period for which his license has been suspended. An administrative body has only such authority as is given to it by law. Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962).

In accordance with this opinion, the trial court is hereby directed to enter an order affirming the decision of the Board as to suspension of appellee's license, but reversing it as to the probationary period imposed after termination of the suspension.

It is so ordered.

TACKETT and OMAN, JJ., concur.

483 P.2d 500

Rudy A. ORTIZ, Chairman, Bernalillo County Democratic Party, Petitioner-Appellant,

v.

Lucy JARAMILLO, County Clerk of Bernalillo County, Respondent-Appellee.

No. 9149.

Supreme Court of New Mexico.

April 5, 1971.

Hartley, Olson & Baca, Albuquerque, for petitioner-appellant.

Alexander F. Sceresse, Dist. Atty., William J. Bingham, Asst. Dist. Atty., Albuquerque, for respondent-appellee.

OPINION

OMAN, Justice.

Petitioner, the Democratic Party Chairman of Bernalillo County, sought mandamus in the District Court to compel respondent, the County Clerk, to furnish him a copy of the magnetic tape, which had been produced and was kept by her, in her official capacity, as the "working master record" of the voter registration records of the county, pursuant to the Optional Registration Act, Chapter 3, Article 5, N.M.S.A. 1953 (Repl. Vol. 1, 1970). An alternative writ was issued, but after a hearing the court entered a judgment quashing the writ and dismissing the petition. Petitioner has appealed, and we reverse.

Petitioner sought a copy of the magnetic tape to facilitate his work as County Chairman of a political party. It is his contention that this tape constitutes a public record and he is entitled to have the same copied, or duplicated, at his expense under respondent's supervision, and the copy thereof delivered to him upon payment therefor.

The trial court referred to the tape both as a public record and as a county record, and respondent concedes it is a public record. See Chapter 71, Article 5, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1961) concerning inspection of public records. However, the trial court reached the following conclusions, although called findings of fact: (1) this was a unique kind of record, which could not be distributed indiscriminately; (2) it must remain always in the custody, under the supervision, and be protected by the County Clerk; (3) the intention of the Legislature in enacting the Optional Registration Act, supra, was that there should be only the "working master record" and just one copy thereof, the "duplicate master record," unless otherwise authorized by the Board of Registration; (4) the further duplication and distribution of the tape would constitute an invasion of the privacy of each citizen who provides the information which appears on the tape and which is required for voter registration; and (5) a copy of the tape should not be made available to petitioner.

Respondent concedes the affidavits of registration which she keeps in her office, as required by Chapter 3, Article 4, N.M.S.A.1953 (Repl.Vol. 1, 1970), and particularly by the provisions of §§ 3-4-8, 3-4-9, 3-4-10 and 3-4-18, N.M.S.A.1953 (Repl. Vol. 1, 1970), contain all the information found on the tape, and that petitioner, or anyone else acting lawfully and for a lawful purpose, may inspect the affidavits of registration. No contention is made that the right to inspect a public record does not include the right to make copies thereof. The right to inspect public records commonly carries with it the right to make copies thereof, subject, however, to reasonable restrictions and conditions imposed as to their use, reasonable regulations as to appropriate times when and places where they may be inspected and copied, and such reasonable supervision by the custodian thereof as may be necessary for their safety and as will secure equal opportunity for all to inspect and copy them. Whorton v. Gaspard, 239 Ark. 715, 393 S.W.2d 773 (1965); Direct Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, 5 N.E.2d 545 (1937); Annot., 84 A.L.R.2d 1261, § 5 at 1265 (1962); 45 Am.Jur., Records and Recording Laws, § 15 at 426 (1943).

We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection, and safety.

The evidence is clear that copies of the tape can be made with reasonable safety. The obvious purpose for the preparation and safekeeping of the "duplicate master record" is to have immediately available the means of replacing the information on the "working master record," if the "working master record," or any portion thereof, should be damaged or destroyed. See

§§ 3-5-19 and 3-5-20, N.M.S.A.1953 (Repl. Vol. 1, 1970).

We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the "working master record" tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information. Nothing said or reasonably suggested in MacEwan v. Holm, 226 Or. 27, 359 P.2d 413, 85 A.L.R.2d 1086 (1961), cited by respondent, supports any claim that the information contained in a written public record becomes confidential, or cloaked with a protection of privacy, upon being converted into a reproducible form on a magnetic tape, which is also a public record. We are not concerned with whether an invasion of privacy might be involved in making the information available directly from the affidavits of registration, because no such question has been presented.

Respondent urges upon us that the trial court's findings are supported by substantial evidence, and, thus, are binding upon us as the facts of the case. There would be merit to this position [LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969)] if the findings of the trial court relied upon were, in truth, findings of fact, rather than conclusions of law, and if these asserted findings of fact were actually supported by evidence, rather than being supported only by the trial court's interpretation of the statutes.

[redacted] The judgment of the trial court is reversed and the cause remanded with instructions to reinstate the petition on the docket and issue a peremptory writ of mandamus commanding respondent to furnish petitioner a copy of the "working master record" magnetic tape.

It is so ordered.

TACKETT and STEPHENSON, JJ., concur.

483 P.2d 502

STATE of New Mexico, Plaintiff-Appellee,

v.

Ronald Leroy JACOBY, Defendant-Appellant.

No. 535.

Court of Appeals of New Mexico.

March 19, 1971.

[redacted]

Robert W. Ward, Lovington, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Ray H. Shollenbarger, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant was convicted of three burglaries, an attempted burglary and possession of burglary tools. He did not appeal these convictions. This appeal is from a denial of post-conviction relief under § 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4). The claims and our answers follow.

1. *Search and seizure.*

The claim is that there was an illegal search of defendant's person and the vehicle in which he was riding; that this evidence was used to secure his convictions. Jacoby's case was consolidated with Everitt's case for trial purposes. This claim was answered on the merits and adverse to Jacoby in Everitt's appeal. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App. 1969). Further, the claim of an illegal search is not a basis for post-conviction relief where the circumstances of the search are known to defendant at time of trial. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968); State v. Pineda, 79 N.M. 525, 445 P.2d 749 (Ct.App.1968). Defendant's claim makes it clear that he knew of the circumstances of the search at the time of his trial.

2. *Double jeopardy.*

Defendant asserts his convictions were in violation of the Fifth Amendment to the U. S. Constitution and to N.M. Const. Art. II, § 15. His counsel asserts this is a claim that defendant was subjected to double jeopardy. Assuming this is the claim made, there are no specific factual allegations on which to base the claim. Only the conclusion is stated. This provides no basis for relief. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App.1969); State v. Sedillo, 79 N.M. 254, 442 P.2d 212 (Ct.App.1968). Further, a claim of double jeopardy was decided, on the merits, adverse to defendant, in State v. Everitt, supra.

3. *Not present at time of convictions.*

Defendant asserts he was convicted of attempted burglary and then returned to his cell. He claims the convictions of the other four offenses were returned by the jury without his presence. The trial court found: "This statement is completely false. The defendant was tried on five separate counts at the same time and before the same jury. All verdicts were returned by the jury at the same time." This finding is not attacked; it, therefore, is the fact before this court. State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968); McCroskey v. State, 82 N.M. 49, 475 P.2d 49 (Ct.App. 1970).

4. *Excessive bail.*

Defendant claims he was held under excessive bail and that the amount of this bail was $30,000.00. The record shows that bail was set for each of the five charges and that the total of the bail was $25,000.00. Defendant states only the conclusion that this total amount was excessive. In the light of five charges, why was it excessive? Defendant doesn't say. Accordingly, the claim is too vague to provide a basis for post-conviction relief. Further, he claims no prejudice from the amount of the bail. Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct.App.1970).

5. *Speedy trial.*

Defendant claims he was denied a speedy trial. The trial court found as a fact there was no such denial. The find-

ing is not attacked and is conclusive on this issue. State v. Reid, supra; McCroskey v. State, supra. As to the lack of speedy trial being a basis for post-conviction relief, see Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct.App.1970).

6. *Preliminary examination.*

Defendant claims "* * * he waived a preliminary examination without the assistance of counsel. * * *" The record shows the falsity of this claim; it shows that defendant had a preliminary examination (the transcript of this proceeding is some 180 pages), and that he was represented by counsel at that preliminary examination.

7. *Fundamental error.*

Defendant contends the trial court committed fundamental error in "sustaining" the conviction of attempted burglary. His claim is "* * * there is a total lack of substantial evidence so that Appellant could have been convicted only on mere speculation." What defendant seeks is a review of the sufficiency of the evidence to sustain this conviction. Insufficiency of the evidence, in itself, is not a basis for post-conviction relief. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct.App. 1969). As to the asserted insufficiency of the evidence being of a degree amounting to fundamental error, "* * * [t]he doctrine is resorted to only under exceptional circumstances and is applied as a means of preventing a miscarriage of justice." State v. Gomez, 82 N.M. 333, 481 P.2d 412 decided February 5, 1971. No such exceptional circumstances exist in this case.

The orders denying post-conviction relief are affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

483 P.2d 504

STATE of New Mexico, Plaintiff-Appellee,
v.
Leroy WOODS, Defendant-Appellant.
No. 630.

Court of Appeals of New Mexico.
March 19, 1971.

Leslie A. Williams, Tharp, Tharp & Williams, Clovis, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, John A. Darden, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Woods was indicted and convicted of aggravated assault under § 40A-3-2, subd. A, N.M.S.A. 1953 (Repl. Vol. 6), which reads in part:

> "Aggravated assault consists of unlawfully assaulting * * * another with a deadly weapon;"

Woods appeals. We affirm.

During an argument over Woods' conduct in another's home, Woods pulled a loaded gun out of his hip pocket, pointed it at the male prosecuting witness and said, "I will kill you now." The prosecuting witness immediately jumped up and ran from the home.

Woods contends there is no evidence that a crime, as defined by the court's instructions, was committed, and that the verdict is contrary to the weight of the evidence.

The trial court, as a means of definition, instructed the jury that "'Assault' consists of an attempt to commit a battery upon the person of another." This is the definition of "assault" under § 40A-3-1, subd. A, N.M.S.A. 1953 (Repl. Vol. 6). The trial court also instructed the jury that "'Unlawful' means contrary to law and without legal excuse or justification," and that the state must prove beyond a reasonable doubt "that Leroy Woods intentionally assaulted" the prosecuting witness. There were no objections to the instructions.

In State v. Anaya, 79 N.M. 43, 439 P.2d 561 (Ct.App.1968), this court held that Anaya holding a gun, pointing it at two men, and asking for money, was sufficient to sustain a conviction of aggravated assault. Woods' conduct with a deadly weapon also falls within the definition of an unlawful assault as defined by the court.

In contending the verdict is contrary to the weight of the evidence, defendant points out that assault was defined as an attempt to commit a battery. He claims there is no evidence that he "attempted" a battery, which is defined in § 40A-3-4, N.M.S.A. 1953 (Repl. Vol. 6) as "the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent, or angry manner."

The evidence supporting the conviction is that defendant pulled the loaded gun from his pocket and made the threat to kill after the complaining witness told defendant to desist from fondling the complaining witness' girl friend. This is substantial evidence of an attempt to apply force in either an insolent or angry manner.

The judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

483 P.2d 505

Nathana GOODMAN, individually and as next friend of Sheila Taylor, a minor, and Sheila Taylor, individually, Plaintiffs-Appellants,

v.

C. V. VENABLE and Susan Ann Venable, Defendants-Appellees.

No. 542.

Court of Appeals of New Mexico.
March 26, 1971.

[redacted]

David L. Norvell, Clovis, for plaintiffs-appellants.

Stuart D. Shanor, Hinkle, Bondurant, Cox & Eaton, Roswell, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiffs appeal an adverse jury verdict on two grounds which relate to (1) the court's refusal of a tendered instruction on presumption of knowledge of a defective condition, and (2) the giving of an instruction on unavoidable accident.

We affirm.

Defendant, Susan Venable, drove her father's car to school. The brakes were functioning normally. Susan and a friend left school and drove to a restaurant for lunch. Susan noticed the brakes had to be depressed a little further than normal to stop the vehicle, although the stopping distance was still normal. At the end of the school day Susan returned to her car to drive home. Before leaving the parking area she had one occasion to try the brakes. She testified: "They weren't working normally. They weren't bad but they would stop." Susan pulled out of the school parking lot and onto the street at a speed of 10 to 15 miles per hour. Susan observed plaintiff's, Sheila Taylor's, car stopping and when Susan was about three car lengths from the rear of Sheila's car, she applied her brake. The brake pedal went to the floor without any apparent effect on stopping the car. Susan's car then rear-ended Sheila's car. Susan stated she had no advance warning that the brakes would completely fail.

Mr. Reeves, an auto mechanic since 1924 and with considerable experience in the repair of hydraulic brake systems, testified that one of the brake lines had ruptured and that "you lose all of your brakes with a rupture like that." An inference from Mr. Reeves' testimony is that the accident would not have caused the rupture. Mr. Reeves stated that in all of his experience this was the second time he had knowledge of a ruptured brake line.

Presumption of Knowledge of a Defective Condition.

[redacted] Plaintiffs contend the trial court erred in refusing to give their Requested Instruction No. 2 which states:

> "It is presumed that an owner of an automobile knows and knew, prior to the time and occurrence in question, of the defective condition of the automobile brakes of the automobile owned by him,

and the burden of proof is on said owner to prove any lack of knowledge."

Plaintiffs assert that § 64–20–41, N.M. S.A.1953 (Repl. Vol. 9, pt. 2, Supp.1969) spells out the law in New Mexico with regard to the maintenance of brakes and stopping distances. Plaintiffs cite Ferran v. Jacquez, 68 N.M. 367, 362 P.2d 519 (1961) for the proposition that the owner is presumed to have knowledge of a defective condition of his brakes.

Plaintiffs' statement of *Ferran* is incomplete. *Ferran* goes on to say that once the plaintiff has shown the statutory violation, that the violation is sufficient evidence to defeat a motion for a directed verdict and defendant then has the burden of coming forward and showing lack of knowledge of the defective condition as a reasonable man which would relieve him of the responsibility placed upon him by the statute.

This is exactly what the trial court did when it gave U.J.I. 11.2. The instruction not only explained the statutes involved (two parts of § 64–20–41, supra) but also sets forth how they were to be applied and the consequences thereof. Those portions were as follows:

"If you find from the evidence that the Defendant conducted herself in violation of either of these statutes, you are instructed that such conduct constituted negligence as a matter of law, unless you further find that such violation was excusable or justifiable.

"To legally justify or excuse a violation the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desires to comply with the law."

The requested instruction was incomplete and therefore an incorrect statement of the law and insofar as it was correct it was repetitious. It is not error to refuse instructions which are incomplete, erroneous or repetitious. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct.App.1970), cert. denied 81 N.M. 721, 472 P.2d 984 (1970); Garcia v. Barber's Supermarkets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App. 1970).

Unavoidable Accident.

Plaintiffs contend that the giving of the instruction on unavoidable accident (U.J.I. 13.9) was error. Plaintiffs rely on Horrocks v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962) for the proposition that not every vehicle accident case warrants giving an instruction on unavoidable accident. There should be a genuine basis for the instruction, such as "unpreventable mechanical failure" and "such must be coupled with circumstances which present a fair issue of whether this failure of the driver to anticipate or sooner guard against the danger or to avoid it, is consistent with a conclusion of the exercise of his due care."

The evidence is such that we could not reasonably conclude, as a matter of law, that there was not an "unpreventable mechanical failure" which the driver could not reasonably anticipate or guard against or avoid it consistent with a conclusion of due care.

Defendants having presented evidence on unavoidable accident were entitled to an instruction supporting their theory of the case. Boyd v. Cleveland, 81 N.M. 732, 472 P.2d 995 (Ct.App.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

483 P.2d 508

STATE of New Mexico, Plaintiff-Appellee,

v.

Larry James MIRELES, Defendant-Appellant.

No. 609.

Court of Appeals of New Mexico.

March 19, 1971.

[redacted]

Richard A. Bachand, Smith, Ransom & Deaton, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of burglary, § 40A-16-3, N.M.S.A. 1953 (Repl. Vol. 6), defendant appeals. He challenges the sufficiency of the evidence under two points. The two points involve: (1) fingerprint evidence and (2) consent to enter.

Manuel Campos was gone from his residence from 9:00 p. m. Friday evening until approximately 9:00 p. m. on Sunday evening. No one else was at home during this period. Upon leaving, he locked all doors. Upon returning, he found both the front and back doors open and discovered that various items of personal property were missing. He gave no one consent or permission to enter or take anything from the house during his absence. Campos did not know the defendant.

In addition to the doors, a front window was open. This window, according to Campos, "* * * normally is locked by a latch from the inside. In order to gain entrance that window would have to have been forced open."

On the evening that Campos discovered the theft, a detective checked for fingerprints. Prints were found on the front window and identified as being those of defendant. The detective testified: "* * they were on the inside of the window where a subject had to insert both hands inside the window and then pull the window, thus stripping the cranking mechanism on the window, * * *"

Fingerprint evidence.

[redacted] Defendant asserts "* * * it would be mere speculation to infer from the circumstantial evidence of fingerprints on an open outside window next to the front door, that the defendant entered the house and removed the property therefrom. * * *" He relies on State v. Gilliam, 245 S.C. 311, 140 S.E.2d 480 (1965). That case held there was insufficient evidence of housebreaking with intent to steal. The evidence held to be insufficient was a

broken pane of glass, the unlocked position of a window latch, absence of stamps from an employee's desk and defendant's fingerprint on a fragment of the broken glass. In so holding, State v. Gilliam, supra, points out there was no evidence for an inference of theft from the fact that stamps were missing from a desk. The opinion states:

> "* * * The unexplained presence of defendant's fingerprint on a fragment of the broken pane outside the building might inculpate him if the evidence established that the building was feloniously entered and by this means, * * *"

In this case the evidence is clear that the residence had been entered with an intent to commit theft. Various items of personal property had been stolen. The testimony of Campos is that "* * * to gain entrance that window would have to have been forced open." Defendant's prints were on the inside portion of the window "* * where a subject had to insert both hands * * * and then pull the window, * *" Under these circumstances, not only is the decision in State v. Gilliam, supra, inapplicable, but the evidence unerringly points to defendant as the one who entered the house and stole the property. Avent v. Commonwealth, 209 Va. 474, 164 S.E.2d 655 (1968); Lawless v. State, 3 Md.App. 652, 241 A.2d 155 (1968).

Consent to enter.

Campos unequivocally testified that no one had authority to enter or remove items from his residence during his absence. Defendant asserts this evidence is insufficient to show an "unauthorized entry" under § 40A–16–3, supra, because "* * * there is no evidence of any kind as to want of consent to entry by Mrs. Campos. * *" The evidence sustains the inference that Mrs. Campos was also living at the residence during all material times.

Defendant relies on Stallworth v. State, 167 Tex.Cr.R. 19, 316 S.W.2d 417 (1958). That case holds that where the owner of the burglarized premises testifies, then lack of consent may not be proven by circumstantial evidence. We do not follow such a restrictive rule. New Mexico does not restrict the method of proving unauthorized entry. It may be proved by circumstantial evidence. State v. Gonzales (Ct.App.), 82 N.M. 388, 482 P.2d 252, decided January 22, 1971; State v. Slade, 78 N.M. 581, 434 P.2d 700 (Ct.App.1967). Further, Stallworth v. State, supra, is not in point because here there is direct evidence of an unauthorized entry.

What defendant seeks is a rule that unauthorized entry is not proved unless every person who could consent to entry testifies that consent was not given. We reject such a requirement. The State had the burden of proving an unauthorized entry under § 40A–16–3, supra. This statute does not require that the proof be by testimony from everyone who could consent to entry.

Since the statute does not impose the requirement for which defendant contends, the burden on the State then is proof of unauthorized entry beyond a reasonable doubt. While the absence of testimony from a person who could have consented is a factor for the jury to consider, if such evidence is presented, nevertheless such is an evidentiary matter. Absence of such testimony does not prevent the question of unauthorized entry from being submitted to the jury if there is evidence from which the jury could find an unauthorized entry. See State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969). In this case there is both direct and circumstantial evidence of unauthorized entry. That evidence is substantial and supports the jury's verdict that the entry was, in fact, unauthorized. Compare State v. Gonzales, supra.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

483 P.2d 510

STATE of New Mexico, Plaintiff-Appellee,

v.

Roland Dee STOUT, Defendant-Appellant.

No. 594.

Court of Appeals of New Mexico.

March 19, 1971.

Leon Taylor, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

The three issues in this appeal from an armed robbery conviction, § 40A-16-2, N.M.S.A. 1953 (Repl.Vol. 6), pertain to defendant's incriminating statement. Defendant claims: (1) the statement was obtained through trickery and without a knowing and intelligent waiver of the right to counsel; (2) the trial court did not make an adequate determination of whether the statement was voluntary; and (3) portions of the statement were inadmissible because of reference to other crimes.

Obtaining the statement.

At the time defendant made his statement he did not have the advice of counsel. Defendant claims "* * * [h]e was not advised of his rights at the time of his arrest or at any time during his in-

terrogation. The first hint of advice as to rights comes in the form at the top of the statement, which Defendant signed for the police. Assuming * * * Defendant read this advice, there has been no showing by the State that he understood them in fact. * * * Perhaps the most shocking aspect of the case at bar is the use of Defendant's twin brother as a hostage to coerce Defendant into signing a confession. * * *" Defendant also claims the wording of the statement was not his; "* * * the interrogating officer instructed the secretary as to what to put into the confession. * * *"

The evidence on each of these claims is conflicting. There is evidence that defendant was advised of his rights on the ride to the police station; that there was no interrogation during the ride but that defendant remarked: "'* * * I don't need a lawyer because I didn't do anything.'" There is evidence that upon arrival at the police station defendant was again advised of his rights and he indicated that he understood what the officer was talking about. There is evidence that he was interrogated for about one hour before he gave the statement. Before giving the statement, he was again advised of his rights and filled in the blanks at the beginning of the typewritten statement. The officer testified the statement was "* * * a true and accurate transcription of what Mr. Stout said * * *" There is a flat denial that defendant was told "* * * that if he would confess or tell you about the crime you would let his [twin] brother go."

The trial judge resolved the conflicts and ruled the statement was admissible. There being substantial evidence supporting the ruling, we cannot say, as a matter of law, that the ruling was error. State v. Burk, (Ct.App.), No. 563, decided February 19, 1971; State v. Briggs, 81 N.M. 581, 469 P.2d 730 (1970).

Adequacy of the trial court's determination.

Before permitting a defendant's statement to be submitted to a jury, the trial court is required to "fully and independently" resolve the question of voluntariness. Not only must the judge's conclusion be "clearly evident," but his findings on disputed factual issues must either be expressly stated or ascertainable from the record. These requirements are discussed in State v. Burk, supra.

Here, as in State v. Burk, supra, there is superficial support in the record for the claim that the trial court did not adequately determine the admissibility of the statement. Here, as in *Burk,* there is no specific ruling on disputed factual issues. At one point, the trial court remarked: "* * the Court is ruling that there is enough evidence to go to the jury under proper instructions * * *" At another point, the trial court stated: "I'm not ruling there was no coercive element. That is a question of fact for the jury. * * *"

However, the trial court conducted a pretrial hearing on the admissibility of the statement. After hearing the evidence, it ruled "* * * as a matter of law there is enough evidence to go to the jury * *", and that the statement would be admissible at trial. His findings on disputed factual issues are clearly ascertainable from the record; it is clear, from the court's remarks, that it believed the officer's testimony and did not believe the defendant. The trial court's remarks, in context, are that the statement was obtained in compliance with legal requirements and was admissible although the final decision concerning the statement was for the jury. State v. Burk, supra; compare State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

Reference to other crimes in the statement.

Defendant asked that references to other crimes in the statement be deleted. Generally, it is error to admit evidence of other offenses. One exception permits evidence of other crimes when this evidence tends to establish the identity of the defendant. State v. Turner, 81 N.M. 450, 468 P. 2d 421 (1970); State v. Lopez, 80 N.M. 599, 458 P.2d 851 (1969), cert. denied, 398

U.S. 942, 90 S.Ct. 1860, 26 L.Ed.2d 279 (1970).

Defendant's statement referred to two offenses in addition to the one for which he was on trial. The prosecutor claimed this reference tended to establish the identity of defendant as the perpetrator of the robbery for which he was being tried. We agree.

The identity issue was apparent as early as the hearings on the pre-trial motions. The issue of identity arose because of defendant's twin, described at times as an identical twin. Cross-examination, prior to introduction of the statement, went to the certainty of the identification of defendant. As a result of this cross-examination, there was a question as to whether the perpetrator of the robbery was defendant or his twin.

The evidence was uncontradicted that three persons committed the robbery. Defendant's statement identifies himself as one of three persons who not only committed the robbery but the two other offenses in a continuous sequence immediately preceding this robbery. Additionally, in the light of the alibi defense, admission of the entire statement was proper. The reference to the two additional offenses did tend to identify defendant as one of the three robbers. The trial court did not err in refusing to delete the reference to the two additional offenses. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (1968).

The conviction and sentence is affirmed.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

483 P.2d 932

Lester MERRILL, Plaintiff-Appellee,

v.

Margaret Ann MERRILL, Defendant-Appellant.

No. 9124.

Supreme Court of New Mexico.

March 22, 1971.

Rehearing Denied April 20, 1971.

James E. Womack, Albuquerque, for defendant-appellant.

Dan B. Buzzard, Clovis, for plaintiff-appellee.

OPINION

TACKETT, Justice.

By motion, plaintiff-father requested a modification of previous orders respecting custody of three minor children who had been awarded to defendant-mother. After hearing in the District Court of Curry County, New Mexico, custody was changed to plaintiff, with visitation rights awarded to defendant. Defendant appeals.

Complaint for divorce was filed November 30, 1967. A child custody and support agreement was entered into by the parties on February 13, 1968. The final divorce decree was entered of record on February 15, 1968, confirming the agreement which awarded custody of the minor children to defendant. Plaintiff, having remarried two months earlier, filed a motion on June 13, 1968, seeking a modification of the divorce decree, to change custody of the children to him. After hearing, the court denied plaintiff's motion on the ground there was not a sufficient change in circumstances to warrant a change in custody. On June 25, 1970, plaintiff again filed a motion seeking modification of the divorce decree with respect to custody of the children. The court, after hearing, granted the motion and changed custody of the

children to plaintiff by order entered August 13, 1970. On August 19, 1970, defendant filed her motion requesting the court to make findings of fact and conclusions of law, and also filed her requested findings of fact and conclusions of law. On August 24, 1970, plaintiff filed his requested findings of fact and conclusions of law.

Under Rule 52(B) (a) (1), Rules of Civil Procedure (§ 21-1-1(52) (B) (a) (1), N.M.S.A., 1953 Comp. Repl. Vol. 4), the trial court was obligated to make and file findings of fact and conclusions of law, because factual determinations were necessary to a proper decision of the case. This he failed and refused to do, possibly on the basis that defendant's requested findings and conclusions were filed on August 19, 1970, six days after entry of the order modifying the final divorce decree. This was error as Rule 52(B) (b), Rules of Civil Procedure (§ 21-1-1(52) (B) (b), N.M.S.A., 1953 Comp. Repl. Vol. 4), clearly states that:

> "Upon motion of a party made not later than *ten* [*10*] *days* after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. * * *" (Emphasis added.)

Defendant principally contends that the court erred and abused its discretion in entering its order of August 13, 1970, which modified the child custody provisions of the previous divorce decree and order.

> "The trial court is vested with great discretion in awarding the custody of [minor] children and we cannot reverse unless the court's conclusion about the best interests of the children is a manifest abuse of discretion under the evidence in the case. * * *"

Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570 (1968).

In a proceeding to modify a provision for the custody of minor children, the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification. Every presumption is in favor of the reasonableness of the original decree. Kerley v. Kerley, 69 N.M. 291, 366 P.2d 141 (1961).

The principal question before us is whether there has been a sufficient change of circumstances, since the original divorce decree was entered, to require modification. We cannot say that plaintiff's remarriage, having a stable home, that defendant may move to Albuquerque (Garcia v. Garcia, 81 N.M. 277, 466 P.2d 554 (1970)), or the fact that the defendant did not force the children to visit the plaintiff, constitutes a sufficient change in circumstances to warrant a modification of the original divorce decree. The record has been searched and it does not reveal a material change of circumstances bearing upon the necessity or the justice of modifying the custody provision contained in the original divorce decree. A change of custody is not permissible except upon a showing of a material change of circumstances. Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968).

In all custody questions, the primary concern should be the best interest and welfare of the children. Terry v. Terry, 82 N.M. 113, 476 P.2d 772 (1970). In the case before us, there is no evidence in the record to indicate that the best interest and welfare of the children would be with the plaintiff. Had the trial court made a finding in this respect, we would then be able to determine if such finding did or did not have support in the evidence. We are unable to find any evidence in the record on this matter.

The three boys, ages 16, 14 and 10, testified that they wanted to live with their mother. The prevailing and correct rule, concerning the proper weight to be given to the expressed wish of minors, whose custody is at issue, is that set forth in Annot. 4 A.L.R.3d 1396 at 1402 (1965), where it is stated that:

> "* * * when a child is of sufficient age, intelligence, and discretion to

exercise an enlightened judgment * * *."

their wishes concerning their own custody are a factor to be considered by the court in arriving at its conclusion on the issue, but it is in no sense controlling. Stone v. Stone, supra.

Did the trial court abuse its discretion in modifying the child custody provisions contained in the final divorce decree, without sufficient evidence of a change of conditions and circumstances to warrant such modification? This question is answered in the affirmative. Trial courts have a wide discretion in custody matters. That discretion is "judicial" and must be based on evidence introduced in the case and is subject to review. Martinez v. Martinez, 49 N.M. 405, 165 P.2d 125 (1946).

> "Judicial discretion is a discretion which is not arbitrary, vague or fanciful, or controlled by humor or caprice, but is a discretion governed by principle and regular procedure for the accomplishment of the ends of right and justice. * * *"

Urzua v. Urzua, 67 N.M. 304, 355 P.2d 123 (1960). Also see, Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968).

Judicial discretion and decision must be based on evidence introduced at the trial and since the record proper in the instant case does not support the trial court's decision, there was an abuse of discretion in entering the order changing custody of the minor children without evidentiary support.

The cause is reversed and remanded to the trial court with direction to enter a new order setting aside the modification order of August 13, 1970, which, in effect, will restore the parties to their original status under the final divorce decree.

Appellant is allowed a reasonable attorney's fee for this appeal in the sum of $1,000, to be taxed as costs against appellee.

It is so ordered.

McMANUS and OMAN, JJ., concur.

483 P.2d 934

James E. WOMACK, Relator-Appellant,

v.

REGENTS OF the UNIVERSITY OF NEW MEXICO, Respondents-Appellees.

No. 9154.

Supreme Court of New Mexico.

April 12, 1971.

James E. Womack, pro se.

Rodey, Dickason, Sloan, Akin & Robb, William A. Sloan, Albuquerque, for appellees.

OPINION

COMPTON, Chief Justice.

This is an appeal by the relator from an order dismissing his application for a writ of mandamus directing the respondents to comply with constitutional and statutory requirements in the exercise of their official duties as Regents of the University of New Mexico. The claimed basis for his right of action is that he is a resident taxpayer. Relator is mistaken in this regard.

The University of New Mexico is a creature of the Constitution of the State of New Mexico, Art. XII, § 13, augmented by statute, § 73-25-3, N.M.S.A. 1953, and the respondents owe their duties to the State of New Mexico, not to a private person. This being so, it follows that relator, though a taxpayer, has no standing to enforce by mandamus a duty owing to the public. State ex rel. Naramore v. Hensley, 53 N.M. 308, 207 P.2d 529. See 52 Am.Jur.2d, Mandamus, § 391.

This is not to say that a private person may not move for mandamus to enforce a public duty not due to the State. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242.

We conclude that appellant was without standing to enforce mandamus. The order should be affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur in result.

483 P.2d 935

In the Matter of the Petition of Sherrill D. Tuft and Thelma Tuft for the Custody of the Minor Children of Sherrill D. Tuft.

Sherrill D. TUFT and Thelma A. Tuft, Petitioners-Appellants,

v.

Barbara TUFT, Cross-Petitioner-Appellee.

No. 9062.

Supreme Court of New Mexico.

April 12, 1971.

B. J. Baggett, Farmington, for appellants.

No appearance for appellee.

OPINION

COMPTON, Chief Justice.

The Juvenile District Court of Sanpete County, Utah, on December 27, 1966, awarded the temporary custody of the minors involved herein to the State Department of Public Welfare of the State of Utah.

Thereafter, on September 10, 1969, and without the consent of the Department of Public Welfare or the Juvenile District Judge, the appellants brought the children to San Juan County, New Mexico, where they filed this suit for their custody. Pending a disposition of appellants' petition in New Mexico, the Sanpete County District Court conducted a hearing on appellee's petition for a modification of the custodial order issued by that court. At the Utah hearing the Juvenile District Court award-

ed the custody of the children to the mother, the appellee here.

Armed with the Utah judgment, appellee sought custody of the children in the San Juan County District Court and from an order dismissing appellant's petition and awarding the temporary custody to appellee on the authority of the Utah judgment, the appellants have appealed.

We see no error in the ruling of the court. We have said in a number of cases that the welfare of the child is the controlling consideration and that we would not hesitate to exercise our jurisdiction if warranted by changing conditions, even to the point of declining to give full faith and credit to the judgments of sister states. Smith v. South, 59 N.M. 312, 283 P.2d 1073; Albright v. Albright, 45 N.M. 302, 115 P.2d 59; Evans v. Keller, 35 N.M. 659, 6 P.2d 200; Mylius v. Cargill, 19 N.M. 278, 142 P. 918. This case does not fall within that class. Accordingly, the full faith and credit provisions of the United States Constitution would permit no other conclusion by the New Mexico Court. United States Constitution, Art. IV, § 1; Mountain States Fixture Company v. Daskalos, 61 N.M. 491, 303 P.2d 698.

But appellant, Sherrill D. Tuft, asserts that he was not a party to the Sanpete hearing. His position cannot be sustained by the facts. His New Mexico attorneys advised him to enter his appearance in the Utah hearing; his Utah attorney advised him otherwise. Nevertheless, his Utah attorney contacted the Utah Judge and sought a postponement of the hearing. Moreover, appellant was called as a witness and testified. Following the Utah decision, finding that appellant appeared personally and by counsel, his Utah attorney filed objections to the findings and conclusions.

The order dismissing the appellants' petition should be affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

483 P.2d 936

Annie QUINTANA, Widow of Nazario L. Quintana, Jr., on behalf of herself and Orlando A. Quintana, a minor, Plaintiffs-Appellees,

v.

EAST LAS VEGAS MUNICIPAL SCHOOL DISTRICT, Employer, and United States Fidelity and Guaranty Company, Insurer, Defendants-Appellants.

No. 530.

Court of Appeals of New Mexico.

March 19, 1971.

Frank Andrews, III, Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for appellant.

Donald A. Martinez, Las Vegas, for appellee.

OPINION

HENDLEY, Judge.

Defendants appeal from a judgment awarding claimants, employee's widow and minor son, an additional award of 10% of the amounts defendants were paying plaintiffs because of defendant employer's failure to provide a safety device, namely, insulated rubber gloves. Defendants give three points for reversal.

We affirm.

The decedent was employed as a maintenance man for defendant-employer. On the day of the fatal accident, decedent and a fellow employee were directed to remove some bell wires running between two school buildings and supported by two poles. The poles belonged to Public Service Company and were used as high voltage electrical distribution lines. The bell wire, when working, carried 24 volts but was being removed because it did not work. During the course of removing the bell wire decedent came in contact with the high voltage electrical distribution lines and was electrocuted.

The trial court found that:

"4. That in the regular course of his duties said decedent was frequently assigned to work with electrical wires maintained by the defendant-employer and which were strung on poles belonging to the Public Service Company of New Mexico, and which poles carried the high voltage power lines of that company's electrical distribution system.

"5. That decedent's fatal injuries were suffered while he was working on the electrical wires of defendant-employer on the poles of the Public Service Company of New Mexico, to which task he has been specifically assigned by his immediate supervisor, and that his injuries and

death were caused by the failure of defendant-employer to provide a reasonable safey device, to wit: insulated rubber gloves, the same being in general use for the protection of workmen working on poles carrying high voltage power lines, and that the poles on which decedent was so working carried high voltage power lines, and that defendant-employer at all times material hereto knew that said poles carried said high voltage power lines."

Defendants challenge these findings on the grounds that they were not supported by substantial evidence.

Section 59-10-7 B, N.M.S.A.1953 (Repl. Vol. 9, pt. 1) states:

"B. In case an injury to, or death of a workman results from the failure of an employer to provide safety devises required by law, or in any industry in which safety devices are not prescribed by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman, then the compensation otherwise payable under the Workmen's Compensation Act shall be increased ten per cent [10%]."

In reviewing workmen compensation cases we consider only evidence and inferences that may be reasonably drawn therefrom, in the light most favorable to support the findings. Adams v. Loffland Brothers Drilling Company, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970).

In attacking the above findings and in asserting the trial court should have adopted their requested findings, defendants raise questions (1) as to the "industry" in which decedent was engaged and (2) failure to provide a safety device in general use in that industry.

It is undisputed that decedent, employed as a maintenance man, worked on bell wires which were near high voltage power lines. There is no evidence that working on high voltage lines was a part of decedent's duties. The distinction defendants would have us make is between working *near* and working *on* the high voltage lines. On the basis that the "industry" in which decedent was engaged was working "near" high voltage lines, defendants say there is no evidence that the safety device involved—insulated gloves—was in general use in that industry. The evidence, according to defendants, is that the insulated gloves were in general use only where the employee worked "on" high voltage lines.

The narrow meaning that defendants ascribe to "industry" is contrary to Briggs v. Zia Company, 63 N.M. 148, 315 P.2d 217 (1957) where it is stated that "[t]o narrow the term 'industry' to specific examples of uses * * * would be too restricted." Consistent with *Briggs*, the "industry" involved here is not work near a high voltage line and is not work on a high voltage line, but work exposing the decedent to the dangers of high voltage lines.

With this definition of "industry," the question is whether the insulated gloves were a reasonable safety device "* * * in general use for the use or protection of the workmen. * * *" Section 59-10-7 B, supra.

There is evidence that the gloves were a safety device for "* * * workmen who are working around such lines * * *" and evidence that they are in "general use" for working "on" such lines. See Romero v. H. A. Lott, Inc., 70 N.M. 40, 369 P.2d 777 (1962). This evidence permits the inference and sustains the finding that the gloves were "in general use for the protection of workmen working on poles carrying high voltage lines."

Defendant next contends that Finding No. 5 is not supported by substantial evidence in that it was not established that the failure to furnish insulated rubber gloves was the cause of the employee's death. Defendants rely on the testimony of Dr. Blough regarding the location of decedent's burns. There were burns over the right shoulder, the front aspect of the right and left elbow, the web space between the thumb and index finger of the right

hand, and near the tips of the thumb and index finger of the left hand.

Defendants state that their submitted and refused Finding No. 5 was proper. It stated:

> "No evidence was adduced that failure to provide insulated rubber gloves was the cause of the workman's death."

Defendants further state that "death could have been caused by any of the burns received by the decedent and there is no evidence in the record to establish the necessary causal connection."

This court does not weigh conflicting evidence or credibility of witnesses but will only view such evidence and inferences to be drawn therefrom as will support the findings. Forrest Currell Lumber Company v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970).

There was evidence direct and circumstantial from which the trial court could draw a reasonable inference that the lack of gloves was the causal connection. There was testimony that the distance between the bell wire and the high voltage line was 18 to 20 inches; that from the position of the ladder against the pole one's head and shoulders would not come in contact with the high voltage line; that one could reach out and touch the line "if you stretch." There was testimony that when decedent was first seen after the electric shock he was standing on the ladder with his arms outstretched. There was testimony that if wearing the insulated gloves one's hands and a short ways up the arm would be protected. From this evidence the trial court could infer that decedent first came into contact with the high voltage line when he reached out with his ungloved hands.

Defendants' third point is that for plaintiffs to recover under § 59–10–7 B, supra, they must prove a causal connection, to a medical probability, as required in § 59–10–13.3, N.M.S.A.1953 (Repl.Vol. 9, pt. 1). Since plaintiffs introduced no medical testimony they say such proof is lacking.

What defendants seek to do is incorporate the requirements of § 59–10–13.3, supra, into § 59–10–7 B, supra. Specifically, they claim they are not liable for additional compensation for failure to supply reasonable safety devices, when they deny that liability, unless plaintiffs prove as a medical probability, that the cause of decedent's fatal injury was the failure to provide the reasonable safety devices. Applying this contention to the facts, they claim we can only speculate as to which of the burns caused the death and, therefore, there is no proof that burns resulting from absence of the gloves caused decedent's death.

The medical probability requirement of § 59–10–13.3, supra, applies where it is denied that the disability (here, the death) is the natural and direct result of the accident. Medical probability under § 59–10–13.3, supra, was not involved in this case because defendants admitted the causal connection between the accident and the death. Section 59–10–7 B, supra, does not go to the causal relationship between the death and the accident. It goes to the causal relation between the death and the failure to supply reasonable safety devices. Section 59–10–7 B, supra, does not require the causal relation between the death and the lack of safety devices to be proved to a medical probability. Nor can we incorporate such a requirement by equating the accident (which is coming into contact with the high voltage lines) with lack of the safety device (which is the absence of the insulated gloves). Such an equation is not permissible because they are different matters. There is no merit to this contention.

The award of compensation is affirmed with an additional award to plaintiff of $1,250.00 for the services of his attorney in this appeal. Section 59–10–23 D, N.M.S.A.1953 (Repl. Vol. 9, pt. 1).

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

483 P.2d 940

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael John BURK, Defendant-Appellant.

No. 563.

Court of Appeals of New Mexico.

Feb. 19, 1971.

Leon Taylor, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of two armed robberies. Section 40A-16-2, N.M. S.A. 1953 (Repl.Vol. 6). The issues concern: (1) absence of a preliminary hearing; (2) asserted lack of a valid waiver in connection with his incriminating statement; (3) asserted inadequacy of the trial court's determination as to admissibility of the statement; and (4) a "shotgun" instruction.

Absence of preliminary hearing.

Under N.M. Const. Art. II, § 14, a defendant may be proceeded against either by a grand jury indictment or by a criminal information. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965); State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct.App.1968). If charged by criminal information, a defendant has a right to a preliminary examination. No such right exists if the defendant is indicted by a grand jury. State v. Mosley, 75 N.M. 348, 404 P.2d 304, supra.

Defendant was indicted by a grand jury. Having been so indicted, he recognizes that he did not have a right to a preliminary examination. His complaint is directed to the maneuvering prior to the grand jury indictment.

Defendant, taken before a magistrate on a Thursday, requested a preliminary examination the next day. The magistrate, however, set the preliminary hearing for the following Monday. On Monday, over defendant's objection, the prosecutor obtained a continuance until Wednesday. On Wednesday, the prosecutor obtained the indictment before the preliminary hearing was held. The prosecutor admitted that, from the outset, he intended to obtain an indictment before a preliminary hearing was held.

Defendant contends "* * * he was denied due process of law because the prosecution was overzealous in its prosecutorial activities * * *" The prosecutor testified as to his preference for grand jury indictments because the preliminary hearing "* * * is a cumbersome time consuming, expensive procedure the defense counsel uses as a means and a vehicle for discovery, which I consider improper. * * *" Defendant asserts the prosecutor's view is inconsistent with his obligation to be a "seeker of the truth," that the prosecutor places himself in the role of an adversary to defendant and desires to keep the defendant from learning the nature of the prosecution's case.

The issue is whether the prosecutor, by overzealousness, deprived defendant of due process. While the prosecutor was zealous to obtain a grand jury indictment, the record does not show that he exceeded the "bounds of propriety," as alleged by defendant. The choice to proceed by information or indictment is that of the State. Compare State v. Mosley, 79 N.M. 514, 445 P.2d 391, supra; Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct.App.1968). The choice is not the defendant's. The record shows that defendant was attempting to deprive the prosecutor of that choice; that defendant was attempting to force the prosecutor to a preliminary hearing against the prosecutor's wishes. The fact that the prosecutor may have maneuvered zealously to preserve the choice, which was his to exercise, does not show that he exceeded the bounds of propriety.

Defendant also contends "* * * he was denied a fair trial because his

counsel was denied the opportunity to prepare an adequate defense." One answer to this claim is: "[t]he object of a bill of particulars in criminal cases is to enable the defendant to properly prepare his defense, * * *" State v. Mosley, 75 N.M. 348, 404 P.2d 306, supra. Defendant obtained a bill of particulars. He does not claim that the information, supplied as a result of the hearing on the motion for a bill of particulars, was insufficient to prepare an adequate defense. The essence of this contention is that because there was a grand jury indictment, defendant was deprived of the discovery he could have obtained at a preliminary hearing. Discovery, however, is not the object of a preliminary hearing. State v. Archuleta, (Ct.App.), 482 P.2d 242, decided December 31, 1970.

The fact that the prosecutor was not overzealous, and that defendant was not deprived of an opportunity to prepare his defense, answers this point. An additional answer to the question of due process and fair trial is given in Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969). It states:

> "In those cases in New Mexico where complaint and information are utilized in lieu of indictment, the preliminary hearing has been held to be a critical stage of the criminal process for purposes of applying the right-to-counsel provision of the Sixth Amendment to the United States Constitution. (Citations omitted). It was so held because it was believed the accused needed the assistance of an attorney in cross-examining state's witnesses whose recorded testimony could, under certain circumstances, be received in evidence at trial. (Citation omitted). We do not read this case to mean, however, that a preliminary hearing is an essential prerequisite to a guilt-determining process which comports with fundamental fairness and due process, and respondent has not directed us to any authority so holding. * * *"

Waiver in connection with incriminating statement.

The testimony shows defendant was advised of his constitutional rights three times—while walking to the patrol car after his arrest, at the booking desk at the police station and immediately prior to defendant giving his incriminating statement the following day. Each time the advice included advice concerning defendant's right to a lawyer. At the hearing on the motion to suppress defendant's statement, defendant testified he was told he was entitled to talk to a lawyer before answering any questions, to have a lawyer present during questioning and that if he didn't have enough money to hire a lawyer that an attorney would be appointed for him.

Before giving the incriminating statement, defendant signed a waiver form which included the phrase: "'* * * If you want a lawyer but do not have the money to hire one, one will be provided for you by the judge. * * *'" Defendant made his statement, and it was being read to him when his attorney came into the room and interrupted the reading. The portion of his statement admitted into evidence was never read back to defendant, nor did he sign the statement.

Defendant claims he did not knowingly and intelligently waive his right to consult with counsel and further, that the State failed in its burden of showing a knowing and intelligent waiver. In support of this claim he relies on testimony that he had a limited education; could not read; except for signing his name, could not write; had been verbally threatened upon his arrest and while in his jail cell; was told to go with officers from his cell to the room where he made his statement; and was told if he "cooperated" that "things would be easier on me." Defendant also relies on his testimony that when told an attorney would be appointed if he didn't have the money to hire one, "* * * I thought, well, if you don't have the money to hire a lawyer the Court would appoint you one

and then you would take care of him afterwards, pay him, or whatever."

We make two comments on the evidence relied on by defendant. (1) It is not claimed that the statement should have been excluded because of coercion or promises of leniency. The alleged threats and promises are relied on in support of the claimed lack of waiver of the right to have counsel present. (2) Defendant's understanding of the advice concerning appointment of counsel is an item to be considered on the issue of waiver, but that understanding is to be considered with all the other evidence on the question. As stated in Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), cert. denied, 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484 (1967):

> "It is, of course, always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to assistance of counsel. When the issue is raised in an admissibility hearing * * * it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning."

The evidence on which defendant relies is contradicted. Defendant testified that on the ride from the place of arrest to jail, and without any prior questioning, he told the officers he wanted "* * * to get it over with as fast as possible * * *" He was jailed about 10:00 p.m. and was not interviewed that night. He was interviewed shortly after 8:00 a.m. on the next day. There is evidence that defendant sought the interview at which the statement was made. After being advised of his rights for the third time, defendant signed his name to the waiver. Defendant was then asked if he "understood the rights form." There is evidence that defendant replied that he did understand and that he would talk without a lawyer.

It was for the trial judge to resolve the conflicts in the evidence. It did so by ruling the statement to be admissible, thereby ruling the State met its burden of establishing that defendant knowingly and understandingly waived his right to the presence of counsel. There being substantial evidence supporting the ruling, we cannot say, as a matter of law, that the ruling on admissibility was error. State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct.App. 1970) and cases therein cited.

Adequacy of the trial court's determination re admissibility of statement.

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964) involved the New York procedure concerning the admissibility of confessions. In New York the trial judge made a preliminary determination regarding the confession and excluded it if, in no circumstances, the confession could be deemed voluntary. If there was a fair question as to voluntariness, the judge received the confession and left the determination of voluntariness to the jury. This procedure was held to violate due process because there was no reliable determination of the voluntariness of the confession admitted in evidence against the defendant. *Jackson* states that the procedures followed in connection with a confession "* * * must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend. * * *"

New Mexico procedure as to confessions does not follow the New York method; rather, we follow the Massachusetts rule. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968). That rule, as stated in Jackson v. Denno, supra, is:

> "* * * the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused, the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are express-

ly stated or may be ascertainable from the record * * *."

A footnote in Jackson v. Denno, supra, states the Massachusetts procedure, which New Mexico follows, "* * * does not, in our opinion, pose hazards to the rights of a defendant. * * *"

Defendant asserts the trial judge failed to follow the requirements of Jackson v. Denno, supra, in that he failed to resolve the disputed facts upon which the voluntariness issue depended. Defendant contends the trial court was required to make a finding on each disputed factual issue pertaining to the voluntariness of defendant's statement. He also contends the trial judge never explicitly found the statement to be voluntary but instead did no more than rule, as in the New York procedure overturned in Jackson v. Denno, supra, that there was enough evidence to allow the jury to pass on the question.

Superficially examined, the record supports defendant's position. There is no specific ruling on disputed factual issues and at one place in the record the trial court did state it was not ruling on whether the statement was voluntary; "* * * [t]hat is entirely up to the jury to determine. * * *"

However, the record also shows that the trial court conducted a hearing, at which evidence was taken, on the question of the admissibility of the confession. This was prior to trial. At that hearing, in denying the motion to suppress, the trial court ruled the investigating officers complied with the "requirements of the law," and that as a "matter of law" the statement was admissible and that the jury could consider it under proper instructions. When the statement was offered at trial, the trial judge made an in-camera inspection of the statement and allowed only a portion of defendant's statement to be read to the jury.

Here, the judge's conclusions are clearly evident from the record. After a hearing, he concluded the statement met legal requirements and was admissible. His findings on disputed issues of fact are also ascertainable from the record since he resolved them against defendant and in favor of admissibility. In this context, the trial court's statement that the issue of voluntariness was entirely up to the jury is no more than a comment that, having determined the statement was obtained in accordance with legal requirements, and was admissible as a matter of law, the final decision in connection with the statement was for the jury. This comports with both New Mexico procedure and Jackson v. Denno, supra. The trial court's determination was not constitutionally inadequate. Compare State v. Soliz, supra.

Shotgun instruction.

Defendant moved for a mistrial after the jury had been deliberating 4 hours and 5 minutes. The motion was denied. At this point, the trial court, over defendant's objection, gave the jury an additional instruction. The jury returned its verdict one and one-half hours later. Defendant complains of the content of the instruction and its timing.

Defendant contends the additional instruction "* * * amounted to a shotgun instruction urging the jury to reach a decision." The additional instruction was not the "Allen" or "shotgun" instruction which has been approved by the New Mexico Supreme Court. See State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct.App.1969). Rather, it basically was N.M. UJI 16.2 which this court commended for use in State v. Minns, supra. Although UJI 16.2 does urge the jury to reach a decision, it is not coercive in its wording.

In this case there was added to UJI 16.2 the following: "If you reach a verdict on one of the counts, you should return a verdict on that count." Defendant asserts the trial court, in using this language, "* * * overstepped the boundaries of the recommended instruction * * *" Defendant argues this language is not included in UJI 16.2 and shows the trial court's "* * * anxiety to reach some kind of verdict; * * *"

The fact that the additional language is not part of UJI 16.2, and the possibility that the trial court may have been anxious to reach a verdict, does not make use of the additional language erroneous. The additional language did no more than tell the jury how to proceed in the event it reached a verdict on one of the two counts but could not reach a verdict on the other count. The additional language is not coercive and obviously was designed to give the jury advice on the charges they were considering. Use of the additional language was not error.

Defendant also claims the additional instruction should not have been given, at the time it was given, because in State v. Hatley, 72 N.M. 377, 384 P.2d 252 (1963) the jury had deliberated three hours and there is "* * * an indication that a longer period of deliberation preceding the instruction could constitute prejudicial error * * *." However, in State v. Moore, 42 N.M. 135, 76 P.2d 19 (1938), the jury had deliberated 18 hours before an additional instruction was given. Further, defendant misreads State v. Hatley, supra. There, the contention was that giving an additional instruction after the jury had deliberated three hours "* * * was too short a time to warrant the court's giving such an instruction * * *" State v. Hatley, supra, makes it clear that the giving of additional instructions is within the trial court's discretion. See also, State v. Moore, supra. Here, there is nothing to show an abuse of discretion in giving the additional instruction at the time it was given.

The judgments and sentences are affirmed.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

483 P.2d 1312

Leonard OBERMAN, Plaintiff-Appellee,

v.

Rachel OBERMAN, Defendant-Appellant.

No. 9118.

Supreme Court of New Mexico.

April 19, 1971.

Menig, Sager, Parker & Curran, John Henry Lewis, Albuquerque, for defendant-appellant.

Nordhaus & Moses, Thomas J. Dunn, Albuquerque, for plaintiff-appellee.

OPINION

STEPHENSON, Justice.

Defendant-appellant (Wife) moved, pursuant to Rule 60(b) of the Rules of Civil Procedure [§ 21-1-1(60) (b), N.M.S.A., 1953], to set aside a paragraph of a certain stipulation which she had entered into with plaintiff-appellee (Husband) and which had subsequently been incorporated into a final decree of divorce. From a judgment denying her motion, Wife appeals.

During the pendency of divorce proceedings between the parties, on December 20, 1967, they entered into a stipulation settling their differences. The stipulation provided, inter alia, that Husband was to transfer to Wife 12,000 shares of the common capital stock of AMREP with an option to pay Wife $60,000 within a stated period and retain the stock. AMREP was then trading on the American Exchange at $12.25 per share.

The reasons for the difference in the option price and the market price were a certain restriction on alienation and the fact that the stock was pledged to a New York bank under an arrangement whereby it would not be freed for a year.

On the same day, a final decree was entered granting Husband a divorce, find-

ing the stipulation to be fair and equitable, approving and confirming it, and incorporating it into the decree.

About one year later, on December 20, 1968, Wife filed her Rule 60(b) motion. It speaks in general terms of fraud and misrepresentation on Husband's part and his failure to divulge information. Wife further alleged that the offending paragraph was entered into by mistake, though whose mistake and whether of law or of fact is not specified. The theory here is that there was a mutual mistake of law and fact.

Following a hearing, the trial court made findings of fact. In its finding numbered eight, it found that Husband's representations were true and accurate in light of his knowledge at the time of the stipulation; that an agreement effectively restricted disposition of the stock; that he was without knowledge of an upcoming secondary offering of the stock; and that he was without knowledge until some months later that as a result of a new loan arrangement the pledge would be released sooner than had been contemplated.

In its finding numbered twelve the court determined that Husband was not guilty of any fraud, misrepresentation or misconduct; that there was no mistake of fact or law as to the stock and that it would be inequitable to grant to Wife the relief she sought.

Wife's opening gambit is to wage an attack on the court's findings eight and twelve, asserting that they are unsupported by the evidence. Under these circumstances, we are bound to view the evidence, together with all inferences reasonably deducible therefrom, in the light most favorable to support the findings. All evidence unfavorable to the findings must be disregarded and no unfavorable inferences will be drawn.

We have carefully examined those portions of the record cited by the parties in support of their respective positions. We are persuaded that the findings have substantial support in the evidence, and we so hold.

It is therefore unnecessary to consider other points raised by Wife, all of which are predicated upon success in overturning the court's findings, which she has attacked.

The judgment of the trial court will be affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

483 P.2d 1313

Jo Ann GHOLSON, Plaintiff-Appellant,

v.

Sammy L. GHOLSON, Defendant-Appellee.

No. 9167.

Supreme Court of New Mexico.

April 19, 1971.

483 P.2d 1314

Richard K. HILLIS, Plaintiff-Appellee,

v.

Charles W. MEISTER, President of Eastern New Mexico University et al., Defendants-Appellants.

No. 622.

Court of Appeals of New Mexico.

April 2, 1971.

Matteucci, Franchini & Calkins, Albuquerque, for plaintiff-appellant.

Eugene E. Brockman, Norman E. Runyan, Tucumcari, for defendant-appellee.

OPINION

OMAN, Justice.

Plaintiff and defendant were formerly husband and wife. Plaintiff appeals from an order granting defendant rights to the custody of their child greater than those defendant had enjoyed under a prior order entered in this same cause.

The sole question presented is whether the trial court abused its discretion in enlarging the custodial rights of the father, and, consequently, in reducing those of the mother. There is substantial evidence to support the findings of the trial court that a change in circumstances had occurred, which warranted the ordered changes in the child's custody. The trial court has wide discretion in the matter of awarding the custody of a child in a divorce case, and the welfare of the child is the primary consideration in making the award. Urzua v. Urzua, 67 N.M. 304, 355 P.2d 123 (1960). We find no abuse of this discretion by the entry of the order.

The order should be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

David L. Norvell, Atty. Gen., Santa Fe, Mark B. Thompson, III, James C. Compton, Jr., Asst. Attys. Gen., for defendants-appellants.

Paul A. Phillips, Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Judge.

Plaintiff's suit, involving his teaching contract at Eastern New Mexico University, named various defendants. Although all of the named defendants gave notice of appeal, no judgment was entered against any of the defendants except the Board of Regents. The trial court directed a verdict in favor of plaintiff and against the Regents. The Regents' appeal raises several issues, only two of which require discussion. These are: (1) whether the faculty handbook was a part of plaintiff's contract with the University and (2) the award of costs.

Whether the handbook was a part of plaintiff's contract.

At the time plaintiff was hired as an assistant professor of art, a faculty handbook had existed for a number of years. Revisions in the handbook was submitted to and approved by the Regents.

The handbook pertained to various aspects of the relationship between the University and its employees. One aspect was the continuance of the services of faculty members—such as plaintiff—in their first year of service. Procedures were set forth in the handbook concerning the treatment of a first year faculty member who was not to be reappointed. The procedure covered both the time and the manner of treatment. These procedures were not followed in plaintiff's case. The evidence is undisputed that in other cases where the procedures were not followed, the person involved had been reappointed to his position. Thus, the uncontradicted evidence is that, under the handbook and the actual practices of the University, plaintiff had an "expectation of reemployment." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Plaintiff's written contract with the Regents of the University was for the academic year 1967–68. This contract makes no express reference to the handbook. The contract required plaintiff to "* * * observe and abide by any and all rules, regulations, and directives adopted by the University. * * *" The contract neither identifies these rules, regulations and directives nor indicates where they may be found. Further, the contract makes no reference to the status of plaintiff, in relation to the University, at the end of the time period covered by the contract.

If we consider the contract reference to rules and regulations as rules and regulations applying to the University as well as to the plaintiff, then the contract is ambiguous because such rules and regulations are not identified from the contract itself. In such a case, the construction placed on the contract by the parties would be controlling. Jernigan v. New Amsterdam Casualty Company, 69 N.M. 336, 367 P.2d 519 (1961); see Cochran v. Gordon, 69 N. M. 346, 367 P.2d 526 (1961).

If, however, we consider the contract simply not to cover either the handbook or plaintiff's status with the University at the end of the contract term, we have a situation where a "* * * course of conduct may give rise to a contract implied in fact, * * *" Gordon v. New Mexico Title Company, 77 N.M. 217, 421 P.2d 433 (1966); see Trujillo v. Chavez, 76 N.M. 703, 417 P.2d 893 (1966).

Under either of the two foregoing approaches, the conduct of the parties may define the terms of their contract. Compare § 50A–1–205, N.M.S.A.1953 (Repl. Vol. 8, pt. 2).

Here, the undisputed evidence shows the handbook was treated as controlling the relationship between the plaintiff and the University. This evidence goes to the time when plaintiff entered the contract and to the time when differences between plain-

tiff and the administration had come to light. At a meeting between a grievance committee and the administration, "both parties" referred to the handbook. This evidence also goes to the time when the administration was proceeding to do without plaintiff's services. A faculty committee was appointed but that committee decided it could not undertake the task it was given to do because the committee was not constituted in accordance with the handbook. The administration then undertook to "dismiss" (rather than to nonreappoint) plaintiff in accordance with handbook procedures. The president of the University characterized the handbook as "the most important single document" governing the relationship between the faculty members and the University administration. The president also testified that the handbook contained some of the terms of employment "* * * with respect to academic freedom and tenure and continuance and termination."

A case very similar to this one is Greene v. Howard University, 134 U.S.App.D.C. 81, 412 F.2d 1128 (1969). There it is stated:

> "* * * Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is.
>
> * * *
>
> "The employment contracts of appellants here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs. * * *"

Ferguson v. Thomas, supra; compare Smith v. Board of Regents, State Senior Colleges, 426 F.2d 492 (5th Cir. 1970); Silver v. Queens College of City University, 63 Misc.2d 186, 311 N.Y.S.2d 313 (1970).

The Regents do not claim there is any dispute in the evidence as to the "course of conduct" between the plaintiff and the University administration which applied the handbook to plaintiff's contract. The Regents contend, however, that this course of conduct does not apply to them as the body that contracted with plaintiff. Specifically, they seek a distinction between the Regents and the University administration. This asserted distinction has no factual basis in this case.

The uncontradicted testimony of the Chairman of the Board of Regents is that the Regents approved revisions in the handbook "as administrative purpose only." Administration is management; "* * * the principles, practices, and rationalized techniques employed in achieving the objectives or aims of an organization. * * *" Webster's Third New International Dictionary (1966). Under this definition, the Regents' approval was for the use of the administration in managing the University, in achieving the aims of the University.

The Chairman of the Board of Regents also testified that the Regents' approval was not contractual. The handbook provision involved in plaintiff's case states:

> "ENMU asserts and exercises the discretion implied by annual contracts. However, the institution believes that it should provide each faculty member with timely notice concerning subsequent status. Therefore, the University will:" (hereafter is listed the procedures not followed in plaintiff's case).

Because of the handbook reference to annual contracts, and the Chairman's characterization of the Regents' approval as "not contractual," the Regents seem to contend that the handbook cannot be considered a part of plaintiff's contract. A similar contention was made and rejected in Greene v. Howard University, supra. There it is stated:

> "* * * This qualifying clause [without contractual obligation], so it is said, relieves the University of any and all obligations of any kind with respect to the observance of its regulations, and vests in the University an unfettered discretion * * *.

"* * *

"* * * The very phrase relied upon * * * is in a Faculty Handbook which is replete with other provisions in conflict with the spirit of the use of that phrase now sought to be made. * * *"

In rejecting this argument, Greene made the statement previously quoted. It is to the effect that contracts are to be read by reference to the "norms of conduct and expectations founded upon them." We view this as no more than a specific application, to a University situation, of New Mexico's general rule that a contract may be implied, or an ambiguity in a contract may be resolved, on the basis of the course of conduct of the parties. The conclusion that the handbook and the Regents' approval was "not contractual" is simply not supported by any evidence. The undisputed evidence is the handbook provisions were considered to govern the University's relationship with plaintiff and the Regents' approved revisions in the handbook for use in managing the University.

Finally, under this point, it appears to be contended that the "course of conduct" should not be a rule applicable to the University as a governmental institution. They point out that in Greene v. Howard University, supra, the University involved was private, not public. Our answer is that the issue here does not involve the public or private character of the University. Eastern New Mexico University, through its Regents, has authority "to contract and be contracted with." Sections 73–22–4 and 73–22–36, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). The issue here simply involves the law of contracts. Compare State v. Clark, 79 N.M. 29, 439 P.2d 547 (1968).

The trial court directed its verdict on the basis there was no factual issue for the jury to consider on the question of whether the contract with plaintiff for the academic year 1967–68 had been breached. We affirm the trial court's ruling because the Regents had authorized its administration to manage the University in accordance with the handbook, because the undisputed evidence shows a course of conduct that made the handbook a part of plaintiff's contract and because it is undisputed that the handbook was not followed.

So holding, various other issues raised by the Regents are irrelevant. These are: (a) Plaintiff made four claims in his amended complaint. Some of these alleged a tort. The Regents claim the trial court should have dismissed the tort claims. This issue is irrelevant because plaintiff did not recover on any tort claims and because no tort claim is involved in this appeal. (b) Plaintiff alleged that he had been continued as a faculty member for the 1968–69 academic year. The Regents assert this contractual claim should have been dismissed because of a failure to allege a written contract for the 1968–69 academic year. This issue is irrelevant because no contract involving the 1968–69 academic year is involved in this appeal. The verdict was directed for breach of the 1967–68 contract. (c) The Regents claim they were not estopped from "not reappointing" plaintiff as a professor for the 1968–69 academic year. This is irrelevant because plaintiff's possible position as a professor for 1968–69 is not involved in this appeal. (d) The Regents claim that failure to follow their own regulations might be grounds for reversing their decision to "dismiss" plaintiff but that such failure would not be grounds for an award of damages against the Regents. This issue is irrelevant because the dismissal, and the proceedings taken in connection with the dismissal, is pertinent only as evidentiary matter on the claim that the 1967–68 contract was breached. Whether plaintiff was properly dismissed as a professor in the 1968–69 year is not involved.

Award of costs.

The judgment awards plaintiff his "taxable costs." Section 21–1–1(54) (d), N.M.S.A.1953 (Repl.Vol. 4) states: "* * * costs against the state, its officers, and

agencies shall be imposed only to the extent permitted by law. * * *"

Plaintiff filed a bill of costs and asked that the items listed be taxed as costs. He claims he is entitled to these costs because no objection was made to his cost bill. The Regents claim no costs should be taxed because authority to do so has not been "provided by law." Both arguments misappraise the situation before us.

All the judgment does is award to plaintiff such costs as are "taxable." Costs cannot be taxed against the Regents under § 21-1-1(54) (d), supra, unless permitted by law. Costs have not been taxed in the record before us so, at this point, we do not know whether any costs will ever be taxed. As to the claim that the Regents made no objection to plaintiff's cost bill, it does not appear that notice, to tax costs, has ever been given. See § 21-1-1(54) (d), supra; Prudential Insurance Company of America v. Anaya, 78 N.M. 101, 428 P. 2d 640 (1967).

The record concerning the costs presents no issue for decision.

The judgment is affirmed.

It Is So Ordered.

HENDLEY and SUTIN, JJ., concur.

483 P.2d 1318

STATE of New Mexico, Plaintiff-Appellee,

v.

Claude David SWIM and Richard Anthony Bobrick, Defendants-Appellants.

No. 551.

Court of Appeals of New Mexico.

April 2, 1971.

Louis G. Stewart, Jr., Albuquerque, for defendants-appellants.

James A. Maloney, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendants' petitions for post conviction relief, Rule 93 (§ 21-1-1(93), N.M.S.A. 1953, (Rpl. Vol. 4), were denied, without an evidentiary hearing. The court, after reviewing the allegations of the petitions, and the files and records of the case, determined that "* * * it is conclusively shown that defendants are not entitled to relief under Rule 93." Appeal is from the trial court's orders denying relief as to each defendant. We reverse.

The sole contention upon appeal is that:

"The Court erred in failing to grant appellants an evidentiary hearing upon their allegations that their pleas of guilty were coerced and involuntary."

Defendants were convicted upon their guilty pleas of robbery while armed with a deadly weapon. § 40A-16-2, N.M.S.A.1953 (Rpl. Vol. 6), and sentences were imposed.

Each of defendants, through separate petitions, allege:

"While petitioner was incarcerated in the said McKinley County jail, petitioner was placed in solitary confinement and was subjected to physical and mental punishment for an extended period of time; such treatment amounted to coercion of the petitioner and was the reason that a plea of guilty was entered by petitioner."

Affidavits signed by each of defendants likewise appear in the record, stating:

"Affiant entered the plea of guilty because of coercian [sic] effected upon them by the Sheriff of McKinley County while affiant was incarcerated in the McKinley County jail."

Voluntariness of the guilty pleas was clearly challenged by the petitions and affidavits. The trial court, in its decision, found:

"On August 13, 1968, the Defendants appeared in District Court and after being advised of the charges against them, of the possible penalty in the event of conviction after a plea or after trial, and of their right to trial by jury, Petitioners entered a plea of guilty to Count I of the Information;

"That the Court thereafter determined from the Defendants that no threats or promises had been made to them and that the plea of guilty was made willingly. The plea of guilty of each of the Defendants was then accepted by the Court."

It is apparent that defendants' claims asserted in their petitions and affidavits are in conflict with the record made at the time the pleas were accepted. Defendants' claims involve matters which allegedly occurred outside the courtroom and, if established would warrant vacating the sentences. The conflict cannot be resolved in the absence of an evidentiary hearing at which the facts can be fully developed even though the circumstances surrounding the acceptance of the plea of guilty would constitute sufficient support for a finding and determination that the pleas were voluntarily made. State v. Maimona, 80 N.M. 562, 458 P.2d 814 (Ct.App.1969).

In State v. Reece, 79 N.M. 142, 441 P.2d 40 (1968), the Supreme Court, considering a comparable fact situation, said:

"This appeal is controlled by what we said in State v. Franklin, 78 N.M. 127, 428 P.2d 982, 983 (1967), from which we quote the following:

'We think it appropriate to call attention to the fact that the Supreme Court of the United States in Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473, discussed the proper procedure for district courts under the provisions of 28 U.S. C.A., § 2255, from which our Rule 93 was patterned. That court pointed out that the federal statute requires a district court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *The court there went on to emphasize that where factual allegations relating primarily to purported occurrences outside of the courtroom put in issue matters upon which the record could cast no real light, the court must hold a hearing at which the prisoner is permited* [*sic*] *to offer evidence.'* (Emphasis supplied.)

"It should be evident that among claims made by petitioner are several concerning occurrences outside the record which, if true, would be grounds for vacating his sentence, and that these assertions could not be resolved without a hearing. Admittedly, these allegations conflict with the record made at the time of the arraignment. However, absent a hearing at which testimony is adduced, no method is available for determining the truth. The court erred in denying

the motion without counsel and an evidentiary hearing. See State v. Buchanan, 78 N.M. 588, 435 P.2d 207 (1967), where the holding in Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), followed by us in State v. Franklin, supra, was again applied. Compare State v. Fuentes, 67 N. M. 31, 351 P.2d 209 (1960), and 66 N.M. 52, 342 P.2d 1080 (1959)."

See also State v. Patton, 82 N.M. 29, 474 P.2d 711 (Ct.App.1970).

Based upon these authorities, we are of the opinion that defendants should have been accorded an evidentiary hearing. The orders of the trial court are accordingly reversed, the cause remanded with directions to the court to grant defendants evidentiary hearings upon the issue of the voluntariness of their pleas of guilty.

It is so ordered.

HENDLEY, J., and DEE C. BLYTHE, District Judge, concur.

483 P.2d 1320

STATE of New Mexico, Plaintiff-Appellee,

v.

Frank FLORES, Defendant-Appellant.

No. 574.

Court of Appeals of New Mexico.

April 2, 1971.

Wycliffe V. Butler, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Flores was convicted of aggravated burglary. Section 40A-16-4, N.M.S.A.1953 (Repl. Vol. 6). "Aggravated burglary consists of the unauthorized entry of any * * structure * * * with intent to commit any * * * theft therein and the person * * * is armed with a deadly weapon." A switchblade knife is a deadly weapon.

Flores possessed one. Defendant was sentenced to not less than 10 years nor more than 50 years. Defendant appeals.

We reverse.

The issues are: (1) Refusal of the trial court to instruct on the issue of insanity as a defense, and (2) refusal to dismiss for failure of the state to prove exclusive ownership or possession of the building.

1. *Was Flores entitled to an Instruction on Mental Illness?*

Flores testified that he was a long time addict and had to steal to supply his habit. On his behalf, two psychiatrists testified. One was an assistant professor of psychiatry at the University of New Mexico School of Medicine, and he was also Psychiatric Consultant in the NARA Heroin Addiction Program. A month after the burglary, he began to treat Flores with methadone. Flores was one of the highest users in the program, but at the time of the trial he no longer used heroin. In the opinion of the professor, Flores at the time of the burglary would be under an extremely strong compulsion to obtain goods at five hours in advance of that time. Although the psychiatrist did not believe the act of burglary was strictly irresistible, he did believe that Flores would be under an extreme anxiety and have a very urgent need to try to obtain the necessary amount of heroin.

The other psychiatrist did a mental examination of Flores over a month after the burglary. In her opinion, Flores suffered a mental illness at the time of the burglary because heroin addiction is a mental illness; that Flores's coercive acts of entering the premises to obtain money are the product of mental illness, because Flores was incapable of controlling himself; that Flores was not able to distinguish between right and wrong at the time he entered the store; that Flores had an irresistible impulse to take whatever he was taking at the time of the burglary, as well as an irresistible impulse to do what he was doing.

There is, therefore, expert, medical testimony that a reasonable doubt exists as to Flores's mental illness at the time of the burglary. This testimony was undisputed and adequate upon which to base a defense of insanity. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Flores tendered an instruction on the defense of insanity. At the time of trial and on appeal, the record does not show that the state questioned the correctness of the instruction. It simply argued that the evidence did not warrant an instruction on insanity. Since there was evidence to support the defense, Flores was entitled to an instruction on this issue. State v. Akin, 75 N.M. 308, 404 P.2d 134 (1965); State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968). In refusing to instruct on the defense of insanity, the trial court erred.

The judgment and sentence of Flores is reversed because the trial court did not instruct on the issue of Flores's insanity.

2. *Does the State have to prove Exclusive Ownership or Possession?*

Flores contends that the state failed to prove exclusive ownership or possession necessitated by the term "unauthorized entry." In State v. Ford, 80 N.M. 649, 459 P.2d 353 (1969), this court held that "an allegation or proof of ownership of a building or structure the subject of a burglary charge is unnecessary." We affirm this decision. There was an admission by Flores of an "unauthorized entry." There is no merit to this claim.

It is ordered that the judgment and sentence are reversed, and that Flores be granted a new trial.

SPIESS, C. J., and HENDLEY, J., concur.

483 P.2d 1322

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnny GARCIA, Defendant-Appellant.

No. 553.

Court of Appeals of New Mexico.
April 2, 1971.

Harold B. Albert, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Garcia was convicted of burglary. He appealed. The only claim of error on appeal is that the trial court erred in not granting appellant's motion for a continuance.

We affirm.

Was Garcia Entitled to a Continuance?

The date of trial was January 27, 1970. Notice of trial was given Garcia on December 5, 1969. On the morning of the trial, Garcia's trial attorney stated that Garcia was not ready for trial because the day before he was in a hospital and began taking codeine; that this was due to a reinjury of an old chest injury; that Garcia had a sort of drug intoxication and he was not in condition to stand trial. The request to postpone the trial was denied. Garcia did not testify about his health, his lack of preparation for trial, nor file a motion for a continuance supported by oath, § 21-8-7, N.M.S.A. (Repl.Vol. 4), nor present any medical testimony on his ability to be ready for trial.

The attorney on this appeal, appointed by the trial court, was not his trial attorney. However, he presented a good brief and argument. But no reasons could be given that the denial of the postponement was prejudicial, or that substantial justice could be more clearly obtained. See § 21-8-9, N.M.S.A.1953 (Repl.Vol. 4) on continuance.

The granting or denial of a motion for continuance is within the discretion of the trial court. There was no abuse of discretion.

We have read and considered the authorities cited by Garcia, and these do not compel a different conclusion.

The judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

483 P.2d 1323

STATE of New Mexico, Plaintiff-Appellee,

v.

Joseph L. GUY, Defendant-Appellant.

No. 593.

Court of Appeals of New Mexico.

April 2, 1971.

David H. Pearlman, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Richard J. Smith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

The appeal is from defendant's conviction of "escape from penitentiary." Section 40A-22-9, N.M.S.A. 1953 (Repl. Vol. 6). Defendant claims the trial court erred in denying his motions for a mistrial. This claim concerns defendant's language and conduct in the courtroom.

During an outburst by defendant at the beginning of his trial, he declared "* * * I'm not going to stand trial, not peaceably, in this county." Defendant continued to interrupt the proceedings and the trial judge directed officers to restrain him. The jury was excused. Defendant was handcuffed. Defendant then proceeded to insults and obscenities. He called courtroom attendants "mother fucker" and "son of a bitches" and the judge a "cock punk." When the judge gave defendant an opportunity to calm down, he reiterated "I'm not standing trial in this Court." After a recess, the jury was returned to the courtroom and the judge directed that the handcuffs be removed. The trial proceeded.

At the conclusion of the direct examination of a prosecution witness, the record

shows that defendant "* * * has just cut his wrists with a razer [sic] blade." The trial was recessed for the day and defendant was given medical attention. The medical report is that defendant was treated for "superficial lacerations of the left forearm" which were not disabling.

On the following morning, defendant moved for a mistrial on the grounds of what the jury "witnessed." This was denied. The witness of the preceding day was cross-examined. During the direct examination of the second witness, defendant stood up and started talking to his guards. The jury was excused. Defendant than proceeded with another outburst which resulted in defendant being placed in a straitjacket. Trial resumed. Defendant began making comments on the testimony of the second witness. The judge directed the trial to continue even though defendant was talking.

Defendant's comments, including obscenities, were then elevated to a scream. Defendant was muffled with a towel over his mouth and restrained by officers. In a short time the screaming recommenced. One question and answer later defendant is described as "mumbling." Fourteen questions and answers subsequently he is described as lying on the floor. A recess was called. Defendant is described as making horrible noises, growling and "looks like he is having a spastic fit." Defendant was then attended by a physician.

Defendant again moved for a mistrial, asserting "* * * that the jury after witnessing the defendant's actions and hearing the language of the defendant it is not possible for them to reach a fair and unbiased verdict. * * *" The motion was denied, the trial continued to conclusion without further untoward incident, and without further physical restraint of defendant.

A motion for mistrial is addressed to the sound discretion of the court and its ruling on the motion will not be reversed unless there is an abuse of discretion. State v. Cochran, 79 N.M. 640, 447 P. 2d 520 (1968); State v. Campos, 61 N.M. 392, 301 P.2d 329 (1956); see State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App. 1970); State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct.App.1968). The record shows that the trial court, when confronted by defendant's language and conduct, proceeded carefully and calmly to insure the defendant received a fair and impartial trial, even remarking to the jury that these matters were not to have any bearing on their deliberations. There is nothing in the record showing that the trial court abused its discretion.

In United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963), cert. denied Ormento v. United States, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963), the trial judge was confronted with "vile language and rebellious conduct." A motion for mistrial was denied. Affirming this action, the opinion states: "Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice * * * will not be delivered into the hands of those who could gain only from its subversion. * * *" See Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); State v. Van Bogart, 85 Ariz. 63, 331 P.2d 597 (1958), cert. denied 359 U.S. 973, 79 S.Ct. 886, 3 L.Ed.2d 838 (1959); People v. Merkouris, 46 Cal.2d 540, 297 P.2d 999 (1956); People v. Kerridge, 20 Mich.App. 184, 173 N.W.2d 789 (1969).

The "vile language and rebellious conduct" of United States v. Bentvena, supra, applies to all of defendant's conduct with the possible exception of what the record described as a "spastic fit." Defendant characterizes this as an epileptic seizure and contends that defendant should not be held responsible for this "fit." There is no medical opinion diagnosing the cause of the "fit," but the record does show it was preceded by outbursts on defendant's part

described as screams, that upon the onset of the "fit" the trial was recessed, defendant was given medical attention and that during the remainder of the trial there were no outbursts and no physical restraint of defendant.

Regardless of the cause of the "fit," the issue is whether the trial court abused its discretion in denying the mistrial. The fact that defendant had a "fit" in the courtroom does not, in itself, show an abuse of discretion in denying a mistrial, and the other circumstances affirmatively show no abuse.

The judgment and sentence is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 328

Myrtle E. PACHECO, Plaintiff-Appellee,

v.

Luis PACHECO, Defendant-Appellant.

No. 9156.

Supreme Court of New Mexico.

April 26, 1971.

Branch & Dickson, Albuquerque, for defendant-appellant.

Abner Schreiber, Los Alamos, for plaintiff-appellee.

OPINION

TACKETT, Justice.

This is an appeal of an order entered by the District Court of Los Alamos County, New Mexico. After hearing on an order to show cause, the defendant Pacheco was found in contempt of court for failure to pay child support. Judgment was entered against Pacheco for $16,000 for arrearage of child support. The sentence on contempt was held in abeyance for a period of thirty days to allow Pacheco to purge himself of the contempt. This he did not do but immediately appealed.

There being no final order entered in this case by the trial court, this court is without jurisdiction in the matter.

While the jurisdictional question was not raised by either party, an appellate court will and should, on its own motion, raise lack of jurisdiction where an order lacks finality due to an absence of the necessary determination and order of the trial court. Aetna Casualty & Surety Company v. Miles, 80 N.M. 237, 453 P.2d 757 (1969).

The appeal is dismissed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

484 P.2d 328

STATE of New Mexico, Plaintiff-Appellee,

v.

Henry RAMIREZ, Defendant-Appellant.

No. 9182.

Supreme Court of New Mexico.

April 26, 1971.

Robert N. Singer, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COMPTON, Chief Justice.

Appellant was found guilty of murder in the first degree and was sentenced to life imprisonment. He appealed and the judgment was affirmed. State v. Ramirez, 79 N.M. 475, 444 P.2d 986. Subsequently, on November 7, 1969, he filed a motion for post-conviction relief pursuant to Rule 93 [§ 21-1-1(93) N.M.S.A. 1953] which was denied. Thereafter, on July 16, 1970, a second motion for relief was filed by him under the same rule, with a request that the court appoint counsel to aid him in connection with his motion. The court refused to appoint counsel and denied relief without a hearing, and he has appealed.

Appellant contends that failure to appoint counsel to assist him violated his constitutional rights to counsel and effectively denied him due process of law. There is no merit to his contentions. His motion was a successive motion and states no basis for relief. In this situation the appointment of counsel was not required. The court did not err in denying his motion without a hearing. State v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct.App.). Compare State v. Sisneros, 79 N.M. 600, 446 P. 2d 875.

The order denying relief should be affirmed.

It is so ordered.

TACKETT and OMAN, JJ., concur.

484 P.2d 329

STATE of New Mexico, Plaintiff-Appellee,

v.

Thomas Wayne CRUMP, Defendant-Appellant.

No. 9143.

Supreme Court of New Mexico.

April 26, 1971.

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[redacted]

James T. Roach, Scott McCarty, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

OMAN, Justice.

Defendant was convicted of robbery, kidnapping, and an attempt to commit murder. He was sentenced for each offense, and he appealed. We reverse the judgment of conviction and sentence for kidnapping, but otherwise affirm.

Defendant first claims he was deprived of his constitutional right to a speedy trial. This right is guaranteed by both the United States Constitution and the New Mexico Constitution. Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967); State v. Polsky, N.M. App., 82 N.M. 393, 482 P.2d 257, decided February 5, 1971.

The acts constituting the offenses with which defendant was charged and convicted occurred on July 13, 1967. He immediately fled the jurisdiction; was apprehended in Michigan on August 2, 1967 by the authorities in that state for a crime committed there; was incarcerated in the Michigan Penitentiary; was so imprisoned when indicted by a New Mexico Grand Jury on February 21, 1969; was returned to New Mexico on about March 24 or 25, 1970; two attorneys were appointed to represent him on March 25 and 26, 1970; and his trial commenced on April 20, 1970.

We agree with the State's contention that the period prior to the filing of the indictment on February 21, 1969 is not to be considered in determining whether there was a violation of defendant's constitutional right to a speedy trial. Oden v. United States, 410 F.2d 103 (5th Cir. 1969), cert. denied, 396 U.S. 863, 90 S.Ct. 138, 24 L.Ed.2d 116 (1969); Harlow v. United States, 301 F.2d 361 (5th Cir. 1962), cert. denied, 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed. 2d 56 (1962); Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959); State v. Polsky, supra, and cases cited therein.

Defendant, in taking the opposite position, relies upon the case of Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed. 2d 1041 (1959), wherein the sole and precise question decided was whether the petitioner's alleged violation of the Federal Kidnapping Act had to be presented by indictment, as required by the Fifth Amendment to the Constitution of the United States and Rule 7(a), Federal Rules of Criminal Procedure, but in which the court stated: "* * * Moreover, if, contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under ap-

propriate circumstances, invoke the protection of the Sixth Amendment."

Nothing further is said in the opinion about the Sixth Amendment, about what constitutes an inordinate delay, or about what are appropriate circumstances under which to invoke the protection of the Sixth Amendment. However, it does appear the quoted language, in the context in which it was used, suggests the right to a speedy trial has application to times and events preceding the institution of formal charges against an accused. Nevertheless, as stated by the Court of Appeals in State v. Polsky, supra: "* * * we agree with the jurisdictions which have clearly and expressly passed upon this question, and which have held the constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. * * *"

As shown above, defendant was imprisoned in Michigan when indicted in New Mexico on February 21, 1969, and was still so imprisoned when removed from that State to be returned to New Mexico to stand trial for the crimes he had committed here on July 13, 1967. Insofar as the record shows, he was not furnished a copy of the New Mexico indictment until about March 25, 1970 upon his arrival in New Mexico. However, he had told the Michigan authorities on August 2, 1967, he was wanted in New Mexico for murder, thereby indicating he believed he had killed his victim. This is clearly inconsistent with his present claim that by reason of his denial of a speedy trial witnesses were lost to him who could have established an alibi as to his presence in Arizona on July 13, 1967.

The claimed loss of alibi witnesses finds support only in an affidavit by one of his appointed counsel attached to a motion to dismiss the indictment for the reason that he had been deprived of his right to a speedy trial. Obviously the information concerning these claimed witnesses as to defendant's presence in Arizona on July 13, 1967 came from defendant himself. Undoubtedly the attorney was very diligent in his efforts to locate the claimed witnesses and any information which would have established an alibi, but his failure cannot be attributed to the State of New Mexico. If every unsupported claim by an accused of the loss of witnesses favorable to him, by reason of delay of the State in failing to bring the accused to trial sooner, were to be accepted as the truth and as a denial of his right to a speedy trial, it would be a rare case in which a defendant could not successfully assert such a defense. Compare State v. Polsky, supra.

"* * * The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. * * *" Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905). See also, Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed. 2d 1047 (1968), (footnote 4 at 221); United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Hoag v. New Jersey, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed. 2d 913 (1958).

The guarantee of a speedy trial is to prevent undue and oppressive incarceration prior to the trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibility that long delay will impair the ability of the accused to defend himself. United States v. Ewell, supra.

Defendant was tried in less than thirty days after his return to New Mexico. His prior incarceration was by the State of Michigan, and not New Mexico. He could hardly have suffered anxiety and concern over the charges before he was returned to New Mexico, when he claims to have first learned of the charges. This is particularly true, since he understood he was wanted for murder in New Mexico, and this understanding necessarily came from his acts and not any charges filed against him. If his claim of alibi be accepted as true, undoubtedly he was prejudiced

by his inability to locate the claimed witnesses who could have substantiated this claim, and it may be possible the delay prejudiced his opportunities for locating these claimed witnesses. However, the right to a speedy trial does not embrace the obligation on the part of the State to accept as true all claims of an accused that his ability to defend himself has been impaired by delay.

The essential ingredient of a criminal prosecution is orderly and deliberate expedition, and not speed. United States v. Ewell, supra; Smith v. United States, supra. A delay may not be purposeful or oppressive. United States v. Ewell, supra; Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). However, there is nothing to indicate any purposeful or oppressive delay by the State, and the passage of fourteen months from indictment to commencement of trial, under the facts here present, is not indicative of a denial of the right to a speedy trial. Compare Hoag v. New Jersey, supra.

Defendant's next three points relate to his claims that the trial court erred in refusing to quash the count in the indictment charging him with kidnapping, in submitting the issue of kidnapping to the jury, and in giving certain instructions and denying certain requested instructions concerning kidnapping. As already stated, we reverse the judgment, insofar as it relates to kidnapping, and the sentence imposed therefor.

The indictment charged, insofar as necessary to a disposition of the question now before us, that: "* * * the said THOMAS WAYNE CRUMP did unlawfully take and restrain by force Dale Johnson with intent that the said Dale Johnson be confined against his will *or* as a hostage, * * *" (Emphasis added)

The emphasized word "or" was changed to "and" by the trial court upon motion of the State prior to trial. Thus, the offense charged was consistent with the second definition of kidnapping as determined by this court in its interpretation of the meaning of our kidnapping statute [§ 40A-4-1, N.M.S.A.1953 (Repl.Vol. 6, 1964)] in State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969). Defendant contends the trial court erred in permitting this amendment of the indictment. We need not decide this issue, but assume the validity of the amendment.

The indictment, by way of general charges in the opening paragraph thereof, and by way of preface to the succeeding three numbered counts in which the facts relied upon as constituting the three charged offenses were detailed, did recite that defendant was accused of "KIDNAPPING, contrary to Sections: 40A-4-1 and 40A-29-2, NMSA-1953" (Repl.Vol. 6, 1964). Section 40A-29-2 relates only to the sentencing authority. However, the three separate ways in which kidnapping may be accomplished under § 40A-4-1, supra, as decided by this court in State v. Clark, supra, were not detailed in the indictment. As indicated above, the facts allegedly constituting the offense were so detailed that they fell within the definition of only one of the disjunctively defined and prohibited acts which constitute kidnapping. State v. Clark, supra.

If a criminal offense is charged in general terms in an information or indictment, as provided in § 41-6-7, N.M.S.A.1953 (Repl.Vol. 6, 1964), and then is followed by a detailed statement of the facts allegedly constituting the offense, the prosecution is limited to establishing the facts so detailed. State v. Newman, 29 N.M. 106, 219 P. 794 (1923); see also 4 Anderson, Wharton's Criminal Law and Procedure, § 1762 (1957). This is necessarily so, since a defendant in a criminal case is entitled to know with what he is charged and to be tried solely upon the charges against him. Maxwell v. United States, 277 F.2d 481 (6th Cir. 1960); Murphy v. State, 231 So.2d 487 (Miss.1970). See also, State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

Here the trial court, consistent with the kidnapping charge in the indictment, instructed the jury:

"* * * Kidnapping is the unlawful taking, restraining or confining of a person by force or deception, with the intent that the victim be confined against his will as a hostage.

"* * *

"* * * to find the defendant guilty of kidnapping you must find beyond a reasonable doubt that the defendant did unlawfully take, restrain or confine the victim by force with the intent that the victim be held as a hostage and confined against his will."

The sole question then is whether there is evidence to support the verdict of guilty of kidnapping as defined by the trial court, and specifically the question is whether there is evidence to support an intent by defendant to hold the victim as a hostage. The trial court instructed the jury "* * * that a 'hostage' means a person held in unlawful custody for the purpose of obtaining the performance of demands made by the person holding him." Objection was made to this definition of hostage, and we are of the opinion it is erroneous. The instruction clearly states a hostage is a person held "* * * for the purpose of obtaining the performance of demands made by the person holding him." This definition is too broad, in that it embraces not only demands made by defendant on a third person, but also demands made directly on the victim. The instruction given by the trial court is broad enough to include the concept of demand which would force the victim to service against his will, which is essential to the third type of act, or conduct, constituting kidnapping as defined in State v. Clark, supra. The State seems to concede this, but then asserts this intent, also, is sufficient to constitute kidnapping, when coupled with the required overt acts. This is true, but defendant was not so charged and the jury was not so instructed.

Hostage is defined in 1 Bouv.Law Dict., Rawle's Third Revision (being 8th Ed.) 1914 as:

"A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

"Hostages were frequently given as a security for the payment of a ransom-bill; and if they died their death did not discharge the contract; * * *"

Hostage is defined in Black's Law Dictionary DeLuxe (4th Ed. 1951) as:

"A person who is given into the possession of the enemy, in a public war, his freedom (or life) to stand as security for the performance of some contract or promise made by the belligerent power giving the hostage with the other."

Webster's Third New International Dictionary, Unabridged (1961) defines hostage as:

"* * * the state of a person given or kept as a pledge pending the fulfillment of an agreement, demand, or treaty; a person in such a state; a pledge, security, or guarantee usually of good faith or intentions * * *."

Hostage is defined in 41 C.J.S. at 361 (1944) as follows:

"In international law, a person given up to an enemy, as a security for the performance of a contract made between belligerent powers, or their subjects or citizens."

This definition of hostage has been copied in 19A Words and Phrases (Permanent Ed. 1970).

The intent to hold the victim as a hostage was not an element of kidnapping at common law. 1 Anderson, Wharton's Criminal Law and Procedure, § 371 at 735 (1957). The intent to hold as a hostage is not the same as intent to hold for ransom. State v. Clark, supra.

It appears clear from the foregoing definitions that the term hostage,

when used with reference to a person and in the context in which it is used in our kidnapping statute, as interpreted in State v. Clark, supra, implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person. Even viewing the evidence in the light most favorable to the State, and resolving all conflicts and indulging all reasonable inferences in favor of the verdict, as we must [State v. Torres, 78 N.M. 597, 435 P.2d 216 (Ct.App.1967)], we are unable to find any evidence in the record which would substantially support a finding that defendant intended to hold his victim as a hostage.

Defendant's fifth point relied upon for reversal is his contention that the trial court erred in permitting a Michigan State Police Officer to testify as to admissions made by defendant on August 2, 1967 upon his arrest in Michigan. These admissions consisted of a statement that he was wanted for murder in Albuquerque, New Mexico, and statements constituting his version of the events which preceded and accompanied his stabbing of the victim and the nature of the weapon with which he did the stabbing. His version differed greatly from the victim's version of the criminal acts committed, but his version, although it did not include a statement as to the date on which the offenses were committed, did place him in Albuquerque when they were committed, and did amount to admissions of criminal conduct on his part.

His contentions are he was not given the Miranda warnings and did not waive either his right against self-incrimination or his right to be furnished with an attorney.

Before the police officer was permitted to testify as to the statements, or admissions, in the presence of the jury, a hearing was conducted in the absence of the jury, and counsel for both the State and defendant examined the officer at length. There is some confusion as to the number of times defendant was warned of his rights, but the following appears to be the sequence of relevant events: Michigan Police Officers had arrested defendant as a suspect in connection with the stabbing of a woman at a bar before defendant was seen by the officer-witness; these other officers had warned defendant of his rights; the officer-witness, upon arriving at police headquarters, also advised defendant of his rights; a question then arose about the identification of defendant by the victim who was hospitalized and who was apparently to be moved to a hospital in another city by reason of the gravity of her stab wounds; defendant consented to going to the hospital to be viewed by the victim; he insisted he had not stabbed her; just before they left for the hospital, or while on the way, the officer-witness again gave defendant the Miranda warnings by reading from a form, and asked defendant if he wished to sign a statement; defendant declined, so no further questions were asked; after they arrived at the hospital, and before entering the victim's room, the officer-witness again warned defendant of his rights and told him he need not enter the room; defendant expressed a willingness to enter the room, and still insisted he had not stabbed the woman; she promptly identified defendant; the officer-witness, on returning defendant to police headquarters, again warned defendant of his rights and asked if he wished to make a statement; defendant then proceeded to tell of the crime he had committed upon the person of the hospitalized woman; after he had given his statement as to this offense, he was asked if he was wanted elsewhere; and he then told of being wanted for another crime in Michigan, for breaking and entering and escaping custody in Indiana, and for murder in New Mexico.

The record does not show an express agreement to be interviewed or an express waiver of his rights, but, after being advised of his rights and after expressing an awareness and understanding thereof, he proceeded to voluntarily answer questions

and to relate his version of what he had done in New Mexico.

Although there is language in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which suggests an in-custody interrogation may properly be conducted only upon an express statement by the accused to the effect that he is willing to make a statement and does not want an attorney, we do not understand the basis for a determination of the voluntariness of an in-custody statement to be so narrowly limited. The ultimate test is that of voluntariness. State v. Armstrong, 82 N. M., 358, 482 P.2d 61, decided March 8, 1971. However, the voluntariness of an act is not to be determined solely upon the presence or absence of an express statement of certain words. This determination must depend in each case upon the particular facts and circumstances surrounding that case. United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), cert. denied, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968). See Annot., 1 A.L.R.3d 1251 (1965).

In our opinion the trial court's determination of voluntariness of the statement is clearly supported by the record.

The sixth point relied upon for reversal is that "THE JUDGMENT SHOULD BE REVERSED BECAUSE THE DEFENDANT WAS NEVER ARRAIGNED ON THE INDICTMENT." The facts pertinent to a determination of this issue are that on his arrival in New Mexico a copy of the indictment was served upon him and competent attorneys were appointed to represent him; he appeared for trial with his attorneys, and, after the disposal of several motions and other matters in chambers, a jury was impaneled and sworn, and the trial proceeded; defendant and his attorneys participated fully in the trial; and no question was raised by him in the trial court about not having been arraigned until well after the trial was underway. There is no question as to defendant's identity, no question about his understanding the charges against him, and no question but what he was diligently resisting the charges at all stages of the proceedings, as evidenced by the energetic and competently presented defense on his behalf by his counsel. Under these circumstances, he could not have been prejudiced by his failure to plead not guilty, and his right to be arraigned and plead to the charges was waived. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969).

The next point relied upon for reversal is the claimed error of the trial court in admitting inflammatory evidence of collateral offenses. The claimed collateral offenses were unnatural sexual acts committed upon the victim by force after defendant had committed the robbery, forced the victim into defendant's automobile, and driven into the hills west of Albuquerque. Immediately after the consummation of these claimed collateral offenses, defendant ordered the victim from the automobile, forced him to walk a short distance, remove a portion of his clothing, and lie on the ground, and then proceeded to kick the victim into unconsciousness and to stab him with a pair of scissors, with the apparent intent of killing him.

Ordinarily proof of a distinct criminal offense, independent of the offense for which a defendant is being tried, is inadmissible. State v. Mason, 79 N.M. 663, 448 P.2d 175 (Ct.App.1968). There are exceptions to this rule. State v. Bassett, 26 N.M. 476, 194 P. 867 (1921); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App.1969); State v. Mason, supra. However, the sexual acts here committed by defendant were not independent of the offenses for which he was being tried. These acts were part of the environment surrounding and an inseparable part of the the whole transaction out of which arose the offenses for which defendant was charged and tried, and these acts were explanatory of the issues involved in, accompanied and were incidental to the charged offenses. They were a part of the res gestae, or the "complete story" as Arizona prefers to call it, and evidence thereof was properly admissible. State v. Villavicencio,

95 Ariz. 199, 388 P.2d 245 (1964); State v. Sinovich, 329 Mo. 909, 46 S.W.2d 877 (1931); Sherrill v. State, 97 Okl.Cr. 154, 260 P.2d 418 (1953); State v. Mason, supra; Ash v. State, 96 Ga.App. 359, 100 S.E.2d 149 (1957); 1 Anderson, Wharton's Criminal Evidence, § 284 (12th Ed. 1955).

The next point relied upon for reversal is a claim that the trial court lacked jurisdiction over defendant, because he was assaulted by a Michigan officer and brought to New Mexico illegally. Defendant admits the position he is urging is directly contrary to Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). However, he urges that we disregard the Frisbie case and take a new direction. We are not inclined to do so. Our position on this question was announced in State v. Losolla, 79 N.M. 296, 442 P.2d 786 (1968).

The final point relied upon for reversal is the asserted error of the trial court "* * * IN PERMITTING AN IN-COURT IDENTIFICATION OF DEFENDANT BY THE VICTIM WITHOUT A PRIOR SHOWING THAT SUCH IDENTIFICATION WAS FREE FROM ANY ILLEGAL TAINT." The claim of error arises out of the fact that on July 20, 1967, an Albuquerque Police Officer showed photographs of thirteen different persons to the victim. One of the persons was defendant. The photographs consisted of two views of each person photographed.

Defendant relies upon Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). His claim is: "The witness who makes an in-court identification must show that he is able to make such identification independent of the reinforcement provided through the prior illegal line-up." He recognizes no lineup was involved here, but urges the rationale here should be the same as that behind the protection afforded the defendants in Burgett, Gilbert and Wade.

The Burgett case did not involve an identification or lineup question. The other two did. However, even assuming the applicability of the rationale of the Gilbert and Wade cases to the facts here, when the question of the victim's identification of defendant arose, the trial court conducted an evidentiary hearing in the absence of the jury. Counsel for both the State and defendant examined the victim as to the basis of his in-court identification, and an attorney for defendant examined the police officer who had shown the photographs to the victim. Nothing developed in this evidentiary hearing even suggested any taint on the in-court identification by reason of the victim having seen the photographs. Clearly the in-court identification was based upon the observations of defendant by the victim on the night of defendant's attacks upon him, and the trial court's determination of lack of taint by the showing of the photographs was supported by clear and convincing evidence. Nothing more was required. State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (Ct.App. 1968). See also, State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App.1970); State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App. 1970).

It follows from what has been said that the judgment of conviction and the sentence for kidnapping must be reversed, but otherwise the judgment and sentences are affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

484 P.2d 338

Anna B. MARJON, Plaintiff-Appellant,

v.

Dan QUINTANA, Joe Romero and Johnny R. Salazar, Ditch Commissioners of Sombrillo Community Ditch, and Joe Montoya, Mayordomo of Sombrillo Community Ditch and Dan Quintana, Joe Romero, Johnny R. Salazar and Joe Montoya, Individually, Defendants-Appellees.

No. 9067.

Supreme Court of New Mexico.
April 12, 1971.
Rehearing Denied May 5, 1971.

W. H. McDermott, Santa Fe, for plaintiff-appellant.

Alfonso G. Sanchez, Norman M. Neel, Santa Fe, for defendants-appellees.

OPINION

OMAN, Justice.

Plaintiff appeals from a final decree in favor of defendants. Defendants were adjudged to have a fifteen foot ditch easement across plaintiff's property, and plaintiff was permanently enjoined from interfering with defendants in the removal of the present lining of the ditch, in enlarging and relining the ditch within the said fifteen foot easement, and in keeping the ditch clear and clean.

Plaintiff relies upon fourteen separately stated and argued points for reversal. We consider only one point, which requires reversal. We need not and do not consider the other points. The point upon which we reverse is the error of the trial court in determining the easement width at fifteen feet.

There is no dispute as to the existence of a ditch easement across plaintiff's lands. There was, however, no allegation or claim in the pleadings as to the width of the easement, and the only evidence relative thereto was (1) that since 1953 the ditch has consisted of an underground culvert with a maximum width of twenty-six inches; (2) prior to the installation in 1953 of the culvert, the ditch was approximately four feet wide; and (3) there was testimony that rights-of-way, or easements, within which some ditches in the area are constructed, are from eight feet to fifteen feet in width, and, in "some spots" along the ditch in question, the property owners have constructed fences on each side of the ditch which are fifteen feet apart. However, these fenced areas are not in the area of plaintiff's property, and they exist only in "some spots" farther up the ditch. There is absolutely no evidence, other than the references to the fences in these "some spots," to even suggest the width of the easement in these "some spots," and there is nothing to indicate the easement across plaintiff's lands was ever fifteen feet in width, or that an easement fifteen feet in width was reasonably necessary for the maintenance of the ditch as it has existed.

However, from the above recited evidence the trial court found:

> "That the Sombrillo Ditch runs through a portion of the property * * * [of plaintiff], said ditch having been in existence for over 20 years and said ditch being situated in an easement 15 feet wide."

From this finding the court concluded:

> "That the Defendants and Sombrillo Community Ditch, have a valid easement, over and on the property of the Plaintiff, measuring fifteen feet wide, which easement has been in existence from time immemorial and over twenty years old."

The evidence fails to support the finding and the conclusion based thereon. Although on appeal only the evidence and reasonable inferences deducible therefrom, which support the trial court's findings, will be considered in determining whether the findings are supported by substantial evidence [Forrest Currell Lumber Company v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970)], to be substantial, it must be such relative evidence as a reasonable mind is willing to accept as adequate support for a conclusion [Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970)], and it must amount to more than mere speculation or conjecture [Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969)].

Defendants seek support for the finding and conclusion in §§ 75–14–5 and 75–14–53, N.M.S.A.1953 (Repl.Vol. 11, pt. 2, 1968); Dyer v. Compere, 41 N.M. 716, 73 P.2d 1356 (1937); Rhodes Cemetery Ass'n v. Miller, 122 W.Va. 139, 7 S.E.2d 659 (1940); 25 Am.Jur.2d, Easements, § 78 at 485 (1966); 28 C.J.S. Easements § 77, p. 757 (1966); Annot. 28 A.L.R.2d 253, § 4 (1953). Nothing said in any of these authorities relied upon by defendants support their claim of right to enlarge to a width of approximately five feet, six inches, without the consent of plaintiff and over her objections, a ditch across her

lands which has been confined since 1953 to a culvert with a maximum width of twenty-six inches, and which has never exceeded four feet in width, and nothing said in any of these authorities suggests support for the trial court's finding and conclusion that the easement is fifteen feet in width.

It appears defendants, and apparently the trial court as well, have construed § 75–14–53, supra, as giving defendants the authority to enlarge the ditch and the easement without the consent of plaintiff, without exercising the right of eminent domain as provided in § 75–1–3, N.M.S.A.1953 (Repl.Vol. 11, pt. 2, 1968), and without compensating plaintiff for the taking of her property. Defendants argue:

> "It is believed unnecessary to distinguish Posey v. Dove, 57 N.M. 200, 257 P.2d 541 (1953) in any detail. Suffice to say, that case did not involve a statutory right on the part of the Defendants to 'alter, change the location of, enlarge, extend, or reconstruct such ditch.' * *."

The fact that ditch commissioners are given the right to alter, change the location of, enlarge, extend, or reconstruct a ditch under the conditions set forth in § 75–14–53, supra, cannot be construed as giving them authority to take private property for these uses without just compensation, contrary to Art. II, § 20, Constitution of New Mexico, and without regard to the procedures required by §§ 75–1–3, supra, and 22–9–1, et seq., N.M.S.A.1953.

In their answer brief defendants assert "* * * there is no change in the character or plan of the servitude; there is no increase in burden on the servient estate, nor will there be any uncompensated damage." They base these assertions upon the orders of the trial court contained in the decree that the removal of the present culvert and the construction and covering of the new ditch shall be at the expense of defendants, and "* * * That the Defendants pay for any damages that may be done to the premises of the Plaintiff as a direct result of the relining work to be done." It is apparent there will be a change in the plan of the servitude and an increase in the burden on plaintiff's property, if the proposed enlargement of the ditch is accomplished and the easement enlarged in accordance with the court's decree. It is not entirely clear what the court had in mind by way of damages which might result from the relining, but it is apparent there was no provision made for compensating plaintiff for the additional lands being taken from her for the widening of the ditch and enlargrng the easement. We are unable to say what the exact width of the easement is, and it is not our function to make this determination, but we do say the determination by the trial court that it is and has been fifteen feet in width for more than twenty years is not supported by the record.

In Posey v. Dove, 57 N.M. 200, 257 P. 2d 541 (1953), the following was quoted with approval from Wiel, Water Rights in the Western States, § 502 at 539 (3d Ed. 1911):

> "'As the right to the ditch or other artificial watercourse is an easement, no change can be made against the landowner over whose land the ditch passes that is burdensome to the servient tenement, or that changes the character of the servitude; as moving a ditch to a new place, or enlarging it. Even if the enlargement or change would benefit the servient estate, the owner thereof has a right to be his own judge of whether he will permit it.'"

Also in the same volume of Wiel, § 501 at 482, it is stated:

> "* * * But a new ditch cannot be built over private land, nor an old one changed, without the consent of the land owner, unless by prescription or condemnation under the power of eminent domain. * * *"

The final decree is reversed and the cause remanded with directions to proceed in a manner not inconsistent herewith.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

484 P.2d 341

SAFEWAY STORES, INCORPORATED and Ernesto Rigales, Plaintiffs-Appellees,

v.

CITY OF LAS CRUCES and its Commissioners et al., Defendants-Appellants.

No. 9117.

Supreme Court of New Mexico.

April 26, 1971.

George R. Schmitt, Las Cruces, for defendants-appellants.

Keleher & McLeod, Michael L. Keleher, Albuquerque, Rudy S. Apodaca, Las Cruces, for plaintiffs-appellees.

OPINION

McMANUS, Justice.

Defendants appeal from the reversal of their administrative action denying approval of transfer of ownership and location of plaintiff Rigales' liquor license to Safeway Stores, Inc.

The Alcoholic Beverages Act, §§ 46–1–1 to 46–12–13, N.M.S.A. (1953 Comp.), establishes certain prerequisites to the granting of a liquor license application or for its transfer to another location. These requirements pertain to the character of the

applicant, certain restrictions as to the location of the license, plus other requirements and continuing requisites as to operation of the licensed establishment. However, it is conceded by the defendants that all of the necessary statutory prerequisites were complied with in connection with the plaintiff's application. Yet, the defendants urge that the trial court erred in failing to find that the New Mexico state legislature has conferred upon state municipalities certain necessary powers, including the discretionary authority to approve or disapprove an application for a liquor license. For purposes of this appeal, we find the above point to be dispositive for our decision.

The defendants alleged that they acted under the discretionary powers given them by § 46-4-8(C), N.M.S.A. (1953 Comp.), which states:

> "Within thirty [30] days after the date of the last publication of the notice in the newspaper, the governing body shall, in regular or special meeting, approve or disapprove the issuance or transfer of the license specified in the notice from the chief of the division of liquor control. The governing body shall, if it disapproves the issuance or transfer contained in the notice, notify the chief of the division of liquor control of such action of disapproval within five [5] days after the action has been taken. Thereupon, the chief of the division of liquor control shall not issue or transfer the license or licenses mentioned in the notice."

The above section must be read in light of the entire Alcoholic Beverages Act, supra, to determine the intent of the legislature. In recognizing the standards established by the act in seeking to achieve its purposes, "* * * it is fundamental that those standards—general as they are—are not to be broadened simply to accommodate the particular whims and philosophy that the parties or the various members of the licensing authority might have concerning the subject matter. That is a task for the legislature." Glenn v. Board of County Com'rs, Sheridan County, 440 P.2d 1 (Wyo.1968).

Agreeing that the plaintiffs met all applicable statutory requirements, the defendants maintain that, acting under no guidelines other than their discretion, they could still properly deny the transferral of the license. We cannot agree with this contention. There is nothing within the scope of the applicable statutory material which would indicate that the legislature intended to give local governing bodies discretion well beyond that exercised by the state liquor director or otherwise set forth as statutory guidelines. To give such interpretation to the section quoted by the defendants would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter.

The statute in question, § 46-4-8(C), supra, in circumstances where the local governing body fails to act for a certain period of time or approves the transfer, authorizes the chief of the division to approve the transfer in his discretion. As written, the statute does not even require discretion on the part of the local governing body. Could it be reasonably held, in the light of the state's preemption in the field of the regulation of liquor businesses, that the legislature intended local governing bodies to have a broader range of permitted action than the chief of the division? We think not. Without any statutory standard whatever, we do not feel that a local governing body could give vent to whatever whims they might choose. Our duty, when it becomes necessary to look into the legislative intent behind such statutes, is to avoid ambiguity, not create it. The chief aim of statutory construction is to arrive at true legislative intent. See Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961); State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Having made out a prima facie case on behalf of the plaintiffs by meeting

the statutory requirements applicable to them, it is then necessary for the defendants to rebut such evidence. See Lyons v. Delaware Liquor Commission, 44 Del. (5 Terry) 304, 58 A.2d 889 (1948). Yet, they fail to come forward with any such evidence, and, apparently relying on their misunderstanding of the law, they allege their ostensibly awesome discretionary power in such matters. A local governing body does perform a valuable discretionary duty in the granting of liquor licenses or in their transfer, but only insofar as determining whether the statutory guidelines have been met locally. The record shows, and the defendants substantively admit, that such guidelines were met.

Having considered all of the points raised on appeal, and having noted that the above point is dispositive of the appeal, the judgment of the trial court is affirmed.

It is so ordered.

TACKETT, J., concurs.

STEPHENSON, Justice (concurring specially).

I concur with the result reached by the majority opinion, but I have traveled a different route in arriving at my conclusion.

Here, a transfer of both location and ownership was sought by appellees. No assertion is, or ever has been made by appellants that the proposed transferee is not qualified to receive the license (§ 46–5–14, N.M.S.A., 1953) or that the proposed location is within the purview of any statutory prohibition (§§ 46–5–26 and 46–5–27, N.M.S.A., 1953).

The issues here are to be resolved by a consideration of § 46–4–8, N.M.S.A., 1953, construing it in conjunction with other provisions of the Liquor Control Act (Chapter 46, Articles 1 through 11, N.M.S.A., 1953, as amended) and decisions of this court. Subsection A of the statute provides in part that prior to approval of a transfer, the director shall give notice to the "local governing body" that an application for transfer has been received. Subsection B requires the governing body to publish a notice setting forth, inter alia, "* * * the date, time and place when the governing body will meet to consider the approval or disapproval of the application." Subsection C is quoted in part in the majority opinion. It seems clear from § 46–4–8, supra, that the city commission is to gather together and consider the approval or disapproval of the application for transfer. It is in regard to this meeting that I depart from the majority opinion. The majority holds that the plaintiffs-appellees made out "a prima facie case" as a result of which it became necessary for the defendants-appellants "to rebut such evidence," which they failed to do. To speak of prima facie cases and the rebutting thereof, implies some sort of orderly hearing conducted for the resolution of issues according to some defined plan.

Yet the statute does not in terms provide for a hearing. If a hearing was contemplated what, I ask, were the issues to be resolved? Not the qualifications of the transferee or the propriety of the proposed location. There was no question as to these matters which are, in any case, the responsibility of the director. Sections 46–5–1 and 46–5–15(B), N.M.S.A., 1953. And if there was a hearing, who were the parties? Who had the burden of proof and what was it that they were trying to prove? The answers to these questions are not to be found in § 46–4–8, supra, or in the Liquor Control Act.

Actually, the meeting was merely to hear protests. In Yarbrough v. Montoya, 54 N. M. 91, 214 P.2d 769 (1950), this court said, speaking of the notice required to be posted by the statute now compiled, as amended, as § 46–5–16(D), N.M.S.A., 1953, as a prerequisite to transfer:

> "The only purpose of such a posting is to give notice of the application so any interested parties may protest."

The striking feature of § 46–4–8(C), supra, is that, without specifying criteria or standards of any sort, it requires the local governing body to "approve or disapprove" the transfer and, if the latter, the decision

is made final and binding upon the director. The description of the statute under consideration by this court in State ex rel. Holmes v. State Board of Finance, 69 N. M. 430, 367 P.2d 925 (1961) precisely applies to § 46-4-8(C), viz:

"As we read the section, the grant is absolute and is totally devoid of restraints, direction or rules."

Serious questions thus arise at the outset as to whether the statute is constitutional. The resolution of this question requires a consideration of basic features of New Mexico's scheme of liquor control.

Although New Mexico recognizes that as between individuals, liquor licenses are personal property, as between the licensee or prospective licensee and the state we are firmly committed to the doctrine that a liquor license is a mere privilege. Nelson v. Naranjo, 74 N.M. 502, 395 P.2d 228 (1964). In Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942), this court said:

"Such license is a privilege and not property within the meaning of the due process and contract clauses of the constitutions of the State and the nation, and in them licensees have no vested property rights."

And in Yarbrough v. Montoya, supra:

"There is no inherent power in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils."

I find little in opinions of this court which are of aid in considering the powers and acts of local governing bodies. Sprunk v. Ward, 51 N.M. 403, 186 P.2d 382 (1947) is not particularly helpful because the statute under which the local governing body was then functioning (Chapter 80, Section 1, Laws of 1941) contemplated a *recommendation* by the local body to the chief of division in regard to the proposed transfer. If the local body so requested, the chief was required to hold a hearing. Provisions were made for issues and the burden of proof. We find no comparable features, directly or by inference, in § 46-4-8(C).

There are, however, numerous opinions of this court dealing with decisions of the chief of division in regard to issuance, revocation and transfer of ownership or location of licenses, which, because of the similarity of issues and statutes, are of interest.

This court has often confirmed the broad discretionary powers of the chief of division and has carried the principle that a liquor license is a privilege rather than property to the point of clothing the quasi-judicial or administrative decisions of the chief of division, or director, as he is now called, with elements of finality. For example, in Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940), this court said in regard to revocation of a license by the chief, that absent statutory provisions providing for notice to the licensee and a hearing, no such rights existed. In Chiordi v. Jernigan, supra, the right of the district court to receive additional evidence on appeal from an order of the chief revoking a license was stringently limited, and the inquiry on appeal was limited to whether the chief had acted fraudulently, arbitrarily or capriciously and within the scope of his authority. In Taggader v. Montoya, 54 N.M. 18, 212 P.2d 1049 (1949), it was held there was no appeal from an order denying a transfer of location. Yarbrough v. Montoya, supra, was an appeal from an order of the chief denying a new license, and this court held that because the chief had wide discretion, the question on appeal was whether the chief's action was unreasonable, arbitrary or capricious.

Although the Liquor Control Act has been amended from time to time so that some of these statements would not now apply, they nevertheless illustrate the trend of decision. The court has not been consistent in classifying the nature of the

chief's decisions on granting, revoking or transferring licenses, having held the decision to be not judicial, but rather "purely ministerial" in Floeck, supra, quasi-judicial but essentially administrative in Chiordi, supra, and "* * * not related to or an incident of the discharge of judicial duties" in Yarbrough, supra. The holdings have been consistent in that regulation of the liquor traffic is an exercise of the state's police power. See Drink, Inc. v. Babcock, 77 N.M. 277, 421 P.2d 798 (1967); Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953); Chiordi, supra; and Floeck, supra.

In the cases we have mentioned reviewing decisions of the chief, reliance has often been placed on the broad discretionary powers granted him by statute, usually citing what is now § 46-5-1, N.M.S.A., 1953, which provides:

> "It is hereby declared to be the policy of this act that the sale of all alcoholic liquors in the state of New Mexico shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in this state; and it is hereby made the responsibility of the chief of division to investigate into the legal qualifications of all applicants for licenses under this act, and to investigate into the conditions existing in the community wherein are located the premises for which any license is sought, before such license is issued, to the end that licenses shall not be issued to unqualified or disqualified persons or for prohibited places or locations."

This court has nevertheless recognized that licensees have the protection of the constitution, even though the license is not "property" in the constitutional sense. In Drink, Inc. v. Babcock, supra, we said:

> "We recognize that the legislature has the power not only to regulate the sale of alcoholic beverages, but to suppress it entirely, and may impose on the liquor industry more stringent regulations than on other businesses. *But when the manufacture and sale of liquor is lawful, as it is under our laws, statutes providing for the regulation of the businesses are limited by constitutional guarantees and must fall within the proper exercise of the state's police power.*" (Emphasis added.)

The cases which I have mentioned disclosing the sweeping regulation of the state, the powers of the director and the effect of his decisions, would furnish an answer to the issues here were we considering a decision by the director. But there are notable distinctions between decisions by the director, on the one hand, and local governing bodies on the other.

Police powers of municipalities are derived solely from the state. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Town of Mesilla v. Mesilla Design Center and Book Store, Inc., 71 N.M. 124, 376 P.2d 183 (1962). If it be said that § 46-4-8(C) vests the Las Cruces governing body with final police power because the decision of the local governing body is made final, then we are squarely confronted with the question of whether the result is an unlawful delegation of arbitrary discretion without standards or guidelines. An oft cited case on this subject is State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936). The court there said on this question:

> "On the question of the validity or invalidity of statutes vesting discretion in public officials without prescribing definite rules of action, we find exhaustive case notes in 12 A.L.R. 1435, 54 A.L.R. 1104, and 92 A.L.R. 400.
>
> "From a reading of many cases, we find the general rule to be that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to

all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void.

"However, within this rule is another rule: 'It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare.' 12 A.L.R. 1447."

Later cases make it clear that the exception noted is not of universal application, even where decisions under the police power are involved. City of Santa Fe v. Gamble-Skogmo, Inc., supra. In any case, nothing would have prevented the legislature here from adopting reasonable standards or criteria. The statute considered in Sprunk v. Ward, supra, that I have described, contained such standards and so does § 46–5–1.

State ex rel. Holmes v. State Board of Finance, supra, involved a statute authorizing the State Board of Finance to reduce annual operating budgets of state agencies by not to exceed ten percent. As I have said, there were no standards prescribed. The court said:

"The attempted delegation must fail because no standards have been provided."

And further:

"The briefs of both parties contain discussions on the sufficiency of standards which may be provided in order to withstand an attack. This court has had several occasions for determining whether standards were required and the sufficiency of those imposed. In this connection we call attention to State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240; State v. Spears, supra [57 N.M. 400, 259 P.2d 356]; Hatfield v. New Mexico State Board of Registration etc., 60 N.M. 242, 290 P.2d 1077; Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449, to cite a few.

"In State ex rel. Sofeico v. Heffernan, supra, is language to the effect that failure of the legislature to provide detailed standards to guide an administrative officer may not make an act unconstitutional in certain situations 'where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare.' However, we do not perceive how the instant situation comes within the exception. As is clear from an examination of Board of Education of Wyoming County v. Board of Public Works, supra [(W.Va.1959), 109 S.E.2d 552] (discussed post), it is not too difficult or impractical to provide standards. Neither is it a police regulation, nor is it necessary for the public welfare."

Although police powers or regulations were not involved in State ex rel. Sofeico v. Heffernan, supra, and State ex rel. Holmes v. State Board of Finance, supra, these matters were certainly involved in the statute under consideration in City of Santa Fe v. Gamble-Skogmo, Inc., supra. The statute there involved was the Santa Fe Historical Ordinance which controls architectural style and details, and this court held the ordinance to be an exercise of police power. In discussing the question of unlawful delegation, the court said:

"Defendants argue together their claim that the ordinance unconstitutionally delegates legislative authority to the style committee and the planning commission and that it fails to furnish adequate standards to guide the commission. It is settled that a legislative body may not vest unbridled or arbitrary power in an administrative agency but must furnish a

reasonably adequate standard to guide it. State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 925. Standards required to support a delegation of power by the local legislative body need not be specific. Most decisions hold that broad general standards are permissible 'so long as they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.' " (Citations omitted.)

The court held that the ordinance there in issue "* * * did, however, provide specific safeguards to insure against arbitrary action or unrestricted administrative discretion," in contrast with the statute under consideration here.

It is clear to me that § 46-4-8(C) is an invalid attempt to vest unbridled, unfettered or arbitrary power to the local governing body without reasonably adequate standards to guide it.

It is no answer to say, as respondents-appellants argue, that the action of the city commission was justifiable and not unreasonable. As the court said in State ex rel. Holmes v. State Board of Finance, supra:

"Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted. It is not what has been done but what can be done under a statute that determines its constitutionality."

See also Hatfield v. New Mexico State Board of Registration, 60 N.M. 242, 290 P.2d 1077 (1955).

Illustrative of the vices which can result in the absence of statutory criteria and the attempted vesting of arbitrary discretion in a public board, are the proceedings which occurred in this very case during the meeting in question. For example, in explaining his vote, one commissioner said that he believed that liquor should not be sold in mercantile establishments and, indeed, it appears that the commission had adopted a resolution to this effect. This imposes upon the use and enjoyment of liquor licenses a restriction not to be found in the Liquor Control Act. Another commissioner stated that a liquor license should die when its location goes out of existence, instead of "floating around endlessly"; yet, § 46-4-8, supra, specifically provides for the transferability of licenses. Here was the expression of a viewpoint running directly counter to the Liquor Control Act. Similarly, the same commissioner later said that there were already too many licenses, but this matter is controlled by § 46-5-24, N.M.S.A., 1953. If the latter two reasons given by the commissioners for their votes had been embodied in resolutions or ordinances, such enactments would have been invalid by reason of being inconsistent with state statutes. Section 14-16-1, N.M.S.A., 1953.

If there was fault here, it was clearly not of the commissioners who were conscientiously and with the utmost good will straining to properly discharge their function. The fault lies in the statute, § 46-4-8, supra, which fails to furnish them with standards and guidelines by which their statutory functions might be discharged in a lawful way.

I would simply hold the statute, for this reason, to be unconstitutional, violative of N.M.Const. art. 3, § 1, insofar as it purports to make the decision of the local governing body regarding the transfer binding upon the director, for the ultimate vice in the statute is the attempted delegation of final decision without requisite guidelines.

The dissents of Chief Justice Compton and Justice Oman say that the constitutional question which concerns me was not raised below or, in fact, in this court. I do not necessarily agree that such is the case. In the proceedings before the city commission, counsel for appellee Rigales asserted constitutional guarantees on behalf of his client. The complaint alleges that the action of the commissioners was unconstitutional, which was denied in the answer. Some statements of the trial court in its opinion and decision, as I construe them, seem, as

a matter of logical necessity, to have been grounded on pertinent constitutional rights and guarantees. The appellees' answer brief contains a discussion of the lack of statutory standards and guidelines rather similar to what I have said. I would be the first to admit that the constitutional questions which seem determinative to me were not raised below with the specificity that one would wish, but I consider that they were presented to us.

The grounds that seem persuasive to me were not the grounds upon which the trial court placed its decision, but I considered the case an apt one to apply the rule that if the result reached by the trial court is correct, its judgment would be affirmed, though based on grounds other than those prevailing on appeal.

Certainly, I had no intention of departing from or ignoring Supreme Court Rule 20(1) [§ 21-2-1(20) (1), N.M.S.A., 1953] and do not consider that I have done so.

COMPTON, Chief Justice (dissenting).

The opinion proposed strikes down our own well-reasoned cases to the contrary, ignores the public policy of the state, and plays havoc with a long established rule of procedure.

The public has clamored for years for a decentralization of the power to regulate the liquor traffic from the liquor director to the local level, the counties and municipalities. The legislative branch of the government has accomplished this goal in a fashion; yet, the proposed opinion says that was not what was intended and if so, § 46-4-8, 1953 Comp., is unconstitutional, something that was not raised in the lower court.

Procedurally, I wonder just what the ruling of this court will be when it is again urged that constitutional questions may be raised for the first time on appeal.

The majority having reached a different conclusion, I respectfully dissent.

OMAN, Justice (dissenting).

I am unable to agree with the opinion authored by Justice McManus, which is concurred in by Justice Tackett, or with the specially concurring opinion of Justice Stephenson. However, I do very largely agree with Justice Stephenson's appraisal of the action which was required on the part of defendants by § 46-4-8, N.M.S.A. 1953 (Repl. Vol. 7, 1966). I disagree with Justice Stephenson's position that the real and basic question presented is the constitutionality of this statute.

The constitutional question which Justice Stephenson says is presented and is determinative of this case was never presented at the protest hearing before defendants, in the trial court, or in any of the briefs filed in this court. The question is clearly not jurisdictional. Thus, it is not a question to be first raised and considered by this court. Supreme Court Rule 20 [§ 21-2-1(20), N. M.S.A. 1953 (Repl. Vol. 4, 1970)]; Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966); In Re Reilly's Estate, 63 N.M. 352, 319 P.2d 1069 (1957); Miera v. State, 46 N.M. 369, 129 P.2d 334 (1942); National Mut. Savings & Loan Ass'n. v. Hanover Fire Ins. Co., 40 N.M. 44, 53 P.2d 641 (1936); Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933); State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

I do not mean to suggest that I would agree with Justice Stephenson's conclusion as to the constitutionality of the statute if the question were properly presented. However, we need not and should not consider it under the circumstances.

In the opinion authored by Justice McManus it is stated defendants concede that all "necessary statutory pre-requisites were complied with in connection with the plaintiff's application." This is obviously refuted by the fact that defendants have at all times contended plaintiffs did not get the approval of defendants as the governing body of the City of Las Cruces as required by § 46-4-8(C), N.M.S.A.1953 (Repl. Vol.

7, 1966). Justices McManus and Tackett, by a claimed statutory construction of the entire Alcoholic Beverages Act for the purpose of avoiding ambiguity therein, would deny what I consider to be a clear expression of legislative intent. This intent is that "* * * the chief of the division of liquor control *shall not* * * * *transfer* the license * * * mentioned in the notice. * * *" [emphasis added], if the local governing body [in this case defendants-commissioners] disapproves the transfer of the license specified in the notice within thirty days after the date of the last publication thereof, and so advises the Chief of the Division of Liquor Control within five days after the action of disapproval has been taken. Section 46–4–8(C), supra.

This is precisely what occurred in this case.

The language of § 46–4–8, supra, is to be given effect as written, and the words used therein are to be given their usual meaning, unless a different intent is clearly indicated. Winston v. New Mexico State Police Board, 80 N.M. 310, 454 P.2d 967 (1969); Gonzales v. Oil, Chemical and Atomic Workers Int. U., 77 N.M. 61, 419 P.2d 257 (1966). It appears to me that the meaning of the language used is clear, plain and unambiguous. If I be correct in my appraisal of the clarity of the statutory language, it must be given effect, and there is no room for construction. Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966); Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct.App. 1967).

It is stated in the opinion of Justices McManus and Tackett that to interpret § 46–4–8(C), supra, as urged by defendants, "would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter. * * *" I disagree with this statement, and suggest they are substituting what they feel should be the law and its manner of application, rather than giving effect to the clearly expressed legislative intent.

I agree the chief aim of statutory construction is to arrive at the true legislative intent, and, when necessary to look into this intent, our purpose should be to avoid and not create ambiguity. However, I submit there is no duplicity, indistinctiveness, or uncertainty of meaning in the language of § 46–4–8(C), supra, and this language does not conflict with the language in any other section of the Alcoholic Beverages Act. At least no such conflict has been pointed out in the briefs or in either of the other opinions.

In my opinion the quotation from Glenn v. Board of County Com'rs., Sheridan County, 440 P.2d 1 (Wyo.1968), has been taken completely out of context and is inapplicable here. I suggest the procedures discussed, and the results reached with reference thereto, in the earlier Wyoming case of Whitesides v. Council of City of Cheyenne, 78 Wyo. 80, 319 P.2d 520 (1957), are much more nearly in accord with applicable procedures in the case now before us, and with the results we should reach in ruling thereon. In the Glenn case the court expressly observed that what it had earlier said in the Whitesides case with respect to the informal procedure adopted by the City Council had been largely superseded by the Wyoming Administrative Procedure Act. No such administrative procedure act is here applicable. Consequently, as Justice Stephenson has observed in his opinion, there was no question of a prima facie case being made out by plaintiffs. The case of Lyons v. Delaware Liquor Commission, 44 Del. (5 Terry) 304, 58 A.2d 889 (1948), has no applicability. A meeting, as required by § 46–4–8(C), supra, was held by defendants and the proposed transfer disapproved. The plaintiffs made no objections to the form or nature of the meeting, and they were given full opportunity to present their positions. Their only complaints went to the disapproval of the proposed transfer.

In my opinion their complaints were not well-founded.

I would reverse, but the majority of the court having agreed on an affirmance of the result reached by the trial court, I respectfully dissent.

484 P.2d 350

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Evans BONNEY, Defendant-Appellant.

No. 623.

Court of Appeals of New Mexico.

April 16, 1971.

James F. Warden, Carlsbad, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant pled guilty to an attempt to commit aggravated battery. Subsequently, he moved for post-conviction relief. Section 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4). After an evidentiary hearing, the motion was denied. Defendant's appeal asserts error in denying his motion because: (1) defendant's actions did not constitute an attempt to commit aggravated battery and (2) the State failed to establish that defendant had the specific intent to commit aggravated battery.

Both claims would be reviewable issues on an appeal after a trial. But that is not the posture of this case. Here, defendant seeks a review of evidence sufficient to sustain a conviction when there has been no trial and attempts to do so in a post-conviction proceeding.

Defendant's plea of guilty was a confession of guilt. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968). The record in this case shows defendant acknowledged his guilt to the trial judge before his plea was accepted. The guilty plea waived trial. Since the plea waived trial, and there being no issue as to the voluntariness of that plea, defendant is bound by his plea. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct.App.1970). Thus, there simply is no question before us as to the sufficiency of the evidence.

Further, even if defendant had been found guilty after a trial, post-conviction proceedings are not a method for obtaining

a retrial of his case. State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968); State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967). Thus, insufficiency of the evidence is not a basis for granting post-conviction relief. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct.App.1969); State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct.App.1969); Nance v. State, 80 N.M. 123, 452 P.2d 192 (Ct.App. 1969); State v. Gonzales, 79 N.M. 414, 444 P.2d 599 (Ct.App.1968).

The order denying relief is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

484 P.2d 351

STATE of New Mexico, Plaintiff-Appellee,

v.

Paul Harry SORIA, Defendant-Appellant.

No. 620.

Court of Appeals of New Mexico.

April 9, 1971.

R. Wilson Martin, Las Cruces, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Richard J. Smith, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant pleaded guilty to the charge of burglary. Judgment and Sentence was entered on September 14, 1970 which stated that defendant was sentenced to "* * * serve a term of not less than one (1) year nor more than five (5) years." It further ordered that the sentence imposed was "* * * suspended conditioned upon the Defendant serving six (6) months in the Dona Ana County Jail." On September 18, 1970 an Amended Judgment and Sentence was entered which contained the foregoing provision and added that "* * * upon completion of the sentence imposed hereinabove, the Defendant, Paul Harry Soria, be placed on probation under the supervision and control of the New Mexico Department of Corrections, Adult Probation and Parole Division, for a period of four (4) years and six (6) months." The order further recited it was to be entered nunc pro tunc as of September 14, 1970 the date the original sentence was filed.

At the hearing on September 18, 1970 the trial court stated it had intended to

place defendant on probation but failed to do so. Defendant strongly objected stating that the court had lost jurisdiction on the grounds that by adding probation after defendant had started to serve a valid sentence, was tantamount to increasing his sentence because probation has requirements such as reporting once a month, prohibitions against drinking, etc., which would effectively enhance the punishment of the original sentence of September 14, 1970 and thus deprive defendant of a substantial portion of his liberties.

We must first decide whether the trial court could enter the Amended Judgment and Sentence nunc pro tunc. Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969) and State v. Hatley, 72 N.M. 377, 384 P.2d 252 (1963) have expressly defined the purposes of a nunc pro tunc order. *Mora* relying on Hatley states:

> "* * * [I]n this case * * * nunc pro tunc has reference to the making of an entry now, *of something which was actually previously done*, so as to have it effective as of the earlier date. It is not to be used to supply some omitted action of the court or counsel but may be utilized to supply an omission in the record of something really done but omitted through mistake or inadvertence. * * *"

In view of the record there is no showing "of something which was actually previously done." In fact the contrary is true. The trial judge stated he "* * * overlooked placing this man on probation after he serves his term here in the county jail. * * *"

Accordingly, the Amended Judgment and Sentence could not be entered nunc pro tunc unless probation is inherent in the September 14, 1970 Judgment and Sentence. We must first decide whether probation was inherent in the September 14, 1970 Judgment and Sentence, even though there is no specific reference to probation.

The State contends that probation is automatic when one is granted a suspended sentence. This point has not been directly dealt with before in this jurisdiction although related issues have been decided and both the State and defendant rely on the same cases in most instances but for different legal propositions.

The State refers us to the language in State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966) which states:

> "Upon deferring or suspending sentence the court is required, in accordance with Section 40A-29-17, N.M.S.A., 1953, to place the defendant upon probation. * * *"

The State also refers us to State v. Holland, 78 N.M. 324, 431 P.2d 57 (1967) and the proposition stated therein that "probation is merely the status of one released under a suspended sentence" and to State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App.1968) for the proposition that a defendant is on probation even though no express order placing defendant on probation be entered with the judgment, so that on a revocation hearing credit for time spent on probation could be deducted from the original sentence.

In *Serrano* we do not view the language quoted to stand for the proposition that probation is automatic once sentence is deferred or suspended, unless § 40A-29-17, N.M.S.A.1953 (Repl. Vol. 1964) makes it so.

In *Holland* a definition of probation in terms of a suspended sentence, by itself, does not comprehensively tell what is a suspended sentence. It only tells us what *may* follow some suspended sentences.

In *Sublett* the question was whether the trial court has authority under the probation statute to withhold credit for allowable probation time when the suspended sentence was revoked. At issue was the meaning of the revocation statute under which the suspended sentence was revoked. *Sublett* held a person whose suspended sentence was being revoked was on probation within the meaning of the probation act, but it did not hold that every person under a suspended sentence was on probation.

Section 40A–29–17, supra, of the Disposition of Offenders Article states:

"* * * When a person has been convicted of a crime for which a sentence of imprisonment is authorized, and when the district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension *if* the defendant is in need of supervision, guidance or direction that is feasible for the probation service to furnish; provided, however, the total period of probation shall not exceed five [5] years." (Emphasis added).

Reading the section as a whole we think the Legislature clearly intended to give the sentencing judge authority to withhold the imposition of probation upon suspending a sentence. Probation was not "automatic" when defendant's sentence was suspended.

This is further buttressed by the permissive language of § 40A–29–18, N.M.S.A. 1953 (Repl. Vol. 1964) which states in part:

"* * * The district court shall attach to its order deferring or suspending sentence *such reasonable conditions as it may deem necessary* to insure that the defendant will observe the laws of the United States, the various states and the ordinances of any municipality. The defendant upon conviction may be required:

"* * *

"E. to be placed on probation under the supervision, guidance or direction of probation authorities for a term not to exceed that of the maximum sentence prescribed by law for the commission of the crime for which he was convicted; and

"F. to satisfy any other conditions reasonably related to his rehabilitation." (Emphasis added).

It follows that the district court, when it sentenced defendant to 6 months in the County Jail and suspended the balance of the sentence without probation, issued a valid original judgment and sentence and accordingly could not amend that judgment and sentence to add the conditions of probation, since a valid sentence may not be amended by increasing the penalty. State v. Allen, 82 N.M. 373, 482 P.2d 237, decided February 15, 1971; Williams v. State, 81 N.M. 605, 471 P.2d 175 (1970); State v. Verdugo, 79 N.M. 765, 449 P.2d 781 (1969); State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968). Adding conditions of probation would increase the penalty here. For example, the conditions of probation under the amended sentence would prohibit defendant from changing his employment, changing his residence, getting married or getting a driver's license without the probation officer's consent.

The Amended Judgment and Sentence of September is void and the district court is directed to purge it from the record and reinstate the Judgment and Sentence of September 14, 1970.

It is so ordered.

WOOD and SUTIN, JJ., concur.

484 P.2d 353

Anastacio TORRES, Jr., Plaintiff-Appellant,

v.

KANSAS CITY STRUCTURAL STEEL COMPANY et al., Defendants-Appellees.

No. 571.

Court of Appeals of New Mexico.

April 9, 1971.

Ramon Lopez, Albuquerque, for plaintiff-appellant.

James C. Ritchie, Robert G. McCorkle, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal by Torres from an adverse judgment in a workmen's compensation case. The appeal is primarily based on alleged errors in the trial court's findings of fact and its failure to adopt Torres' requested findings of fact.

We affirm.

Torres states: The issue is: Was plaintiff disabled to any extent after seven weeks of compensation having been paid to him?

We have reviewed the record and find substantial evidence to support the trial court's findings which are a negative answer to the question. On review, we consider the evidence in the light most favorable to support the findings and determine only whether the evidence, so considered, substantially supports the findings of the trial court. Lyon v. Catron County Commissioners, 81 N.M. 120, 464 P.2d 410 (Ct.App. 1969).

Torres also complains that the trial court abused its discretion in allowing defendants to impeach their own doctor by use of the doctor's deposition. Defendants claimed that in the light of the doctor's deposition testimony, they were surprised at some of his answers on cross-examination. Defendants interrogated the doctor, on redirect, as a hostile witness. See § 21-1-1(43) (b), N.M.S.A.1953 (Repl. Vol. 4). Torres' only objection was that it was "improper redirect." The deposition was not offered in evidence. In effect, it appears that the defendants were simply refreshing the witness's recollection. There was no abuse of discretion. Compare

State v. Garcia, 57 N.M. 166, 256 P.2d 532 (1953).

Torres makes three other claims concerning the trial court's findings as to disability. He asserts the trial court should have found he was permanently disabled as a result of his accident. Substantial evidence, however, supports the finding of seven weeks disability. He claims the trial court erred in failing to find he had epilepsy as a natural and direct result of the accident. The doctor who testified as to the epilepsy stated that he couldn't say, with any certainty, that the epilepsy was caused by the accident. This supports the trial court's refusal to find "medical causation." See Mayfield v. Keeth Gas Company, 81 N.M. 313, 466 P.2d 879 (Ct.App.1970). He claims the trial court erred in failing to award compensation for facial disfigurement. See § 59-10-18.5, N.M.S.A.1953 (Repl. Vol 9, pt. 2, Supp.1969). This claim is based on the fact that Torres lost four teeth in the accident. There is no evidence, however, that there was any facial disfigurement resulting from the loss of teeth.

Torres further claims error for failure of the trial court to award medical and hospital expenses incurred by Torres after February 15, 1969. However, the trial court found that defendants had paid for the medical care and services rendered to plaintiff as a result of the accident. Substantial evidence supports this finding. It concluded that the expenses involved under this point did not result from medical care or treatment required or needed as a result of the accident. Since the expenses here involved were not reasonably necessary as a result of Torres' accident, he was not entitled to recover them from defendants. Williams v. City of Gallup, 77 N.M. 286, 421 P.2d 804 (1966).

The judgment of the court below is affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

484 P.2d 355

STATE of New Mexico, Plaintiff-Appellee,

v.

Paul Cipriano SENA, Defendant-Appellant.

No. 591.

Court of Appeals of New Mexico.

April 9, 1971.

David W. Bonem, Clovis, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Morris Stagner, Special Asst. Atty. Gen., Clovis, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of unlawfully possessing LSD. Section 54–5–18, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp. 1969). The trial court submitted the issue of entrapment to the jury. Defendant claims this was error, asserting he was entrapped as a matter of law.

Concerning the defense of entrapment, State v. Roybal, 65 N.M. 342, 337 P.2d 406 (1959) states:

> "* * * it is not permissible for an officer to initiate the criminal act, nor to use undue persuasion or enticement to induce the defendant to commit a crime, when without such conduct upon the part of the officer the defendant would not have committed such crime."

See also, State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968); State v. Akin, 75 N.M. 308, 404 P.2d 134 (1965); State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (Ct. App.1968); State v. Romero, 79 N.M. 522, 445 P.2d 587 (Ct.App.1968). Entrapment does not occur unless the criminal conduct was the product of the creative activity of law enforcement officials. Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

In claiming entrapment as a matter of law, defendant relies on the following evidence. A police informer purchased LSD from defendant. The informer was a friend of defendant and had lived at defendant's house shortly before the purchase was made. The police chief had wanted the informer to purchase marijuana from defendant because the penalty was heavier. The informer was unable to buy marijuana. There were two unsuccessful attempts to get defendant to obtain LSD for the informer, but according to defendant he had given up his drug activity. The third try was successful. The informer made certain representations to defendant. The evidence as to the representations is that the informer told defendant some "heavies" wanted to start "a ring," and "they might go to violence." Also, that "some airman" wanted LSD, "* * * they had given him [the informer] some money and he had spent it so he told me that they were going to hurt him if he didn't get it." The defendant testified that although he was staying away from narcotics, he obtained the LSD because the informer "told me that he had to have it." The defendant also testified he would not have obtained the LSD without this inducement.

Defendant relies on Sherman v. United States, supra, where on "the undisputed testimony of the prosecution's witnesses," entrapment was established as a matter of law. If the testimony relied on by defendant was undisputed, there would have been entrapment under State v. Roybal, supra. However, the evidence is in conflict.

The LSD incident involved here occurred on March 2nd. There is evidence that defendant obtained this LSD on February 26th. There is also evidence that in the preceding October defendant had given the police a statement involving him in "hauling" what was thought to be marijuana from Albuquerque to Clovis; that defendant was involved in the pseudo-marijuana haul because of threats by people with Mafia connections. There is evidence that during the time the informer was staying in defendant's home, defendant furnished LSD to the informer; evidence that on February 24th defendant sold the informer

what purported to be "two caps" of LSD. There is no evidence of representations by the informer in connection with this sale. Although the informer and defendant were friends, the informer testified he had no knowledge that defendant was trying to stay off of dope. Defendant admitted he "did drugs" prior to February 24th and that "on more than one occasion" he procured for the informer what he thought was LSD.

The foregoing evidence goes toward defendant's predisposition to commit the crime. It goes to the credibility of defendant's testimony which asserts the informer's representations were the inducing cause of his crime. This evidence raises a factual issue "* * * whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether [defendant] was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. * * *" Sherman v. United States, supra. There being conflicts in the evidence on the entrapment issue, the trial court properly refused to rule there was entrapment as a matter of law. Masciale v. United States, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed.2d 859 (1958). Compare State v. Sanchez, supra.

The judgment and sentence is affirmed. It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 357

STATE of New Mexico, Plaintiff-Appellee,

v.

Ralph Edward McCARTY, Defendant-Appellant.

No. 534.

Court of Appeals of New Mexico.

April 9, 1971.

Manford W. Rainwater, Tucumcari, for defendant-appellant.

James A. Maloney, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was convicted of armed robbery (§ 40A-16-2, N.M.S.A. 1953 (Repl. Vol. 1964)). His sole point on appeal is:

"Accused was Denied His Constitutional Rights Under the Sixth Amendment of the United States Constitution, as Made Applicable to the States by the Fourteenth Amendment to the United States Constitution, when the Prosecuting Witness Made a Court Room Identification of the Accused after the Accused had

been Exhibited to the Witness Before Trial at a Confrontation for Identification Purposes Without Counsel."

We affirm.

On February 26, 1970, the night clerk at the Royal Palacio Motel was robbed at gun point by two assailants. As soon as the robbers left, he called the police giving notice of the robbery and a description of the robbers. The police went to various motels looking for the robbers. At the Holiday Inn, defendant and a companion were identified by the night clerk as the men who robbed him approximately two hours earlier.

Defendant contends that the confrontation at the Holiday Inn was a tainting of the in-court identification in that "* * * the state failed to show that the prosecuting witness's testimony had an independent basis or failed to show that the witness was relying only on what he saw at the time of the robbery."

We cannot agree. The record discloses that the in-court identification was based on what the victim saw when he was robbed. Further, the trial court held a hearing out of the presence of the jury to make such a determination. This independent hearing culminated in the court's question to the witness whether he could identify the two robbers purely from what he observed during the robbery at the Palacio Motel. The witness affirmed that fact.

The foregoing, together with the witness's account of the robbery, which took from three to five minutes, and the fact that the robbers were not masked, is adequate support for the court's ruling that the in-court identification was based solely on what the witness observed at the time of the robbery. See State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct.App.1970); State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970), cert. denied 81 N.M. 506, 469 P.2d 151 (1970).

Defendant contends that the decisions of Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) and United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) are controlling on his claim of having been denied the right to counsel at the Holiday Inn confrontation. The State contends that *Wade* and *Gilbert* should be limited to post-indictment identification as was done in People v. Palmer, 41 Ill.2d 571, 244 N.E.2d 173 (1969) and People v. Almengor, 268 Cal. App.2d 614, 74 Cal.Rptr. 213 (1969).

We hesitate to adopt any fixed rule which would go beyond Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) wherein it is stated that it is "the totality of the circumstances", as revealed by the record, which must be considered.

The issue is not whether defendant's rights were violated by not having counsel at the Holiday Inn confrontation, but whether there was error, as a matter of law, when the trial court ruled, in an independent hearing, that the in-court identification was independent of any pretrial confrontation and that the in-court identification was thus admissible. See State v. Torres, supra.

Having determined this issue in favor of the State, we affirm.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

484 P.2d 358

Ray Vernon ADKINS, Petitioner-Appellant,

v.

The STATE of New Mexico, Respondent-Appellee.

No. 575.

Court of Appeals of New Mexico.

April 9, 1971.

Ted L. Hartley, Garrett & Hartley, Clovis, for petitioner-appellant.

James A. Maloney, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for respondent-appellee.

OPINION

HENDLEY, Judge.

Defendant's motion for post-conviction relief under Rule 93 [§ 21-1-1(93), N.M.S.A.1953, (Repl.Vol. 4, 1970)] was denied after a hearing on the motion. Defendant asserts the trial court erred in finding that at the original trial he (1) was adequately advised of his rights, (2) was adequately represented by counsel, (3) knowingly and intelligently waived his right to counsel, and (4) voluntarily entered his guilty plea.

We affirm.

On appeal we view the evidence most favorable to support the findings. State v. Moser, 80 N.M. 404, 456 P.2d 878 (1969). Findings supported by substantial evidence are conclusive on appeal. State v. Wheeler, 81 N.M. 758, 473 P.2d 372 (Ct.App.1970). The findings of the trial court regarding the Rule 93 motion are sustainable by the record.

Independent of that hearing the record reveals that at the original proceeding prior to accepting the guilty plea, the trial judge solicitously explained to defendant his rights and explored the voluntariness of the plea, to the extent of not accepting a plea of guilty to the second count of the indictment. Further, when defendant stated he did not want an attorney, the trial judge insisted that he consult one. An attorney was provided by the court and he consulted with the defendant. Defendant, after consultation with an attorney, stated he did not want an attorney. The record of that proceeding is such that a denial of petitioner's motion without a hearing would have been sustained. Compare State v. King, 82 N.M. 200, 477 P.2d 1015 (Ct.App. 1970); State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct.App.1968).

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

484 P.2d 359

John A. WILLIAMSON, Plaintiff-Appellant,

and

Royal Globe Insurance Group, Plaintiff-in-Intervention,

v.

E. J. SMITH, d/b/a E. J. Smith Plumbing & Heating, and J. R. Trenching and Excavating Company, Inc., Defendants-Appellees.

No. 539.

Court of Appeals of New Mexico.
March 26, 1971.
Certiorari Granted April 21, 1971.

Irwin S. Moise, Sutin, Thayer & Browne, Albuquerque, for plaintiff-appellant.

J. J. Monroe, Joe Diaz, Iden & Johnson, Albuquerque, for appellee E. J. Smith.

C. LeRoy Hansen, Civerolo, Hansen & Wolf, Albuquerque, for appellee J. R. Trenching and Excavating Co.

OPINION

SPIESS, Chief Judge.

The plaintiff, Williamson, a journeyman plumber, was employed in laying a sewer line along the bottom of a trench which had been cut to and partially through a street in the City of Albuquerque. The particular work was being performed in connection with a construction project of Warren Properties. It appears that defendant, E. J. Smith, a master plumber, was employed by Warren Properties to assume charge of the plumbing work. Smith had secured the services of Williamson through a local union by means of an employment contract between Smith and the local union. The trench had been cut by J. R. Trenching and Excavating Company, Inc., (J.R.) through the use of a trenching machine.

As Williamson was performing his work in the bottom of the trench a cave-in occurred and as a result he was injured.

The soil in the area of the trench and at the point of the cave-in was composed of a loose sand overlaid by approximately four feet in thickness of hard, packed dirt. At the point of the cave-in the trench was about 10 feet 11 inches in depth.

The cause of the cave-in was attributed to the "sloughing off" into the trench of the sand which supported the hard, packed dirt. This "sloughing off" of the sand was due, at least in part, to vibrations caused by vehicular traffic upon the street.

Williamson, by his complaint, sought damages against Smith and J. R. on account of injuries which he had sustained upon the ground that both Smith and J. R. had a duty to shore and crib the trench and both failed so to do; that the cave-in odcurred and he was injured as a direct and proximate result of the failure of both Smith and J. R. to shore and crib the trench.

In answer to the complaint Smith and J. R., among other defenses, pled assumption of risk on the part of Williamson. Depositions of Williamson, Smith and the president of J. R. were taken. Thereafter Smith and J. R. moved for summary judgment dismissing the action. The trial court granted the motion and entered summary judgment, based upon a review, as is stated, of the "* * * pleadings, depositions, affidavits, and other evidence, both oral and documentary, * * *" the court concluding that "* * * there is no genuine issue as to any material fact, that the plaintiff, John A. Williamson, voluntarily assumed the risk of the injuries complained of herein. * * *"

Contrary to the language contained in the judgment, there is no showing that material other than the pleadings, depositions, and an affidavit were before the trial court for its consideration in granting the summary judgment. Williamson has appealed from the summary judgment. We affirm.

Williamson asserts that the trial court erred in determining, as a matter of law, that he had assumed the risk of injuries for which he sought damages. In substance, it is his position that genuine issues of material fact exist which must be submitted to and resolved by the trier of facts and consequently precluded entry of summary judgment.

The question, consequently, on this appeal is whether there is a genuine issue as to any material fact presented by the matter considered by the court upon the motion for summary judgment, namely, the pleadings, the depositions, and Williamson's affidavit. This issue must be considered from the standpoint of whether Williamson (1) knew the place where he was working was unsafe; (2) appreciated the danger, and (3) voluntarily assumed the risk. Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961); Padilla v. Winsor, 67 N.M. 267, 354 P.2d 740 (1960); Dempsey v. Alamo Hotels, Inc., 76 N.M. 712, 418 P.2d 58 (1966).

We note here that Williamson, in addition to challenging the trial court's conclusion relating to the assumption of risk, likewise argues that the trial court erred in determining as a matter of law that he was guilty of contributory negligence. We do not consider this latter argument for the reason that the summary judgment, which we affirm, relates only to assumption of risk.

The trial court, when confronted with a motion for summary judgment must determine whether there is a genuine issue of material fact warranting submission of the case to the trier of facts. Zengerle v. Commonwealth Insurance Company of N. Y., 60 N.M. 379, 291 P.2d 1099 (1955).

It is fundamental that issues of fact are not to be decided on motions for summary judgment and such motion should be denied unless the court is convinced from all matters before it that the moving party is entitled to judgment as a matter of law. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963); Butcher v. Safeway Stores, Inc., 78 N.M. 593, 435 P.2d 212 (Ct.App.1967).

It is likewise fundamental that on appeal from a summary judgment testimony will be reviewed in the most favorable aspect it will bear in support of the right to trial. Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968). The defense of assumption of risk becomes a question of law where the evidence will support but one legitimate inference. Stewart v. Barnes, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969).

The issue as to whether a servant assumed the risk of injury is ordinarily a fact question to be determined by the trier of facts and is always so where reasonable men might draw different conclusions from the evidence, although when one inference only is deducible therefrom the question is for the court. See Crawford v. Western Clay & Gypsum Products Company, 20 N.M. 555, 151 P. 238 (1915).

It is undisputed that Williamson was an experienced plumber and had worked in the particular trench for a distance of some 300 feet above the place where the accident occurred and throughout this area he had encountered the problem of sand sloughing off in the ditch. He said: "* * * It crawled in on us all the time. We had to keep it pushed back all the time."

Williamson was aware of the danger that a cave-in could result from the sloughing off of the sand from beneath the hard-packed surface dirt. He was asked "Did you ever go up to him (Smith) and say it was a hazardous situation because it (sand) was sloughing off? A. I did. I told him we should drop some plywood in there and put something in between it and if it caved in it wouldn't catch a man. They said they didn't have any plywood."

There can be no question under Williamson's statement that he knew the trench in which he was working, or called upon to work, was unsafe. His statement to Smith discloses without dispute that he appreciated the danger of a cave-in.

A further showing of Williamson's knowledge and appreciation of danger is demonstrated by the following:

"Q And you were aware of the fact that if the sand sloughed off, that the hard portion of the ditch would cave in on top of it?

A Well, now, that's something I couldn't answer for the simple reason that most of the time that crawling sand in a ditch that way will crawl in on you, you know, but that on top, nobody knows when it will turn loose.

Q So, there's always that risk?

A Yes, sir, there's that risk there.

Q You knew that risk was present?

A Yes, sir.

Q As I understand it, you would not have gone down in the ditch or worked in the ditch had it not been for the fact that you wanted to work there on that job and make some money?

A Well, I wouldn't put it that way, I just put it in the way that any working man has to work to live and I was just after a living, that's all.

I could have made just as much money on any other job as I could that one, but it's just the idea of having the job in town so you could be home with your family."

* * * * * *

"Q And you felt that if you refused to go down in that ditch that your employer would discharge you, is that correct?

A Yes, sir. Any time you refuse to do what the foreman tells you, you can go home."

* * * * * *

"Q As I understand it, you told Mr. Smith that you thought that there ought to be two pieces of plywood held apart by a two-by-four or something?

A Yes, sir.

Q Did you tell him that after he told you to go down into the ditch?

A Well, yes, sir. We were there—whenever he was digging the ditch, we all stood there and talked about the ditch and were watching the sand in the bottom cave-in on the ditch and he said, 'you reckon it will cave?' I said, 'it could.' I says, 'if we had two pieces of ply board and put down there and put a two-by-four between them, if it did cave, then it wouldn't catch a man in there.'

Q Who asked you if you reckoned it would cave-in?

A Mr. Smith."

It appears to be undisputed that Williamson, as shown by his own statements, knew the place in which he was working was unsafe and that he fully appreciated the danger of the cave-in. With this knowledge and appreciation of danger he nevertheless went into the trench and continued working there until the cave-in occurred.

In our opinion, the elements of assumption of risk are unmistakably present and were properly so determined as a matter of law.

Williamson argues that the conclusion that he assumed the risk as a matter of law, is not sustainable where by reason of economic coercion or compulsion he felt compelled to accept the risk to avoid possible loss of employment. He argues that a fact question consequently was presented as to whether he had voluntarily assumed the risk. Williamson stated, as we have quoted, that he felt he would lose the particular employment if he declined to work in the trench. His affidavit also indicates that a discharge from the particular employment would prejudice his right to secure work on other projects. The rule generally followed, and which we consider applicable here, is that if a servant undertakes the performance of work, the danger of which he fully comprehends, the fact that he undertakes it through fear or threat of dismissal will not relieve him of the assumption of risk. Jasper v. Lumpee, 81 N.M. 214, 465 P.2d 97 (1970); Demarest v. T. C. Bateson Constr. Co., 370 F.2d 281 (10th Cir.1966); Gamble v. Gamble, 171 Neb. 826, 108 N.W.2d 92 (1961); Gabbard v. Sharp, 167 Kan. 354, 205 P.2d 960 (1949); Louisville & N. R. Co. v. Russell, 164 Miss. 529, 144 So. 478 (1932); Newman v. Griffin Foundry & Machine Co., 38 Ga.App. 518, 144 S.E. 386 (1928); Vol 2, Shearman and Redfield on Negligence (Revised Ed. 1941), pg. 589.

Williamson takes the position that Padilla v. Winsor, supra, is controlling here and fully supports his assertion of error on the part of the trial court.

Padilla was a master-servant case. Padilla was employed by Winsor as a ranch hand and was furnished two riding horses for his use; one named Elmer and one named Trigger. Padilla was informed by Winsor that both horses were gentle. He was instructed to ride one of the horses one day and the other the next, alternating them. Padilla rode both horses almost daily from August 15th, 1955 to November 21st, 1955, when he was injured as a result of being thrown from Trigger when he started bucking. Padilla preferred Trigger because Elmer was prone to stumble and he considered Trigger a better horse, gentle, and easier to handle if he had to be loaded into a pickup in the pasture.

Prior to the accident Trigger had bucked with Padilla. Relating to this incident the following testimony is quoted in the opinion.

" 'Q. Did you tell Mr. Winsor about your experience with the horse that morning and what the horse did? A. Yes, when we was driving the bunch I told Mr. Winsor that Trigger had throwed me down and we began to talk about him, and he said that he throwed him once, too, but I didn't pay much attention to the old man because Mr. Winsor used to use just one spur, and I thought that he had catched the horse with a spur and that's what make him buck, so I didn't pay much attention that the horse was mean.

'Q. But Mr. Winsor did tell you that the horse had thrown him? A. Yes, one day that he and Severda was working cattle he said that horse started bucking without reason, but I kind of jumped Mr. Winsor that he had hooked him with a spur.' "

The court appears to have taken the view that because Trigger had bucked on two previous occasions did not necessarily render him an unsafe horse. Padilla, consequently, could not as a matter of law be charged with knowing that the horse was unsafe. Judicial notice was taken of the fact "* * * that horses no matter how gentle, with slight provocation, or without any known provocation, will sometimes shy, jump or even start to buck."

The court concluded that because Padilla knew that Trigger had bucked twice before the accident was not a sufficient basis upon which to determine assumption of risk as a matter of law.

In the instant case, as we have said, Williamson knew the place provided for him to perform his work was unsafe and fully appreciated the danger; in this respect it differs from *Padilla.*

Williamson appears to argue that a servant does not assume any risks resulting from his continuing to work and use the instrumentality about which he has complained and is seeking to have the master remedy, citing *Padilla* and Vol. 2, Shearman and Redfield on Negligence, (Revised Ed.1941), pg. 589.

This rule, in our opinion, is not applicable here because, although Williamson did complain about the unsafe condition of the trench and did seek to have a protective device installed he was told that such device would not be provided.

The fact that a servant has complained of an unsafe condition does not relieve him of the assumption of risk in the absence of an assurance or promise, express or implied, by the master that the condition will be remedied. See Hallstein v. Pennsylvania R. Co., 30 F.2d 594 (6th Cir.1929); Western Arkansas Telephone Co. v. Grantham, 200 Ark. 411, 139 S.W.2d 49 (1940); McDaniel v. Myers, 156 Kan. 21, 131 P.2d 650 (1942); Liptak v. Karsner, 208 Minn. 168, 293 N.W. 612 (1940); Mobile & O. R. Co. v. Clay, 156 Miss. 463, 125 So. 819 (1930), Certiorari denied Clay v. Mobile & O. R. Co., 282 U.S. 844, 51 S.Ct. 24, 75 L. Ed. 749 (1930); Ducjack v. New Jersey Zinc Co., 104 N.J.L. 575, 141 A. 791 (1928).

Williamson further argues that he "* * * knew deep ditches in sandy soil could be dangerous but nevertheless undertook to work in the one in which he was injured. However, * * * he didn't know this ditch was going to cave in. * * *" He says that this situation cannot be distinguished from *Padilla.*

As we have stated, it is the appreciation of the danger that the ditch could cave in which supplies an element of assumption of risk rather than a knowledge that the ditch was, in fact, going to cave in. We do not read *Padilla* as requiring a contrary holding.

We conclude that no genuine issue of material fact was present which precluded the entry of summary judgment and the entry of the summary judgment was proper. The judgment is affirmed.

It is so ordered.

HENDLEY, J., and BLYTHE, District Judge, concur.

484 P.2d 364

STATE of New Mexico, Plaintiff-Appellee,

v.

Frankie CRUZ, Defendant-Appellant.

No. 595.

Court of Appeals of New Mexico.

April 9, 1971.

Harold H. Parker, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Cruz pleaded guilty to two counts of an indictment charging him with burglary and larceny. He was sentenced for a period of not less than one nor more than five years on each count, and the sentences were to run concurrently from May 15, 1969.

Cruz filed a motion to vacate the sentences under § 21-1-1(93) N.M.S.A.1953. A hearing was granted and the motion denied. The trial court found that there was no denial or infringement of the constitutional rights of Cruz to render the judgment and sentence vulnerable to collateral attack, and that Cruz had not sustained the burden of proof as to the allegations of his motion. Cruz appeals from this order.

We affirm.

There are two claims of error on appeal, (1) Cruz was promised by an assistant district attorney that if he pleaded guilty to the alleged crimes, he would not be charged under the Habitual Criminal Statute; that this was a promise or threat that made his plea of guilty involuntary; (2) the record does not affirmatively reflect that Cruz was fully advised by the trial court at the time of his plea of guilty.

Cruz first contends that his plea was not voluntary because he was induced to plead guilty. The hearing before the trial court shows that Cruz was adequately advised by his attorney; that thereafter, Cruz and his attorney initiated conversations with the assistant district attorney about the Habitual Criminal Act. On the day of the guilty plea, Cruz and his attorney visited the assistant district attorney. His attorney asked, "Will you assure this man if he pleads guilty you will not file the habitual on him?" The assistant district attorney turned around and told Cruz, "If you plead guilty I will not file the habitual on you." Cruz testified he understood from this question and answer that if he pleaded not

guilty and went to trial and was convicted, that the assistant district attorney would file the habitual criminal charge against him. This he considered to be a threat and, based upon this claimed threat, he pleaded guilty. His attorney testified that Cruz freely and voluntarily pleaded guilty.

When Cruz pleaded guilty, the trial court told Cruz, "I want to be sure you understand what we are doing. * * * But I detect a note of hesitance on the second count. I want you to understand that I am not going to sit here and have any semblance of any kind of railroading." When Cruz's attorney asked for a moment to speak with Cruz, the court said, "Yes, bearing in mind I don't want any pressure placed upon you by anybody to do this." After discussion with his attorney, Cruz pleaded guilty to the second count.

There is substantial evidence that Cruz was not threatened and that his plea of guilty was not induced by a promise from the assistant district attorney. Rather, substantial evidence supports the view that Cruz induced the assistant district attorney to refrain from filing a habitual criminal charge. Furthermore, such a promise, even if it induced Cruz to plead guilty did not make it involuntary, State v. Lattin, 78 N.M. 49, 52, 428 P.2d 23 (1967), where the plea is made voluntarily after proper advice of counsel and with a full understanding of the consequences. State v. Robbins, 77 N.M. 644, 648, 427 P.2d 10 (1967), cert. denied 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967). See also State v. French, 82 N.M. 209, 478 P.2d 537 (1970); North Carolina v. Alford, 400 U. S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). It appears that Cruz was guided by his attorney's advice and regrets his own decision. This does not render the plea involuntary. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Under the facts and circumstances of this record, we cannot say Cruz's plea of guilty was involuntary as a matter of law because there is substantial evidence that Cruz was not induced to plead guilty by the state.

Cruz next contends that the record at the time of the plea does not affirmatively reflect that he was fully advised by the trial court of the rights he was foregoing by pleading guilty, nor the penalties he might incur, nor whether there were sufficient facts to determine that he actually committed the crime.

The only cases cited by Cruz and discussed by the state are State v. Elledge, 81 N.M. 18, 462 P.2d 152 (Ct.App.1969), which discusses Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In *Boykin,* Boykin was given a death sentence for common law robbery. The record did not disclose that the petitioner voluntarily and understandingly entered his plea of guilty, and the case was reversed. *Boykin,* however, was a direct appeal. *Elledge* was a post conviction proceeding where there had been no direct appeal. *Elledge* distinguished *Boykin* because:

> "It does not hold that where there has been no direct review, as in this case, voluntariness may not be determined as a question of fact in a post conviction proceeding."

Further, *Elledge* proceeded on the basis that *Boykin* did not change the New Mexico rule that the trial judge has a duty to ascertain that a defendant knows the consequences of his plea and to advise him of those consequences if he is not otherwise advised. In *Elledge,* the defendant may have been otherwise advised. These cases do not support Cruz's contention.

Cruz claims, (1) he was not advised by the trial court of his rights to a jury trial, even though a jury was present and ready for trial the day he pleaded guilty; (2) he was not advised of his right not to incriminate himself, even though he discussed this thoroughly with his attorney; (3) he was not advised of his right to face his accusers, even though his attorney discussed some of the evidence against him (his fingerprint at the scene of the crime); (4) he

was not advised of the penalties he would face although the question of a life sentence under the Habitual Criminal Act was specifically discussed. Each of these claims go only to the lack of specific advice by the trial judge—specifically, a recitation by the trial judge—rather than defendant's understanding of his rights.

The trial court stated at the end of the hearing, "It is obvious from the testimony that the defendant well understood the nature of the charges." The record in this case shows that Cruz was adequately advised by his attorney and that his plea was voluntary.

Cruz further contends that he did not know what penalties he faced under the Habitual Criminal Act. He believed he faced life and, if he did not plead guilty, the district attorney would prosecute under the Habitual Criminal Act. The record shows that his attorney told him he was facing the Act "which is life." Cruz's attorney was a capable attorney. Habitual criminality is a status, not an offense. Lott v. Cox, 75 N.M. 102, 401 P.2d 93 (1965). The district attorney had a duty to prosecute Cruz as an habitual offender if his conviction brought him within the Act. See State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971).

Cruz now claims he is entitled to post conviction relief because the assistant district attorney had no authority to promise not to invoke the Habitual Criminal Act, even though defendant sought and obtained that promise and nothing in the record shows the promise has not been kept. Specifically, he complains of being spared the increase penalty of the Habitual Criminal Act.

The trial court did not err in denying post conviction relief since the evidence at the evidentiary hearing supports the trial court's determination that there was no denial of Cruz's constitutional rights.

The order denying relief is affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

484 P.2d 367

STATE of New Mexico, Plaintiff-Appellee,

v.

Ramon MADRID, Defendant-Appellant.

No. 617.

Court of Appeals of New Mexico.

April 16, 1971.

John A. Anderson, Las Cruces, for defendant-appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted and sentenced for the unlawful possession of marijuana under § 54-7-13, N.M.S.A.1953 (Rpl. Vol. 8, Pt. 2). This Act is known as the Uniform Narcotics Drug Act.

Defendant has appealed challenging the constitutionality of the Uniform Narcotics

Drug Act. We do not consider the constitutional question raised because, in our opinion, the trial court proceeded without jurisdiction to try and sentence defendant under the Uniform Narcotics Drug Act; the applicable Act being § 54–5–14, N.M.S.A.1953.

This case, in our opinion, falls squarely within State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct.App.1971); See State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.1970); State v. Rendleman, 481 P.2d 708 (Ct.App.) decided February 12, 1971; and State v. Thorn, 483 P.2d 312 (Ct.App.) decided March 12, 1971.

We reverse with instructions to vacate the judgment and sentence and dismiss the charge under which defendant was convicted.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

484 P.2d 368

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerry LUNN, Defendant-Appellant.

No. 576.

Court of Appeals of New Mexico.

April 9, 1971.

William C. Marchiondo, McAtee, Marchiondo & Michael, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Lunn was convicted of murder in the second degree, § 40A–2–1, N.M.S.A.1953 (Repl.Vol. 6), and of an attempt to commit murder in the second degree, § 40A–28–1, N.M.S.A.1953 (Repl.Vol. 6). We reverse the convictions because hearsay testimony was admitted which deprived the defendant of his constitutional right to confront the witnesses against him. Sixth Amendment to the U. S. Constitution, N.M.Const. Art. 2, § 14. This confrontation issue involves testimony admitted as part of the res gestae.

The killing of Nick Candelaria and the wounding of his wife, Gabriela Candelaria, occurred at their home in the nighttime. There is evidence that two young sons of the Candelarias were in their bedroom at the time of the shootings. Neither boy had been called as a witness at two prior trials of this case. The first resulted in a conviction which was reversed in State v. Lunn, 80 N.M. 383, 456 P.2d 216 (Ct.App. 1969); the second resulted in a mistrial because the jury was deadlocked. According to defendant, he had never talked to the boys. The trial court ruled that if the boys were to be called as witnesses, the defense would be given an opportunity to interview them before they testified.

The State did not call the boys as witnesses; instead, it presented two witnesses who testified as to the statements made by the boys shortly after the shootings. The testimony as to the boys' statements was admitted, not for the purpose of showing that the boys made statements, but for the truth of the contents of those statements. Thus, the testimony as to what the boys said was hearsay. See McCormick, Evidence § 230, at 480 (1954); 6 Wigmore, Evidence § 1746, at 134 (3rd ed. 1940).

This hearsay testimony was admitted under an established exception to the hearsay rule. Wigmore, supra, § 1745, identifies this as an exception for spontaneous exclamations. New Mexico calls it the res gestae rule. New Mexico generally follows Wigmore in the definition and application of this exception. See State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct.App.1970), cert. denied 401 U.S. 941, 91 S.Ct. 943, 28 L.Ed.2d 221 (1971), and cases therein cited. Compare with Wigmore, supra, §§ 1747–1751.

The res gestae statement is admissible as an exception to the hearsay rule because it is "particularly trustworthy," Wigmore, supra, § 1747, and because "* * * the superior trustworthiness of * * * extrajudicial statements * * * [creates] a necessity or at least a desirability of resorting to them for unbiassed [sic] testimony. * * *" Wigmore, supra, § 1748. Wigmore, supra, § 1750, recommends that application of the res gestae exception be left to the determination of the trial court. New Mexico held, in Garrett v. Howden, 73 N. M. 307, 387 P.2d 874 (1963) "* * * that the determination of the admissibility of the testimony is a matter within the sound discretion of the trial court, and that that court's determination, in the absence of a clear abuse of discretion, will not be disturbed on appeal. * * *" See also, State v. Gunthorpe, supra.

Because of the New Mexico res gestae decisions, we proceed on the assumption that the out of court statements of the boys were admissible under the res gestae exception to the rule excluding hearsay testimony. Objecting to the admission of testimony as to the boys' statements, defendant claimed he was being deprived of the right to cross-examine the boys.

Although defendant's objection did not specifically mention the confrontation clause, the objection concerning cross-examination raised the confrontation issue. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969) states: "* * * The denial of the right of an accused to fully cross-examine a hostile witness deprives him of the right guaranteed by the constitution 'to be confronted with the witnesses against him.'" (citation omitted).

The New Mexico Supreme Court held the constitutional right of confrontation was denied where a defendant was denied the right to cross-examine a co-defendant who gave damaging testimony against the defendant, State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949); where testimony at a prior trial was admitted and cross-examination at the prior trial had been improperly restricted, State v. Halsey, 34 N.M. 223, 279 P. 945 (1929); and where a record of conviction of another person, for engaging in an unlawful game of chance, was admitted to prove that there had been gambling for money at defendant's trial for permitting the unlawful gambling on defendant's premises, State v. Martino, 25

N.M. 47, 176 P. 815 (1918). Compare Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899).

Although the right of cross-examination is an aspect of the constitutional right of confrontation, defendant urges that "confrontation" involves more than the right of cross-examination. He cites the U. S. Supreme Court decision of California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L. Ed.2d 489 (1970) which does appear to include more than the right of cross-examination in the confrontation clause. One item included in confrontation in California v. Green, supra, is the right of the jury to observe the demeanor of the witness in giving his testimony. This observation, of course, is denied where the out of court statement is admitted into evidence without the declarant testifying. Defendant urges this asserted "demeanor" aspect of confrontation as a matter for consideration here.

5 Wigmore, supra, §§ 1395, 1396, takes the view that confrontation is satisfied if there has been cross-examination; that the observation of demeanor on the witness stand is a result of cross-examination but is not a part of the confrontation right. The U. S. Supreme Court has indicated there is no denial of the right of confrontation by the introduction of testimony given at a prior trial, if there has been cross-examination at the prior trial and the witness is unavailable. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). Where prior testimony has been properly admitted, the fact finder does not have the opportunity to observe the demeanor of that witness. Thus, it may be doubted that the U. S. Supreme Court holds that "demeanor" is an aspect of the constitutional right of confrontation. New Mexico follows the Wigmore view. State v. Jackson, 30 N.M. 309, 233 P. 49 (1924). Compare State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1957); State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct.App.1968). We do not consider the fact that the jury was unable to observe the demeanor of the boys in considering the confrontation issue in this case. We consider the confrontation issue solely on the basis of the right of cross-examination.

Defendant would have had the right to cross-examine the boys concerning their out of court statements if they had been called as witnesses. Mascarenas v. State, supra; compare State v. Archer, 32 N.M. 319, 255 P. 396 (1927). Here, the boys were not called as witnesses. Because the boys did not testify, defendant was denied his right to cross-examine as to statements of the boys admitted for the truth. Yet, the statements were admissible under New Mexico's res gestae rule. Thus, we have opposing concepts—the evidentiary rule which would admit the statements, and the constitutional right of confrontation which would deny admission of the statements because defendant was deprived of his right of cross-examination.

We found no New Mexico decisions discussing these concepts when they were in opposition, and little authority outside of New Mexico. Vasquez v. State, 145 Tex. Cr.R. 376, 167 S.W.2d 1030 (1942) is similar to the factual situation in this appeal. There it was held that the right of confrontation was denied by the admission of the child's statement made under circumstances which appear consistent with New Mexico's res gestae rule. In reaching this result, the Texas court does not discuss a policy consideration involved in the res gestae rule—that of the trustworthiness of the hearsay statement. This aspect of trustworthiness was involved in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970) where one of the issues discussed was an evidentiary rule of Georgia in opposition to the right of confrontation.

Dutton v. Evans, supra, involved a co-conspirator's out of court statement made during the concealment phase of the conspiracy. The statement was admissible under Georgia law. *Dutton* held the statement was admissible and a plurality held

there was no violation of the right of confrontation.

We resolve the confrontation issue in this case on the basis of our analysis of Dutton v. Evans, supra. In that case, Evans, Williams and Truett were charged with murder. Truett was granted immunity from prosecution in return for his testimony. Truett testified at Evans' separate trial. His testimony was that Evans and Williams committed the murders. He was one of 20 prosecution witnesses.

Another prosecution witness was Shaw. He testified that he and Williams were fellow prisoners at the time Williams was arraigned on the murder charge. Shaw testified that when Williams returned from the arraignment he asked Williams how he made out in court and that Williams replied that if it hadn't been for Evans "we wouldn't be in this now." The defense objected to Shaw testifying as to Williams' remark about Evans on the ground that it violated Evans' right of confrontation. The prosecution did not call Williams to testify in Evans' trial.

The U. S. Supreme Court resolved the confrontation question without a majority opinion. Four justices, Marshall, Black, Douglas and Brennan, were of the opinion that the admission of Shaw's testimony, about Williams' remark, violated Evans' right of confrontation because there had been no opportunity to cross-examine Williams about his purported remark. Under this view, Lunn was denied his right of confrontation.

One justice, Harlan, did not view the issue in Dutton v. Evans, supra, as involving confrontation; rather, it was a due process question. Being of the opinion there was no denial of due process, Justice Harlan concurred in the result reached by the plurality opinion of Justices Stewart, White, Blackmun and Chief Justice Burger.

The plurality opinion in Dutton v. Evans, supra, states "* * * the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials * * *," and "* * * the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." Thus, the plurality opinion seems to find no confrontation violation if the hearsay testimony is reliable and advances the accuracy of the truth determining process. In reaching this view, the plurality opinion considers four "* * * indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." We apply the indicia of the plurality opinion to the boys' statements, but in doing so express no opinion as to whether other indicia may also be considered.

While all four of the indicia are directed to the trustworthiness of the out of court statement, the fourth seems nearest to New Mexico's res gestae rule. The fourth indicia is: "* * * the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. * * * His statement was spontaneous, and it was against his penal interest to make it. * * *" Although we find nothing in the record indicating the boys' statements were against their interest, compare State v. Buck, 33 N.M. 334, 266 P. 917 (1927), nevertheless, we assume for this opinion only that the circumstances under which the boys made their statements meet this fourth indicia.

It is different as to the other three indicia discussed in the plurality opinion of Dutton v. Evans, supra.

The first indicia is: "* * * the statement contained no express assertion about past fact, * * *" The statements of the boys, James and Rocky, to the witnesses, Police Officer Smith and the boys' grandmother, contain expressions about past fact. Each of the boys identified Lunn as being present and James' statement to Officer Smith is that "* * *

he saw Jerry Lunn standing there with a gun in his hand."

The second indicia is: "* * * Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. . . ." Here, it is conceivable that cross-examination could show that Rocky was not in a position to identify Lunn as the person who shot his parents. Nothing in the statements attributed to Rocky indicates Rocky personally observed what went on in connection with his parents. Rocky's statement identifies Lunn by what he heard and by looking through a window in his bedroom and seeing "Jerry's [Lunn's] new truck parked out front." Officer Smith, in his cross-examination, admitted that Rocky did not tell him that he saw Lunn.

The third indicia is: "* * * the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. * * *" Here, however, possibilities of faulty recollection are established. Rocky purportedly told the officer that he awakened, overheard some conversation, looked out the window, then "heard a bomb." According to the grandmother, Rocky said "he woke up when he heard an explosion." There may be no inconsistency because apparently two shots were fired. Yet, the opportunity to determine whether the statements were consistent did not exist because defendant did not have the opportunity to cross-examine.

Further, according to the officer, James "* * * told me to ask Rocky, his brother, that his brother knew everything in his statement, * * *" According to the grandmother, after Rocky woke up from the "explosion," "James repeated what he had said to him." These quotations raise the question of whether Rocky's statements were, in part, based on what James told him or on what he overheard. They raise the question of whether Rocky's statements were properly res gestae statements.

The first three indicia of reliability relied on by the plurality opinion in Dutton v. Evans, supra, are not met in this case. Further, the plurality opinion is based on the premise that *Dutton* did not involve crucial or devastating evidence. We have no such premise here. Apart from Gabriela Candelaria, whose credibility is attacked, the only direct evidence that Lunn did the shootings is found in the boys' hearsay statements. Compare Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Under the criteria used in the plurality opinion in Dutton v. Evans, supra, we cannot say, on a practical basis, that the accuracy of the truth determining process was advanced by admitting the out of court statements of James and Rocky without giving the defendant an opportunity to cross-examine the boys. The possibility that cross-examination could have shown the unreliability of the statements is not "wholly unreal" in this case.

We hold that admission of the statements attributed to the boys was error because defendant was denied his constitutional right of confrontation, here, the right to cross-examine. We reach this result under both the four justice plurality opinion and the four justice dissenting opinion in Dutton v. Evans, supra. Our holding is limited to the circumstances of this case. Compare Territory v. Duran, 3 N.M. (Gild.) 189, 3 N.M. (John) 134, 3 P. 53 (1884). We announce no rule of general application when an established exception to the hearsay rule is opposed to the constitutional right of confrontation. When these concepts are opposed, their opposition must be resolved on a case by case basis. See plurality opinion in Dutton v. Evans, supra.

The judgments of conviction and sentences are reversed. The case is remanded

with instructions to grant Lunn a new trial.

It is so ordered.

HENDLEY, and SUTIN, JJ., concur.

484 P.2d 373

STATE of New Mexico, Plaintiff-Appellee,

v.

Albert G. ANAYA, Defendant-Appellant.

No. 577.

Court of Appeals of New Mexico.

April 16, 1971.

R. N. Franklin, Franklin & Anaya, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Richard J. Smith, Mark B. Thompson, III, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Convicted of the theft of automobile tires from an automobile, Sec. 64-9-4, N.M.S.A.1953 (Rpl. Vol. 9, pt. 2), defendant, Anaya, has appealed. Anaya's contention is that the tires were obtained through an unreasonable search and seizure in violation of constitutional guarantees and their admission in evidence was prejudicial error. We affirm the judgment and conviction.

The undisputed material facts are: Officers of the Albuquerque Police Department were informed that a suspected theft of tires from automobiles at a used car lot was in progress. The officers proceeded immediately to the used car lot; Anaya was arrested as he attempted to flee from the scene. A suspect was apprehended in an automobile used by defendant. An officer testified that he saw the tires, which were admitted in evidence, in the rear of the car in which the suspect was seated. He also testified that the tires had blue rims, and that in his opinion, they matched the color of the rims of an automobile in the used car lot which had two tires missing.

Following Anaya's arrest the officer removed the tires from the car and placed them in the patrol car. During trial they were admitted in evidence over Anaya's objection.

Contrary to defendant's contention, the undisputed facts fail to disclose a search. The tires were in plain view of the officer from a place where he had a right to be. No search occurred. The seizure was not constitutionally prohibited and consequently the tires were properly admitted in evidence.

This case appears to us to be controlled by: State v. Carlton, (Ct.App.) 82 N.M. 537, 484 P.2d 757, decided February 19, 1971; and State v. Miller, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969), cert. denied 80 N.M. 198, 453 P.2d 219 (1969). See

also Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

The judgment is affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

484 P.2d 374

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe LYNCH, Defendant-Appellant.

No. 573.

Court of Appeals of New Mexico.

April 9, 1971.

Mary C. Walters, Toulouse, Moore & Walters, Albuquerque, for defendant-appellant.

James A. Maloney, Atty. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was convicted in Magistrate Court of the crime of injury to animals. Section 40A–18–2, N.M.S.A. 1953 (Repl. Vol. 1964). The conviction was appealed de novo to the District Court and affirmed. Defendant's appeal presents four points for reversal. The issue of jurisdiction is dispositive of the appeal.

We reverse.

Magistrate Court Jurisdiction.

The jurisdiction of magistrate courts in criminal matters is limited to "* * * cases of misdemeanors where the punishment prescribed by law is a fine of one hundred dollars ($100) or less, or imprisonment for six [6] months or less, or where fine or imprisonment or both are prescribed but neither exceeds these maximums." Section 36–3–4, N.M.S.A. 1953, (Repl. Vol. 1964, Supp. 1969).

The penalty for the violation of the statute under which defendant was convicted is prescribed by § 40A–29–4, subd. A, N.M.S.A. 1953 (Repl. Vol. 1964), imprisonment "* * * in the county jail for a definite term less than one [1] year, or to the payment of a fine of not more than one thousand dollars ($1,000), or to both such imprisonment and fine in the discretion of the judge." The Magistrate Court could proceed as provided in § 36–3–4(B), supra, but it was without jurisdiction to try defendant.

Since the Magistrate Court was without subject-matter jurisdiction, there

is no possibility of waiver or consent to jurisdiction. State ex rel. Overton v. New Mexico State Tax Commission, 81 N.M. 28, 462 P.2d 613 (1970). Thus, the magistrate proceedings were void and defendant's conviction therein a nullity.

District Court Jurisdiction.

Section 36–15–3, subd. A, N.M.S.A. 1953 (Repl. Vol. 1964, Supp.1969) states:

"Appeals from the magistrate court shall be determined by trial de novo in the district court, *and all laws, rules and regulations governing the magistrate court shall govern the trial in the district court.*" (Emphasis added).

Thus, on appeals from a magistrate court, the district court becomes a court of limited jurisdiction for the purpose of the appeal and the trial de novo. See Sanchez v. Reilly, 54 N.M. 264, 221 P.2d 560 (1950); Pointer v. Lewis, 25 N.M. 260, 181 P. 428 (1919); Barruel v. Irwin, 2 N.M.(Gild.) 223 (1882); City of Albuquerque v. Sanchez, 81 N.M. 272, 466 P.2d 118 (Ct.App.1970). If the magistrate court lacked jurisdiction the district court suffered the same lack of jurisdiction. Geren & Hammond v. Lawson, 25 N.M. 415, 184 P. 216 (1919); Pointer v. Lewis, supra; Chaves v. Perea, 3 N.M.(Gild.) 89, 2 P. 73 (1884).

Reversed and remanded with directions to set aside the conviction, judgment and sentence.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

484 P.2d 754

In the Matter of Edward J. APODACA, Attorney at Law.

No. 9190.

Supreme Court of New Mexico.
April 7, 1971.

PER CURIAM:

This matter coming on for consideration by the Court upon Report of the Board of Commissioners of the State Bar of New Mexico, charging Respondent, Edward J. Apodaca, with unethical and unprofessional conduct in the handling of his office trust account, and including Findings of Fact and Conclusions and Recommendations, and the Court being sufficiently advised in the premises, and the Respondent appearing in person.

COMPTON, C. J., and TACKETT, McMANUS, OMAN and STEPHENSON, JJ., concur.

It is ordered that the Report of Board of Bar Commissioners to the Court of their findings of fact and conclusions and recommendations filed herein be and the same is hereby adopted in its entirety.

It is further ordered that the Respondent, Edward J. Apodaca, be and he is hereby adjudged guilty of unprofessional and unethical conduct in the handling of his office trust account, as fully set forth in the Report of Board of Bar Commissioners and the said Edward J. Apodaca be and he is hereby in open Court censured and reprimanded for such unethical and unprofessional conduct in the handling of his office trust account.

484 P.2d 754

STATE of New Mexico, Plaintiff-Appellee,

v.

Dennis Paul CARLTON, Defendant-Appellant.

No. 9232.

Supreme Court of New Mexico.
April 7, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 533, 82 N.M. 537, 484 P.2d 757 be and the same is hereby returned to the Clerk of the Court of Appeals.

484 P.2d 754

STATE of New Mexico, Plaintiff-Appellee,

v.

Luis P. ANDRADA, Defendant-Appellant.

No. 9245.

Supreme Court of New Mexico.
April 21, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 555, 82 N.M. 543, 484 P.2d 763 be and the same is hereby returned to the Clerk of the Court of Appeals.

484 P.2d 755

STATE of New Mexico, Appellee,

v.

Fernando GONZALES, Appellant.

No. 614.

Court of Appeals of New Mexico.
April 23, 1971.

Robert L. Christensen, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Thomas L. Dunigan, Asst. Atty. Gen., for appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted on two counts of unlawful sale of marijuana under § 54–7–14, N.M.S.A.1953 (Rpl.Vol. 8, pt. 2), the Uniform Narcotics Drug Act. Defendant has appealed and contends here, as he did before the trial court, that the prosecution was improperly conducted under [§ 54–7–14] the general Act, but should have been prosecuted under the special Act, which applies specifically to the crimes charged. [§ 54–5–14, N.M.S.A.1953 (Rpl.Vol. 8, pt. 2)].

We have held that prosecutions under § 54–7–14, supra, for giving away or possession of marijuana cannot stand. State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App. 1970); State v. Rendleman, 82 N.M. 346, 481 P.2d 708 (Ct.App.1971); State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct. App.1971); and State v. Thorn, 82 N.M. 431, 483 P.2d 312 (Ct.App.) decided March 12, 1971.

The parties appear to concede, and we think correctly so, that since the special statute [§ 54–5–14, supra,] includes the sale of marijuana, that this case is not distinguishable from *Riley, Rendleman, McNeece* or *Thorn*, upon the ground that a sale rather than giving away or possession of marijuana is involved.

It is the state's position that since the acts committed by defendant and upon which the prosecution was based occurred in January of 1969, the general statute [§ 54–7–14] was applicable, citing State v. Chavez, 77 N.M. 79, 419 P.2d 456, (1966). In *Chavez* the court held that although both the special Act, relating only to marijuana, and the general Act, relating generally to narcotic drugs, were passed in 1935, the legislature, through later amendments to the general Act, by including marijuana as a narcotic drug and likewise increasing the penalties under the general Act and not amending the special Act, intended the general Act to be applicable to marijuana prosecutions.

It is argued that the holding in Riley is based, at least in part, upon the reasoning employed in *Chavez*, namely, that since the penalty provisions of both the general and special Acts were amended by Chapter 236, Laws of 1969, it was intended that the spe-

cial Act be applicable to marijuana prosecutions as a later legislative expression. In *Riley*, the holding that the special Act, [§ 54–5–14] was applicable to the prosecution there involved was not based upon the 1969 amendment to both the special and general Acts, but upon the ground that the special Act [§ 54–5–14, supra,] relating exclusively to marijuana was controlling over the general Act [§ 54–7–14, supra,] relating generally to narcotic drugs.

The fact that the alleged unlawful sales occurred before the effective date of the 1969 amendment does not support a conclusion that *Riley* is inapplicable to this action.

In our view, the court lacked jurisdiction in convicting and sentencing defendant under the general Act. [§ 54–7–14]. State v. McNeece, supra.

The conviction and sentence is reversed; the cause remanded, with instructions to dismiss the charge against defendant under the particular statute.

It is so ordered.

WOOD and SUTIN, JJ., concur.

484 P.2d 756

STATE of New Mexico, Plaintiff-Appellee,

v.

Diane GARCIA, Defendant-Appellant.

No. 634.

Court of Appeals of New Mexico.

April 23, 1971.

Chester A. Hunker, Clovis, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, John A. Darden, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant was prosecuted under § 54–7–14, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp. 1969) for the unlawful sale or delivery of marijuana. This is the general narcotics statute. Defendant contended before the trial court, and asserts here, that the prosecution should have been under § 54–5–14, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2), which is the special statute. We agree. This issue was decided in State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App. 1970). Riley has been applied in State v. Thorn (Ct. App.), 82 N.M. 431, 483 P.2d 312, decided March 12, 1971; State v. Rendleman, 82 N.M. 346, 481 P.2d 708 (Ct.App.1971), and State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct.App. 1971). The State asserts that State v. Riley, supra, was wrongly decided. We disagree; instead, we reaffirm what was stated in the Riley opinion.

The judgment and sentence is reversed. The cause is remanded with instructions to dismiss the charge against defendant under the general narcotics statute.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

484 P.2d 757

STATE of New Mexico, Plaintiff-Appellee,

v.

Dennis Paul CARLTON, Defendant-Appellant.

No. 533.

Court of Appeals of New Mexico.
Feb. 19, 1971.
Rehearing Denied March 11, 1971.
Certiorari Denied April 7, 1971.

Fred T. Hensley, Portales, David W. Bonem, Clovis, for defendant-appellant.

James A. Maloney, Atty. Gen., Santa Fe, John A. Darden, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

The defendant was convicted of violating § 40A–16–11, N.M.S.A.1953 (Rpl. Vol. 6), RECEIVING STOLEN PROPERTY. This statute reads:

"Receiving stolen property consists of buying, procuring, receiving or concealing anything of value, knowing the same to have been stolen or acquired by fraud or embezzlement."

* * * * * *

"Whoever commits receiving stolen property when the value of the property is over one hundred dollars ($100) but not more than twenty-five hundred dollars ($2,500) is guilty of a fourth degree felony."

The value of the property involved in this prosecution was found to exceed $100.-00, and defendant was sentenced in accordance with the applicable statute.

Review is sought by defendant under nine points.

It is first contended that the venue was not properly laid in Roosevelt County. The evidence discloses that property consisting of riding equipment of various kinds was stolen from the owner's tack room near Roswell, Chaves County. Some of this equipment, including a western saddle and a number of leather straps, was found in or upon defendant's property in Roosevelt County. The color of this saddle had been changed by darkening it; leather straps had been changed by reducing their size. An inference could properly be drawn that concealment of the stolen property occurred in Roosevelt County. The statute, § 40A–16–11, *supra*, states but one offence; it provides, however, four methods by which the offence may be committed, namely, buying, procuring, receiving, or concealing stolen property. Proof of any one of these methods, coupled with requisite knowledge, is sufficient to sustain a conviction. Venue was properly laid in Roosevelt County, where concealment occurred.

Defendant next contends that the trial court erred in admitting into evidence certain items identified as Exhibit 1 (an English riding saddle); Exhibit 2 (a number of leather straps); Exhibit 3 (a western saddle); and Exhibit 4 (a braking halter or hackamore). The admission of the items into evidence was objected to on the ground that there is no showing of continuity of possession between the Sheriff Davis and his successor, Sheriff Widener.

The testimony discloses that each of these items were found by Davis (then Sheriff of Roosevelt County) upon or in property of

the defendant. Davis identified the items as being those so found by him. Davis further testified that he had turned the items over to his successor, Sheriff Widener. Widener testified that he had received the items from Davis and were in his possession to the time of trial.

It appears to us that the testimony adequately disclosed the custody of the property from the time it was found to the time of trial. Furthermore, it is generally held that, as long as an article can be identified, it is immaterial in how many, or in whose hands it has been. Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 231 P.2d 952 (1951); Lestico v. Kuehner, 204 Minn. 125, 283 N.W. 122 (1938); State v. Sprout, 365 S.W.2d 572 (Mo.1963); State v. Allen, 183 Neb. 831, 164 N.W.2d 662 (1969); Friesen v. Schmelzel, 78 Wyo. 1, 318 P.2d 368 (1957); Keller v. Coca Cola Bottling Co., 214 Or. 654, 330 P.2d 346 (1958). In our opinion, the trial court correctly admitted the particular items of personal property into evidence over the objection.

Defendant further contends that his motion for a directed verdict should have been granted because the particular Exhibits 1 through 4 were improperly admitted into evidence. Holding as we do, that the exhibits were properly admitted, we likewise hold that the court did not err in denying the motion for a directed verdict.

Defendant moved to suppress certain evidence consisting of the English saddle (Exhibit 1) and a number of straps bearing a particular brand (Exhibit 2). A pretrial hearing was held upon the motion. The evidence there presented disclosed that a search warrant had been issued and delivered to the Sheriff for execution. The warrant listed a number of items to be seized, but did not include the English saddle, nor the straps.

The officers, the defendant, and one of the persons from whom property had been stolen were present during the search. Certain of the items described in the warrant were seized. Upon entering one of the premises described in the warrant, and while conducting a search therein, the officers saw the English saddle and straps. These items at the time were identified as stolen property.

The trial court denied defendant's motion to suppress, and its action is here for review. It is argued that the trial court erred because the items which were seized were not described in the warrant. This contention, in our opinion, is without merit. The validity of the warrant and the right to conduct the search upon the premises is not questioned. When, in the course of a lawful search for property illegally possessed, the officers conducting the search discover other property illegally possessed the property so discovered may be seized. State v. McMann, 3 Ariz.App. 111, 412 P.2d 286 (1966); Johnson v. United States, 110 U.S.App.D.C. 351, 293 F.2d 539 (1961), cert. den. 375 U.S. 888, 84 S.Ct. 167, 11 L.Ed.2d 118 (1963); United States v. Eisner, 297 F.2d 595 (6th Cir. 1962), cert. den. 369 U.S. 859, 82 S.Ct. 947, 8 L. Ed.2d 17 (1962); Seymour v. United States, 369 F.2d 825 (10th Cir. 1966), cert. den. 386 U.S. 987, 87 S.Ct. 1297, 18 L.Ed.2d 239 (1967); Aron v. United States, 382 F.2d 965 (8th Cir. 1967); Romero v. Superior Court for Los Angeles County, 266 Cal.App. 2d 714, 72 Cal.Rptr. 430 (1968); State v. Haggard, 89 Idaho 217, 404 P.2d 580 (1965); People v. Robinson, 40 Ill.2d 453, 240 N.E.2d 630 (1968); State v. Johnson, 16 Ohio Misc. 278, 240 N.E.2d 574 (1968); State v. Whitewater, 251 Or. 304, 445 P.2d 594 (1968); See Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Defendant, in support of his attack upon the admissibility of the particular items of evidence, cites Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). In *Marron* the court held that items not named in warrant could not be seized as an incident to the execution of warrant. *Marron*, however, did not involve the seizure of contraband in the view of the officers lawfully conducting a search. Defendant likewise cites State v. Paul, 80

N.M. 521, 458 P.2d 596 (Ct.App.1969). In *Paul* the seizure, likewise, was not contraband but items of pure evidence.

Defendant further contends that the trial court erred in denying the motion to suppress because he was denied his right to the assistance of counsel at the time the property was seized. This contention, in our opinion, is likewise without merit.

No authority has been cited by defendant, nor have we discovered any imposing an obligation on the part of officers searching pursuant to a warrant to have defendant or his counsel present during the search.

Defendant, by his next point, asserts that "* * * the trial court erred in allowing cross-examination of the defendant relative to the commission of past felonies and misdemeanors." The following question was asked of defendant: "Have you been, Mr. Carlton, have you ever been convicted of a felony or misdemeanor?" At this point objection was made to the question upon the ground, as stated by defendant's counsel, that the question was not asked in good faith for the reason that the prosecutor was aware that defendant had not been convicted of a felony or misdemeanor other than a homicide conviction which was then pending on appeal. See State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966); State v. Garcia, 80 N.M. 247, 453 P.2d 767 (Ct.App.1969).

The trial court overruled the objection but said: "I'll limit the District Attorney to asking the question if he has been convicted of a felony, if he wants that, or he can ask it. 'Have you been convicted of a felony or misdemeanor?' And do not ask what it was under."

Section 20-2-3, N.M.S.A.1953, provides, in part, "A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, * * *"

It is held that the cross-examination may not go beyond the name of the particular offence. State v. Clark, 80 N.M. 91, 451 P.2d 995 (Ct.App.1969); State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct.App.1969).

The question was clearly proper under the language of § 20-2-3, *supra*.

Argument is made that the question was improper because the homicide conviction was pending on appeal. In responding to the question asked by the prosecutor defendant simply answered "Yes, sir."

We are unable to determine from the record whether the answer related to the homicide conviction which was on appeal, or some other felony of which defendant may have been convicted.

It is further argued that the trial court did not attempt to weigh the probative value of proof of a prior conviction of a felony as against the prejudicial effect of such proof. In substance, the defendant says that no judicial discretion was exercised in admitting the testimony, contrary to State v. Coca, *supra*. It appears from the record that the issue relating to the probative value of the testimony as against its illegitimate tendency to prejudice was brought to the trial court's attention and the court then exercised its discretion and permitted the testimony.

Defendant further contends that the value found by the jury of the western saddle and hackamore does not have evidentiary support. Testimony was offered as to the value of the western saddle and hackamore and also as to the English saddle and leather straps. Verdict forms were submitted to the jury wherein the jury was directed to determine the "market value" of the western saddle and hackamore separately from the English saddle and straps. The jury found the market value of the western saddle and hackamore to be $107.50 and the English saddle and straps to be $170.00.

Defendant acknowledges that if we have determined that the English saddle and straps were properly admitted in evidence then his contention relating to the finding of the market value of the western saddle and hackamore is lacking in substance for the reason that the proof of value of the property exceeded $100.00. Having determined that English saddle and straps were

properly received in evidence, we do not consider this contention.

Defendant further asserts that "The trial court erred in allowing the state to introduce testimony to the effect that the defendant remained silent when questioned by the police regarding where he had obtained the allegedly stolen property." The record material to this point discloses the following testimony.

"Q Now, back to the question, Mr. Davis, on August 24, 1968, when the saddles were found, State's Exhibit 3, the hackamore, State's Exhibit 4, and the rope, State's Exhibit 5, was Mr. Carlton asked anything by anyone?

A Yes, sir, he was.

Q And who asked him what?

A Mr. Boone.

Q And what did Mr. Boone ask him?

A He asked him if he cared to tell us where he obtained this property.

Q And what was his statement or answer?"

[Objection interposed by defendant's counsel.]

"A He stated that he did not want to talk to Mr. Boone about it."

Defendant argues that one circumstanced as he was at the time is under no duty to speak, and that his silence or refusal to reply to questions or statements directed to him creates no inference of guilt as against him. Consequently, evidence may not be introduced to show that defendant failed or refused to speak or answer questions propounded to him by a prosecuting officer. Defendant cites Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); and State v. Hatley, 72 N.M. 280, 383 P.2d 247 (1963).

We agree that in the circumstances here the question was improper and the answer was erroneously admitted. The question was improper and the answer was inadmissible because no inference of defendant's guilt may be drawn here, from defendant's answer, and because of the danger that the jury might equate defendant's failure to talk with guilt. The question is whether the circumstances are such that there is no danger that the jury drew an improper inference or equated defendant's answer with guilt. See State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct.App.1969).

We are of the opinion that, for two reasons, the jury did not consider the question and answer in an improper manner. First, the answer was that defendant did not want to talk to Mr. Boone about it, not that he didn't want to talk at all. Defendant testified that he did talk about the property to sheriff's officers from both Curry and Chaves Counties. His testimony, as to talking to the officers, is uncontradicted. Second, not only did defendant talk about where he obtained the property (both to the officers and to the jury), he explained that he didn't want to talk to Mr. Boone, who was the assistant District Attorney, "* * * without the presence of Mr. Buzzard [defendant's attorney], * * *."

In the light of these circumstances, although the trial court erred in admitting the answer that defendant didn't want to talk to Mr. Boone, there was no prejudice to defendant, and the error does not require a reversal. State v. Hovey, *supra*.

The defendant further contends:

"THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AND FURTHER FOR THE COURT'S FAILURE TO INSTRUCT A VERDICT FOR THE DEFENDANT BASED ON THE FAILURE OF THE STATE TO GIVE THE DEFENDANT A PROPER WARNING OF HIS CONSTITUTIONAL RIGHTS."

Defendant argues that he was not warned of his constitutional rights as required by *Miranda*. The record discloses that on the 24th of August, 1968, defendant accompanied the officers, at their request, to two properties of his where searches for stolen property were to be conducted. It also appears that de-

fendant remained with the officers throughout the searches and was present when the stolen property was seized. It is likewise shown that defendant was not warned of his constitutional rights at any time during the 24th of August, 1968, although he had been so warned on the 20th and 21st of August, 1968, in connection with a charge other than that herein involved. Defendant has not called our attention to evidence of any statement made by him of any exculpatory or inculpatory nature, nor has our search of the record disclosed such evidence. The failure, consequently, to give the appropriate warnings would be unavailing as a basis of error, or a basis for a mistrial.

Defendant further contends that:

"THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT A VERDICT FOR DEFENDANT BECAUSE OF THE HIGHLY PREJUDICIAL EFFECT ON THE JURY OF THE COURT ALLOWING THE DISTRICT ATTORNEY TO CROSS-EXAMINE THE DEFENDANT FROM AN INSTRUMENT THAT WAS NOT PROPERLY CERTIFIED TO NOR AUTHENTICATED AND VERIFIED BY THE PERSON WHO ALLEGEDLY TRANSCRIBED THE INSTRUMENT."

It appears from the record that defendant, upon being called as a witness in his behalf, testified to various matters relating to his purchase of several pieces of the riding equipment. Upon cross-examination, and for the purpose of impeachment, the district attorney, in an effort to disclose certain contradictory or inconsistent statements theretofore made by the defendant read certain questions asked of defendant, and his answers thereto, from transcribed notes. The transcript was not authenticated, nor certified, which is the basis of defendant's claim of error.

It is fundamental that a statement, written or oral of a witness as to a material matter inconsistent with his testimony at trial is admissible for impeachment purposes. *See*, C. McCormick, Evidence, 34 at 63 (1954).

In questioning concerning the prior statement, a foundation was laid as to the time, place and details of the statement. See Nichols v. Sefcik, 66 N.M. 449, 349 P. 2d 678 (1960).

Questions were asked about two prior statements in the transcribed notes. Defendant denied making the first statement. He could not remember making the second statement. Under § 20–2–2, N.M.S.A. 1953, proof could have been offered that defendant did, in fact, make the prior statements. No such proof was offered. Since no attempt was made to introduce the transcribed notes, the asserted lack of authenticity or certification was premature if the objection went to introduction of the notes.

If the objection was directed to *any* questioning concerning a prior statement before the basis for such questioning is shown to be in the form of admissible evidence in the questioner's possession, the answer is that § 20–2–2, *supra*, imposes no such requirement. The questions could be asked even though there was no foundation for admission of the notes, State v. Butler, 38 N.M. 453, 34 P.2d 1100 (1934), because the object of § 20–2–2, *supra*, is to give the witness an opportunity to deny or explain the apparent contradiction. State v. Carabajal, 26 N.M. 384, 193 P. 406 (1920).

Finally, and in an effort to secure a new trial, defendant contends that the trial court, after conference with counsel, stated that the case would be submitted to the jury under two counts, but contrary to such statement the charge was submitted under a single count. It is argued that the defendant was prejudiced in that his counsel, "* * * was unable to make objections at proper times had he known that the court was only going to submit the charges in one count."

If this contention has merit, which we do not decide, it is, nevertheless, not supported by the record. The trial court did not state that the case would be submitted un-

der two counts. The record does disclose that, after conference with counsel, and in referring to the difference in proof of value of the various items of riding equipment, the court said: "* * * So it can be submitted on two counts." Not that it would be so submitted. At the conclusion of the conference the trial court stated: "* * * it can be submitted to conform to the evidence."

The judgment will, accordingly, be affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

484 P.2d 763

STATE of New Mexico, Plaintiff-Appellee,

v.

Luis P. ANDRADA and Joseph B. Baca, Defendants-Appellants.

No. 555.

Court of Appeals of New Mexico.

March 26, 1971.

Certiorari Denied April 21, 1971.

William W. Bivins, Las Cruces, for appellant Andrada.

Neil E. Weinbrenner, Las Cruces, for appellant Baca.

James A. Maloney, Atty. Gen., Santa Fe, Ray Shollenbarger, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

Convicted of aggravated burglary, § 40A–16–4, N.M.S.A.1953 (Repl.Vol. 6), defendants appeal. The issues concern: (1) severance; (2) lesser included offenses; (3) evidence of intent; (4) the instruction on intent; and (5) the failure to strike an allegedly unresponsive and prejudicial answer of a witness.

Motion for severance.

Both defendants moved for a severance. Baca's motion claimed that his defense would be in direct conflict with Andrada's defense; that a joint trial would effectively deprive Baca of the opportunity to present an effective defense. Andrada's motion asserted "* * * the defenses of the defendants herein are such that the consolidation of the cases for the purposes of trial would be prejudicial to movant." The trial court ruled "* * * you are not entitled to a separate jury on that, your joint Motions will be denied."

In asserting denial of a severance was error, both defendants recognize that the granting of separate trials to defendants who have been jointly informed against, as here, is a matter for the trial court's discretion. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied 391 U.S. 927, 88 S. Ct. 1829, 20 L.Ed.2d 668 (1968); State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960). Their claim is that the trial court abused its discretion. In so contending, both defendants recognize there is nothing in the record, other than the claims made in the motions, and the trial court's ruling, which pertains to the motions for severance. Thus, there is nothing in the record showing how Baca would be deprived of an opportunity to present an effective defense or how Andrada would be prejudiced by a joint trial. As to these items, defendants ask us to accept their explanation of what was presented to the trial court in arguing in support of the motions. Specifically, they ask us to consider matters outside the record. This we cannot do. Our review is limited to the record. Section 21–2–1(17) (1), N.M.S.A. 1953 (Repl. Vol. 4); State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct.App.1970).

The only specific claim in the record is Baca's claim that his defense would be in direct conflict with Andrada's defense. Assuming this is a fact, the fact of conflicting defenses, standing alone, does not amount to a showing that the trial court abused its discretion in denying the claim. Compare State v. Aull, supra; State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct.App.1967).

Lesser included offenses.

Section 41–13–1, N.M.S.A.1953 (Repl.Vol. 6) states in part:

> "* * * [F]or an offense consisting of different degrees, the jury may find the accused * * * guilty of any degree of such offense inferior to that charged * * * or of an attempt to commit such offense or any degree thereof; * * *"

The trial court submitted to the jury the charge of aggravated burglary, § 40A–16–4, supra, and the lesser offenses of burglary and criminal trespass, §§ 40A–16–3 and 40A–14–1, N.M.S.A.1953 (Repl.Vol. 6). No

complaint is made that burglary and criminal trespass were improperly submitted as lesser included offenses under the facts of the case.

By their requested instructions, both defendants asked that additional lesser offenses be submitted to the jury. These additional offenses are identified as "attempt to commit aggravated burglary," "attempt to commit burglary" and "unlawful carrying of a deadly weapon." See §§ 40A–28–1 and 40A–7–2, N.M.S.A.1953 (Repl.Vol. 6). Error is claimed because of the trial court's refusal to instruct on these three offenses.

State v. Anaya, 80 N.M. 695, 460 P.2d 60 (1969) states:

> "Appellant had the right to have instructions on lesser included offenses submitted to the jury. This right depends, however, on there being some evidence tending to establish the lesser included offenses. * * *"

State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955), rev'd on other grounds, State v. Miller, 76 N.M. 62, 412 P.2d 240 (1966); State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct.App.1969); see also State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966); State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Defendants recognize that under the foregoing decisions it is not error to refuse to instruct on a lesser included offense unless there is some evidence tending to establish the lesser included offense. They assert, however, that other New Mexico decisions do not require that there be evidence of the lesser included offense. They claim that once there is evidence sufficient for the jury to consider the offense charged, that the trial court, if requested, is required to instruct on all lesser offenses included within the charged offense regardless of whether there is evidence tending to establish the lesser included offense. They say this view is supported by State v. Ulibarri, 67 N.M. 336, 355 P.2d 275 (1960) which states:

> "This court has often held that the trial court must instruct the jury in every degree of the crime charged when there is evidence in the case tending to sustain such degree. * * *"

State v. Ulibarri, supra, involved degrees of homicide and the lesser included offense of voluntary manslaughter, under the facts, in defendant's conviction of first degree murder. The language quoted from *Ulibarri* is appropriate to the charge there involved and consistent with § 41–13–1, supra. The quoted language does not state that a lesser offense, included within the offense charged, is to be submitted to the jury even if there is no evidence tending to establish the lesser included charge. There is no inconsistency between State v. Ulibarri, supra, and the rule reiterated in State v. Anaya, supra. Defendants were not entitled to have lesser included offenses submitted to the jury unless there was evidence tending to establish the lesser included offenses.

Defendants contend, however, that "attempted" crimes are a special category and that because of this special category an "attempted" crime should be submitted to the jury in every case where there is a submissible issue as to the completed crime. Defendants refer us to the "rule" that every completed crime necessarily includes an attempt to commit that crime, and to State v. Lutheran, 76 S.D. 561, 82 N.W.2d 507 (1957). That case held that the jury was properly instructed, and the defendant properly convicted of an attempt, although the defendant was charged with a completed offense. Defendants also rely on the wording of § 41–13–1, supra, arguing that the reference to "attempts" in that statute is in the disjunctive and, therefore, to be considered separately from the statutory reference to an "offense inferior to that charged."

Defendants' position concerning "attempts" disregards the reason for requiring evidence tending to establish lesser included offenses before they are submitted to the jury. That reason is that if the jury is instructed on lesser included offenses, for which there is no evidence, false

issues would be interjected. See State v. Pruett, 27 N.M. 576, 203 P. 840, 21 A.L.R. 579 (1921). New Mexico has consistently taken this position—that there must be evidence tending to establish the lesser included offense before it is to be submitted to the jury. State v. Anaya, supra; State v. Ortega, supra; State v. Sandoval, supra; State v. Pruett, supra. Although none of these decisions directly concerned an "attempt," the principle is as applicable to "attempts" as to lesser completed crimes.

Section 40A–28–1, supra, in defining an "attempt to commit a felony" includes the requirement that the perpetrator must have failed to "effect its commission." If the evidence is of the completed crime, then the crime of "attempt" is not involved. To instruct on an "attempt" where there is no evidence tending to establish a failure to complete the crime would present a false issue to the jury.

Section 41–13–1, supra, authorizes "attempts" to be submitted to the jury. That section, however, does not authorize the submission of an "attempt" issue when there is no evidence tending to establish an attempted crime which failed to be completed.

We hold that there must be evidence tending to establish an attempt as defined in § 40A–28–1, supra, before the issue of "attempt" may be submitted to the jury as a lesser included offense.

Defendants' remaining contention under this issue is that there is evidence to establish the crimes of attempted aggravated burglary, attempted burglary and unlawfully carrying a deadly weapon. As to the two asserted attempts, we disagree.

It is undisputed that at approximately 1:50 a. m. a rear door of a sporting goods store was partially open; its lock having been pried off. Both defendants were inside the store; they had neither authority nor permission to be there. When caught, they had items in their possession which belonged to the store.

If there was an "intent to commit any felony or theft" [§§ 40A–16–3 and 40A–16–4, supra] in the store, defendants had committed either burglary or aggravated burglary. If there was the requisite intent, there was nothing to indicate a failure to commit some form of burglary. See § 40A–28–1, supra. If the requisite intent was absent, the defendants neither committed any degree of burglary nor any degree of attempted burglary. As between an attempt to commit some degree of burglary and some degree of a completed burglary, the evidence goes only to a completed crime rather than an attempt.

As to "unlawfully carrying a deadly weapon," there is evidence tending to establish that each defendant was armed with a loaded .38 caliber pistol concealed on his person. Thus, there is evidence tending to establish this crime. See § 40A–7–2, supra. The fact that there is such evidence does not, however, establish that the trial court should have instructed the jury as to this offense. The trial court is not required to instruct on every offense for which there is evidence. Compare State v. Garcia, 78 N.M. 136, 429 P.2d 334 (1967).

The trial court is not required to instruct on offenses which the evidence tends to establish unless the offense is a lesser offense included within the crime charged. The New Mexico decisions have consistentently referred to *lesser included* offenses. State v. Anaya, supra; State v. Sandoval, supra. Section 41–13–1, supra, refers to a "degree of such offense inferior to that charged." See State v. Ulibarri, supra. In this connection compare State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969) which discusses included offenses in connection with a double jeopardy question.

A comparison of the statutes involved, §§ 40A–16–4, 40A–16–3 and 40A–7–2, supra, shows that the offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary. Not being an included offense, the trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense.

Lack of substantial evidence as to intent.

This issue, and the subsequent issues, is raised only by Baca. His claim is that the evidence of his guilt is insufficient under the circumstantial evidence rule. This claim goes to evidence of his intent.

State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969) states:

> "* * * We fully recognize the rule that intent, as an element of crime, is seldom susceptible of proof by direct evidence, and that it may be inferred from a series of acts, occurrences and circumstances. * * *"

Assuming there is no direct evidence of Baca's intent, it must be inferred from the acts and conduct of Baca. See State v. Brito, 80 N.M. 166, 452 P.2d 694 (Ct.App. 1969).

Baca claims the evidence of his intent—his acts and conduct—fails to exclude every reasonable hypothesis other than his guilt and, therefore, is insufficient. See State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct.App.1970). This claim is based on evidence that Baca was intoxicated shortly before he was apprehended inside the store. Because of the evidence of his asserted drunken condition, he claims evidence of his acts and conduct fails to exclude the reasonable hypothesis that he was incapable of an intent to commit aggravated burglary. We disagree.

There is evidence of forceful entry into the store; evidence that the glass on a locked gun display case was broken and Baca was in possession of a pistol from the case; evidence that, when apprehended, the gun was loaded and one shell had recently been fired; evidence that upon being found in the store by the officer he remarked: "'If I had not been holding that box, I would have shot you.'" The only reasonable inference from this evidence is that even if Baca was as intoxicated as alleged he nevertheless had the intent to commit a theft in the store that he unlawfully entered. Compare State v. Gonzales, 82 N.M. 388, 482 P.2d 252, decided January 22, 1971; State v. Hardison, supra.

Instruction as to intent.

An instruction told the jury that "* * * the State has in part, sought to prove the intent of the Defendants to commit a felony or theft * * * by circumstantial evidence. * * *" The instruction went on to explain the circumstantial evidence rule.

Baca contends all the evidence of his intent is circumstantial. He claims use of the words, "in part," is erroneous because "* * * calculated to mislead the jury to assume that there was direct evidence of the Defendant's intent * * *"

In the preceding point, we assumed there was no direct evidence of Baca's intent. Under this point Baca would have us determine whether there is any such direct evidence. Compare State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App.1967). We do not decide this issue because it is not properly before us for review.

Baca's objection to the instruction reads: "* * * Defendant objects to the inclosure of the words 'In part' on instruction number 11 of the Court; * * *" Baca gave no reason to the trial court why "in part" should not be included in the instruction.

The objection was not "* * * sufficient to alert the mind of the court to the claimed vice therein, * * *" Section 21-1-1(51) (2) (h), N.M.S.A.1953 (Repl. Vol. 4). Since the objection made was insufficient to alert the trial court to the error now claimed, Baca has not preserved the asserted error for review. State v. Roybal, 76 N.M. 337, 414 P.2d 850 (1966); State v. Carillo, 80 N.M. 697, 460 P.2d 62 (Ct.App.1969), cert. denied 397 U.S. 1079, 90 S.Ct. 1532, 25 L.Ed.2d 815 (1970).

Failure to strike unresponsive and prejudicial answer.

When the prosecutor was questioning one of the investigating officers as to Baca's condition, the following occurred:

> "Q. Did you observe anything in the Defendant's manner? Did he stagger?
>
> "A. No, sir, I wouldn't say he was staggering. He jumped around, he

moved around quite a bit. He leaned up against a wall two or three times, but I wouldn't call it staggering, no. It appeared to me he was doing it on purpose.

"BY MR. WEINBRENNER: Your Honor, I am going to object to that last remark as not being responsive and ask it be stricken.

"BY THE COURT: What is that?

"BY MR. WEINBRENNER: He said it appeared to him that the Defendant's actions appeared to be on purpose. That's a gross conclusion.

"BY THE COURT: Yes, let's not give an opinion, Officer Harris, on matters like that. Tell the way you saw him, what his actions were, let the jury conclude what they want to."

That part of the answer, "It appeared to me he was doing it on purpose" is asserted to be prejudicial. Baca claims this phrase "* * * conveyed to the jury the idea that this Defendant was just pretending to be intoxicated. This went to the very heart of the Defendant's defense, and was blatantly calculated to prejudice the jury * * *."

Baca claims the trial court erred in failing to instruct the jury to disregard this statement. From the quoted remarks it is apparent the trial court agreed with counsel that the statement was a conclusion. It is unnecessary to decide whether the court's comment was in effect an admonition to the jury to disregard the statement. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969). Such a decision is unnecessary because Baca never invoked a ruling on his motion to strike. In making its comment, the trial court did not rule on the motion to strike. After the comment, Baca did not pursue the motion to strike. Not having invoked a ruling of the trial court on the motion, Baca cannot predicate error in this court on the failure to strike the statement. State v. James, supra; State v. Duran, supra; compare Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct.App.1969).

The judgment and sentence is affirmed. It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 768

STATE of New Mexico, Plaintiff-Appellee,
v.
Pat JARAMILLO, Defendant-Appellant.
No. 607.

Court of Appeals of New Mexico.
April 16, 1971.

Walter F. Wolf, Jr., Schuelke & Wolf, Gallup, for appellant.

David L. Norvell, Atty. Gen., John Darden, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted of aggravated battery (§ 40A–3–5(A) (C), N.M.S.A.1953 (1969 Supp.)), and has appealed contending that the trial court erred in denying his motion for a continuance based upon the ground that a particular witness could not be located for service of a subpoena, and, further, in refusing to give certain tendered instructions relating to lesser included offenses. We affirm.

The statute, § 40A–3–5(A) (B) and (C), N.M.S.A.1953 (1969 Supp.) provides:

"A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

"B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

"C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony."

The defendant and one Reyna, while in a bar, became involved in an altercation. Both of them left the bar for the purpose of engaging in a fight. Defendant at the time was armed with a pistol and during the course of the fight the pistol was discharged and Reyna was shot in the stomach.

At the outset of the trial, defendant orally moved the court for a continuance on the ground that he was unable to secure the presence of a witness, one Alfonso Sanchez. Defendant's counsel stated to the court that Sanchez, if procured, would testify to matters material to the defense, and, among other matters, would testify that the prosecuting witness, Reyna, was chasing or running after the defendant prior to the fight. It was asserted by counsel for defendant that the particular testimony was important as support for his claim of self defense.

It appears from the record that a subpoena for Sanchez was issued and delivered to the Sheriff the day before the trial, although defendant and his counsel had more than two weeks notice of the date of trial. It further appears from the record that another witness who had been subpoenaed could supply testimony similar in nature to that which counsel thought would be given by Sanchez.

It is fundamental that a motion for continuance rests within the sound discretion of the trial court, and its ruling will not be disturbed unless the record shows an abuse of discretion. State v. Cochran, 79 N.M. 640, 447 P.2d 520 (1968). In our opinion, the record does not show an abuse of discretion on the part of the trial court in denying the motion.

Defendant submitted certain instructions relating to lesser included offenses which were refused by the court. The refusal to give these instructions is asserted as reversible error. The rule is firmly established in this jurisdiction that a defendant has the right to have instructions on lesser included offenses submitted to the jury. The right, however, is dependent upon there being evidence tending to establish the lesser included offense. State v. Anaya, 80 N.M. 695, 460 P.2d 60 (1969).

Defendant admitted that he had the pistol in his possession at the time of the fight. He also testified that he intended to hit Reyna on the head with it. We see no evidence in the record which would have warranted the court in instructing on a lesser included offense.

The conviction is affirmed.

It is so ordered.

WOOD and SUTIN, JJ., concur.

484 P.2d 770

Wendell R. WILLIAMS, Sr., Individually and as Personal Representative and Administrator of the Estate of Wendell R. Williams, Jr., Deceased, Irving E. Moore, Personal Representative and Administrator of the Estate of Bret Dean Morris, Deceased, and Louis Morris, Plaintiffs-Appellants,

v.

The NEW MEXICO STATE HIGHWAY COMMISSION a/k/a the New Mexico State Highway Department, Defendant-Appellee.

No. 556.

Court of Appeals of New Mexico.
April 9, 1971.

Richard E. Ransom, William G. Gilstrap, Smith, Ransom & Deaton, Albuquerque, for plaintiffs-appellants.

Leland S. Sedberry, Jr., Peter J. Brouillire, III, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for defendant-appellee.

OPINION

DEE C. BLYTHE, District Judge.

This action presents a novel question concerning the "completed operations" hazard of the new form of comprehensive general liability insurance policy.

Plaintiffs brought this action in the District Court of Santa Fe County against the State Highway Commission and others for wrongful death and other damages incurred as a result of an automobile collision caused by the presence on a federal highway of a yearling calf. From a partial summary judgment in favor of the State Highway Commission the plaintiffs appeal. We affirm.

Plaintiffs contend that:

"The Court Erred in Ruling that the Policy of Insurance Owned by the Highway Department did not Afford Coverage for its Negligent Inspection, Maintenance and Repair of the Cattle Guard."

The decision turns upon the coverage afforded by a comprehensive liability insurance policy carried by the Commission, as authorized by § 5-6-19, N.M.S.A.1953 (Repl.Vol.1966), being Laws of 1959, ch. 333, § 2, which provides in part:

"The state, county, city, school district, district, state institution, public agency or public corporation may insure its officers, deputies, assistants, agents and employees against any liability for damages for death, personal injury or property damage resulting from their negligence or carelessness during the course of their service or employment as part of the consideration for such employment, and for such damages resulting from the dangerous or defective condition of public property, which condition is allegedly due to their negligence or carelessness. * * *"

Sections 5-6-20, N.M.S.A.1953 (Repl. Vol.1966) and 5-6-21, N.M.S.A.1953 (Repl.Vol.1966) waive sovereign immunity to the extent of such insurance coverage. See Chavez v. Mountainair School Board, 80 N.M. 450, 457 P.2d 382 (Ct.App.1969).

The issue is not whether the deaths were proximately caused by the Commission's "negligent failure to inspect, repair, and maintain the said fence and cattle guard." The issue is whether the insurance policy carried by the Commission covers this risk. Only insurance coverage on the hazard involved will waive sovereign immunity. Chavez v. Mountainair School Board, supra.

The insurance policy held by the Commission is the so-called revised standard comprehensive general liability insurance policy adopted in 1966 by the insurance industry. Therefore, cases decided before 1966 are of scant use in this case. In fact, the new form of policy, separately and more fully defining "completed operations" and "products," was made necessary by court interpretations of the old forms contrary to underwriting intent. See Cowan, "Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General-Automobile Policy," 1966 Proceedings, Section of Insurance, Negligence and Compensation Law, American Bar Association; 2 Long, The Law of Liability Insurance, § 18, App. B at p. 50 (1970). The questions here involved are of first impression in this jurisdiction. We have been cited to no cases, and have found none ourselves, from other jurisdictions interpreting these provisions of the new form of policy.

The pertinent parts of the policy read:

"B. EXCLUSION — COMPLETED OPERATIONS AND PRODUCTS HAZARD

"It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to bodily injury or property damage included within the 'Completed Operations Hazard' or the 'Products Hazard.'

"* * *

DEFINITIONS

"* * *

"'[C]ompleted operations hazard' includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned or rented to the named insured.

"'Operations' include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

"1. when all operations to be performed by or on behalf of the named insured under the contract have been completed.

"2. when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or

"3. when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or sub-contractor engaged in performing operations for a principal as a part of the same project.

"*Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.* (Emphasis ours.)

"* * *

"B. EXCLUSION OF HIGHWAYS

"It is agreed that the policy does not and shall not be construed to cover any liability arising solely from the existence of or condition of highways, streets, roads or other dedicated ways, including bridges, culverts and similar structures appurtenant thereto.

"This exclusion does not apply to accidents arising out of construction, maintenance or repair operations undertaken by or on behalf of the named insured.

"* * *"

Putting all these parts of the jigsaw puzzle together, we come to the inevitable conclusion that the installation of the cattle guard in question was a "completed operation" and therefore not covered by the policy of insurance. The cattle guard had "been put to its intended use."

Plaintiffs contend there is an ambiguity in the listing of one of the hazards included in the coverage afforded by the "Comprehensive General Liability Insurance Coverage Part," as follows:

"1. Premises Operations (Show (a) Locations of insured premises owned by, rented to, or controlled by the named insured (b) interest of named insured in such premises and (c) part occupied by named insured). [After which the following is typed]

"State of New Mexico

"All operations, yards and buildings."

Plaintiffs would construe "all operations" as including not only the Commission's actual operations but those duties imposed by statute. They cite City of Carlsbad v. Northwestern National Insurance Company, 81 N.M. 56, 463 P.2d 32 (1970), as authority for the proposition that the Commission should have performed its statutory duty to regularly inspect and maintain cattle guards.

With this reasoning we cannot agree. Assuming, but not deciding, that the Commission had a statutory duty to maintain the cattle guard in question, we find nothing in the record to indicate that it undertook to do so or, if it did, that the "operation" of doing maintenance work on the cattle guard in some way contributed to the accident in question. The presumption that officials comply with the law mentioned in *City of Carlsbad* is not pertinent to the precise question of whether an operation was in progress at the critical time.

Plaintiffs would avoid the "Exclusion of Highways" endorsement on the ground that cattle guards are not specifically mentioned therein and are not "bridges, culverts [or] similar structures appurtenant" to highways, or at least that this exclusion is ambiguous.

We disagree. Cattle guards are common objects in this cattle country. See § 47-13-9, N.M.S.A.1953 (Repl.Vol.1966) of the Herd District Law and § 55-6-11, N.M.S.A.1953 (Vol. 8, pt. 2, Repl.Vol.1962) regarding Obstructions and Injuries to Highway. We can take judicial notice of their nature. Rule 44(d) permits the "court to resort for its aid to appropriate books or documents of reference."

Webster's Third New International Dictionary, 1967, defines a cattle guard as:

"a device consisting of a shallow ditch across which ties or rails are laid far

enough apart to prevent livestock from crossing."

The fact is that a "cattle guard" serves as a bridge and a culvert.

We find no ambiguity in the policy. Its 12 pages of fine print may be hard to read and understand, but it is not ambiguous.

The partial summary judgment in favor of the State Highway Commission should be affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 773

STATE of New Mexico, Plaintiff-Appellee,

v.

James Robert FAULKENBERRY, Defendant-Appellant.

No. 610.

Court of Appeals of New Mexico.

April 23, 1971.

L. George Schubert, Hobbs, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas L. Dunnigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Faulkenberry was convicted of unlawfully selling or disposing of marijuana under § 54–5–14, N.M.S.A.1953 (Repl. Vol. 8, pt. 2), and unlawful possession of a dangerous drug, Pentobarbital Sodium, pursuant to § 54–6–38(B), N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp.1969). Faulkenberry appeals.

We affirm.

Faulkenberry claims that (1) marijuana is not a dangerous drug; (2) he is entitled to two separate juries to try him on two separate counts; (3) he is entitled to a new trial to establish ownership of the suitcase and its contents by a witness.

We have reviewed the record and fail to find where these issues were first raised in the district court. They are not, therefore, subject to review.

The judgment and sentence are affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

484 P.2d 1264

Frank SULLIVAN and Victor Sullivan, Plaintiffs-Appellees,

v.

Marianne SULLIVAN, Defendant-Appellant.

No. 9158.

Supreme Court of New Mexico.

May 10, 1971.

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

Sosa, Garza & Neumeyer, Las Cruces, for defendant-appellant.

Frederick A. Smith, Truth or Consequences, for plaintiffs-appellees.

OPINION

McMANUS, Justice.

Plaintiffs brought this suit for partition of certain lands under the New Mexico Partition Statutes, §§ 22–13–1 through 22–13–8, N.M.S.A.1953. During the proceedings the trial judge appointed commissioners to report to the court on a partition plan. Their first report was not acted upon by the court, and an amended report was rejected. However, a later, amended report was filed, a hearing held, and the court substantially adopted this report from which defendant appeals.

[redacted] Defendant alleges error by the trial court in its acceptance of the commissioners' report which categorized the lands involved by descriptive names rather than by

metes and bounds in accordance with § 22–13–6, supra. However, the applicable metes and bounds descriptions were contained in the various pleadings, exhibits, and in the transcript. With such information before it, the court could certainly ascertain the areas under consideration by the popular names used and the documentary references to metes and bounds. Furthermore, there was no objection to the use of area names at the time of the hearing, and the transcript reflects that the parties were quite alert about the particular areas in controversy. See Sandoval v. Sandoval, 61 N.M. 38, 294 P.2d 278 (1956).

Error is also alleged in that the report of the commissioners went beyond the instructions of the court and made further recommendations as to sale of the property should the parties be dissatisfied with the suggested partition. There was a full hearing on the commissioners' report, after which the court accepted its basic parts, ignoring its supplement. We do not find error in this facet of the report accepted by the court, as the trial judge omitted those portions of the report on which he made no order and this was within his discretionary powers, without prejudicing either of the parties.

Further error is alleged as to the actual partition of the property involved, and as to the fact that partition was also apparently made of state leased lands. Although the defendant alleges that the partitions ordered by the court were inequitable in that she received lands deficient in water, the record does not sustain such allegation. Study of the commissioners' report and the transcript shows substantial evidence behind the ruling of the court. A report should not be set aside where there is substantial evidence to support it, and ordinarily will not be disturbed where the evidence is conflicting. Purcell v. Purcell, 303 Ky. 478, 198 S.W.2d 43 (1946). There was sufficient and permanent spring water on the property partitioned to the defendant to serve the grazing acreage. The sole fact that there was more water on lands partitioned to plaintiffs does not of itself prove that the partition was "grossly unequal," and the defendant fails to meet her burden of proof in showing such inequity. See Sandoval v. Sandoval, supra.

Nor do we find error concerning the partition of leased lands. Defendant also asked the court to make partition of the lease property and again by stipulation requested that the commissioners consider division of the federal and state leased land. During the course of the proceedings, it was understood that the commissioners' proposal as to leased lands could be considered only as a recommendation. The defendant did not object to this action at the trial and cannot now complain.

The judgment of the lower court is affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

484 P.2d 1265

STATE of New Mexico, Plaintiff-Appellee,

v.

Tommie Clayton TILL, Defendant-Appellant.

No. 9159.

Supreme Court of New Mexico.

May 10, 1971.

McAtee, Marchiondo & Michael, O. L. Puccini, Jr., Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

TACKETT, Justice.

The District Court of Eddy County, New Mexico, denied a motion for post-conviction relief without a hearing. Defendant appeals.

The defendant contends that the trial court erred in denying his motion for post-conviction relief, based on (1) a "shotgun" instruction, (2) inadequate counsel (no objection was raised in the original trial of this case, cited as State v. Till, 78 N.M. 255, 430 P.2d 752 (1967)), and (3) newly discovered evidence. All three contentions are without merit.

Numbers (1) and (2) are controlled by the holding in State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct.App.1968), and State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App.1970). With respect to number (3), the requirements necessary to warrant a new trial on newly discovered evidence are set forth in State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968):

> "* * * (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such that it could not have been discovered before trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. * * *"

See cases cited therein.

Under the above requirements, defendant failed to set forth sufficient facts in his petition, or by affidavit, to warrant consideration by the trial court, as the contended newly discovered evidence was not disclosed, nor is it revealed by the record in this court.

Based on such nondisclosure, the petition must fail.

The decision of the trial court is affirmed. It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

484 P.2d 1266

Loula DEXTER et al., Plaintiffs-Appellants,

v.

LAKESHORE CITY SANITATION DISTRICT, Defendant-Appellee.

No. 9175.

Supreme Court of New Mexico.
May 10, 1971.

John B. Speer, Albuquerque, for appellants.

Marron, Houk & McKinnon, Albuquerque, for appellee.

OPINION

McMANUS, Justice.

This was an action in the District Court of Sierra County on bonds and interest coupons issued by defendant Lakeshore City Sanitation District. John B. Speer brought the action on behalf of himself pro se and as attorney for the other three plaintiffs, James B. Speer II, as trustee, Loula Dexter and D. G. Bell. After the cause was at issue, plaintiff John Speer moved for summary judgment, which was denied. By stipulation of the parties, an amended complaint was filed and the case proceeded to trial without a jury, which resulted in a judgment for John B. Speer and a denial of the claims of the other three plaintiffs.

Plaintiff claims as error the failure of the trial court to grant summary judgment in plaintiffs' favor. The trial court's ruling on this motion was based substantially on the same reasoning as was his ruling after a full hearing on the case was concluded. Consequently, these will be covered together.

John B. Speer offered evidence as to the ownership of the bonds and coupons which were the subject of the trial. The bonds in question were bearer bonds and the other plaintiffs were neither present at the trial nor did they testify. The court accepted John B. Speer's testimony as to those bonds and coupons owned by himself, but refused his testimony as to the ownership of other bonds and coupons allegedly owned by the other three plaintiffs and dismissed their cause with prejudice.

A bearer bond is a negotiable instrument, whose mere possession is sufficient evidence upon which to predicate a right to sue, the presumption being that the holder of a negotiable instrument becomes its holder for value. See, Coler v. Board of County Com'rs., 6 N.M. 88 at 127–128, 27 P. 619 (1891). Numerous other cases have held that the title or interest of the holder of commercial paper cannot be disputed or inquired into unless necessary to establish a legitimate and meritorious defense. See City of Lakeland v. Select Tenures, Inc., 129 Fla. 338, 176 So. 274 (1934); Mid-State Homes, Inc. v. Hockenbarger, 192 Kan. 505, 389 P.2d 760 (1964); John Davis & Company v. Cedar Glen #

Four; Inc., 75 Wash.2d 214, 450 P.2d 166 (1969). Defendant in our case asserted no such defenses as discussed above, but filed a general denial of most of the allegations on the basis of lack of information or knowledge sufficient to form a belief as to the truth of the allegations. The burden of establishing a defense is upon the maker of negotiable promissory paper. The trial court erred in refusing to accept John B. Speer's testimony as to the other plaintiffs' ownership of bonds and coupons, as his mere possession and tendering of these instruments into evidence was sufficient.

Plaintiff, John B. Speer, also alleges error in that the trial court denied him interest from the date of maturity of the bonds until the date the court rendered judgment in his favor. The bonds in question were general obligation bonds calling for six per cent interest per annum. Defendant alleges that in the absence of specific language on the instrument, interest cannot be collected after the due date of the bonds, as that would result in the collection of interest upon interest. However, the case of Munro v. City of Albuquerque, 43 N.M. 334, 93 P.2d 993 (1939), is dispositive of this issue. In that case the court distinguished between special and general obligation bonds, making it clear that because of state statutes allowing a governing body to levy and collect taxes for payment of general obligations at any time they should become necessary, see §§ 75-18-16, 75-18-17, N.M.S.A. (1953 Comp.), as opposed to special obligation bonds which can draw only upon specific funds as designated by statute and city ordinance, interest may be collected after the date of maturity of a general obligation bond in accordance with the general rule as cited in 27 A.L.R. 81 at 89, which states:

> "According to the great weight of authority, interest coupons or notes executed by the maker of a note or bond to evidence instalments of interest do bear interest after maturity, although there is no provision for interest."

See also, § 50-6-3, N.M.S.A. (1953 Comp.). Therefore, John B. Speer is entitled to collect interest computed at the rate of six per cent per annum from the date of issuance of the bonds until the date he actually receives payment for them.

The judgment of the trial court is affirmed as to John B. Speer, except that he shall also be awarded interest on his judgment from the date of maturity of the bonds until the date of actual payment of the bonds. As to the other plaintiffs, the judgment of the trial court is reversed, with orders for a new trial, as any evidence of their ownership of bonds and coupons due was wrongfully refused entry by the trial court.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

484 P.2d 1268

STATE of New Mexico, ex rel. Arturo APODACA et al., Petitioners-Appellants,

v.

NEW MEXICO STATE BOARD OF EDUCATION et al., Respondents-Appellees.

No. 9193.

Supreme Court of New Mexico.

May 10, 1971.

Ruben Rodriguez, Santa Fe, for petitioners-appellants.

David L. Norvell, Atty. Gen., E. P. Ripley, Special Asst. Atty. Gen., Santa Fe, Chavez & Cowper, Belen, for respondents-appellees.

OPINION

OMAN, Justice.

Petitioners appeal from a judgment discharging an alternative writ of mandamus. We affirm.

The validity of the consolidation of Belen Municipal School District No. 2, hereinafter called Belen, and La Joya Rural Independent School District No. 5, hereinafter called La Joya, is questioned in these proceedings. Petitioners rely upon three points for reversal. The first point is their claim that as residents of La Joya they have been effectively disenfranchised by the consolidation, contrary to their elective franchise rights as guaranteed by Art. VII, §§ 1 & 3, Constitution of New Mexico.

Their claim is based upon the fact that La Joya lies within the County of Socorro and the Seventh Judicial District, while Belen and the public schools therein, which are presently being attended by La Joya children, are located in Valencia County and the Second Judicial District. Pursuant to Art. XII, § 6, Constitution of New Mexico, one member of the State Board of Education is elected from each of the State's judicial districts which were in existence at the time of the adoption of this section of our Constitution. Thus, if the consolidation be valid, petitioners will vote for the election of a State Board member from the Seventh Judicial District, while the La Joya children will be attending schools presently located within the Second Judicial District from which another State Board member is elected.

It is conceded that members of the State Board of Education are state officers and not local officers. Art. XII, § 6, supra, expressly provides: "The state board of education shall determine public school policy and vocational educational policy and shall have control, management and direction of all public schools, pursuant to authority and powers provided by law." The board's powers and duties relative to the determination of policy, control, management and direction of all public schools in the State are detailed in § 77-2-1, N.M.S.A. 1953 (Repl. Vol. 11, pt. 1, 1968), and § 77-2-2, N.M.S.A.1953 (Supp.1969).

There is nothing in our Constitution or statutes prohibiting a school district from crossing either county or judicial district boundaries. There is no requirement that children attend public schools within the judicial district where they reside, and no prohibition against their attending public schools outside the judicial district of their residence.

The right to vote is not a natural right, but a franchise conferred by organized government. Wilson v. Gonzales, 44 N.M. 599, 106 P.2d 1093 (1940). We find nothing in either § 1 or § 3 of Art. VII of the New Mexico Constitution which suggests there is thereby conferred on a qualified elector the right to cast his vote for a candidate for the office of State Board of Education from the judicial district in which the elector's child attends public school. His right is to vote for the candidate of his choice for this position, to be elected from the judicial district in which he has voting residence. Art. XII, § 6, supra.

The second point relied upon for reversal is the claim that Subsection B of § 77-3-3, N.M.S.A.1953 (Interim Supp. 1970) contravenes the prohibitions imposed by Art. IV, § 24, Constitution of New Mexico, in that it constitutes a special law to consolidate only the Belen and La Joya School Districts. This subsection of our statutes provides:

> "The state board may also order consolidation of a school district which has not maintained either a junior or senior high school program for two [2] consecutive years prior to consolidation with an adjacent district which has maintained such programs for the students of both districts upon receipt of a resolution requesting consolidation from each local school board of each school district affected by the consolidation."

There is no question about the applicability of the provisions of this subsection of our statutes to Belen and La Joya and their consolidation, if the prohibition against special laws, as provided in Art. IV, § 24, supra, was not contravened by the Legislature in enacting it. The pertinent portion of Art. IV, § 24 provides:

> "The legislature shall not pass local or special laws in any of the following cases: * * * the management of public schools; * * *. In every other case where a general law can be made applicable, no special law shall be enacted."

Petitioners urge that the only school districts affected by Subsection B, supra, are Belen and La Joya. However, the record fails to support this contention. A finding and a conclusion to this effect requested by petitioners were denied by the trial court. In any event, it is apparent from the lan-

guage of the statute that it has applicability to any and all school districts which come within the classification created by the statute. The bases, or reasons, for the classification of school districts affected by the provisions of this statute, as opposed to those school districts not affected thereby, are substantial, and the classification is clearly reasonable within the applicable rules of construction and interpretation. See Board of Trustees of Town of Las Vegas v. Montano, 82 N.M. 340, 481 P.2d 702 (1971); City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967); Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940); State v. A., T. & S. F. Ry. Co., 20 N.M. 562, 151 P. 305 (1915).

The third point relied upon for reversal is the claim that Subsection B, supra, contravenes Art. II, § 18, Constitution of New Mexico, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, "* * * IN THAT IT DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS AND ALL DONE WITHOUT DUE PROCESS * * *."

Petitioners' first argument under this point is predicated upon their claim of the invalidity of Subsection B, supra. They state:

"If this consolidation was made under Section 77-3-3B, and it was, * * * then this consolidation is unconstitutional for the reason that Section 77-3-3B made an unreasonable classification for consolidation of school districts, especially since said classification was arbitrarily made to apply only to these two districts and affected them only."

We have already determined the validity of § 77-3-3(B), supra.

Petitioners' final argument is that the trial court concluded that the consolidation could have been legally accomplished under § 77-3-3, supra, without reliance upon Subsection B thereof. Therefore, petitioners say the consolidation must fail because there was no compliance with the requirements of §§ 77-3-9 through 12, N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968), concerning the appointment by the State Board of Education of an interim local school board and the subsequent special election of a local school board to govern the newly created or consolidated school district.

The trial court also concluded, as have we, that § 77-3-3, supra, was validly enacted. In any event, we are not bound by the trial court's conclusions of law, but may draw our own legal conclusions. Whitehurst v. Rainbo Baking Company, 70 N.M. 468, 374 P.2d 849 (1962). The consolidation having been ordered pursuant to § 77-3-3(B), supra, the provisions of § 77-3-3.1, N.M.S.A.1953 (Interim Supp. 1970), were controlling as to the board which should govern the consolidated district, and the provisions of §§ 77-3-9 through 12, supra, were inapplicable.

The judgment discharging the alternative writ should be affirmed.

It Is So Ordered.

COMPTON C. J., and STEPHENSON, J., concur.

484 P.2d 1272

STATE of New Mexico, Plaintiff-Appellee,

v.

Leo CHAVEZ, Defendant-Appellant.

No. 9253.

Supreme Court of New Mexico.

May 5, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 532, 82 N.M. 569, 484 P.2d 1279, be and the same is hereby returned to the Clerk of the Court of Appeals.

484 P.2d 1272

STATE of New Mexico, Plaintiff-Appellee,

v.

Jessie GUTIERREZ, Defendant-Appellant.

No. 9258.

Supreme Court of New Mexico.

May 12, 1971.

Original Proceeding in Certiorari.

Ordered that application for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 608, 82 N.M. 578, 484 P.2d 1288 be and the same is hereby returned to the Clerk of the Court of Appeals.

484 P.2d 1272

Thomas Leo WARREN, Plaintiff-Respondent,

v.

James H. ZIMMERMAN, Individually, and Charles Zimmerman, a minor, Defendants-Petitioners.

No. 9250.

Supreme Court of New Mexico.

May 12, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 616, 82 N.M. 583, 484 P.2d 1293 be and the same is hereby returned to the Clerk of the Court of Appeals.

484 P.2d 1273

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael B. ODEN, Defendant-Appellant.

No. 631.

Court of Appeals of New Mexico.

April 23, 1971.

Dick A. Blenden, Rosenberg & Blenden, Carlsbad, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Thomas Patrick Whelan, Jr., Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of disorderly conduct, § 40A-20-1, N.M.S.A.1953 (Repl. Vol. 6, Supp. 1969), defendant appeals. The dispositive issue is the sufficiency of the evidence to sustain the conviction.

The applicable portion of § 40A-20-1, supra, reads:

"Disorderly conduct consists of:

"A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace;"

Which of the descriptive words appearing in the statute prior to the word "conduct" are involved in this case? Defendant asserts only "indecent" or "profane" could be applicable. The State does not contend that "profane" is applicable. Of the statutory words, the State claims "indecent" and "abusive" are applicable. In addition, the State asserts defendant's conduct was "obscene" and apparently would have us consider the question of obscene conduct under the statutory phrase "otherwise disorderly conduct."

Since neither the State nor the defendant contend defendant's conduct was "profane," we eliminate "profane conduct" as a part of the appeal. In doing so, we dispose of defendant's claim that the trial court improperly refused to permit defendant to cross-examine a State's witness as to her use of and familiarity with profanity. Since profane conduct is not involved in the case, a witness' use of or familiarity with profanity is also not involved.

Further, we decline to involve ourselves, in this appeal, with the question of whether defendant's conduct was obscene or abusive. It is not necessary to do so. The parties are in agreement that the question of indecent conduct is to be considered. Thus, our review is on the basis that "dis-

orderly conduct consists of engaging in indecent conduct which tends to disturb the peace."

Even with this reading of the statute, the parties disagree as to what must be proved to establish a violation. Defendant contends there are two parts to the statute. He asserts his conduct must have been (1) indecent and (2) tend to disturb the peace. The State contends the phrase, "which tends to disturb the peace," applies only to "otherwise disorderly conduct." The State asserts there is a statutory violation if no more than "indecent conduct" is established; that it was not required to prove that the indecent conduct tended to disturb the peace. Since the word "conduct" appears only once in the statute, we have no difficulty in assuming that the statute should be read as defendant contends. Thus, for the purposes of this appeal, we proceed on the basis that defendant's conduct must have been indecent and must also have tended to disturb the peace.

What conduct is involved? Five girls were playing tennis. A car drove up. The occupants of the car remarked how badly the girls were playing. The girls ignored these remarks. Three males then emerged from the car and asked if they could play. They were told they could not. These males then took the tennis balls away from the girls.

Defendant then got out of the car. When the girls told the males to give back the tennis balls, defendant remarked "* * * girls weren't born with them;" that girls weren't "[b]orn with balls." "* * * [H]e asked us why we needed them because girls didn't need any, * * *"

During this encounter, "* * * he [defendant] lifted up his arm and he asked us if that looked like a vagina." From an exchange between the trial court and defendant, it appears that defendant made a fist with his hand when he raised his arm.

Meanwhile, the other three males had returned to the car. At the conclusion of the above encounter with defendant, the three males emerged from the car nude. The girls then started running. Defendant said he "walked" with the girls. At this point, defendant "* * * asked us if we had never seen a boy like that before."

Most of the girls testifying admitted they were more shocked by the display of nudity by the three males than by defendant's conduct. At least one of the girls testified she was shocked by defendant's conduct and defendant testified the girls "did take offense at the word [balls]."

Defendant asserts "* * * that at most the language used in his conversation with the girls at the tennis court was a euphemism and was never intended and was not in fact indecent." Defendant's language was certainly not a euphemism, which is defined in Webster's Third New International Dictionary (1966) as "the substitution of an agreeable or inoffensive word or expression for one that is harsh, indelicate, or otherwise unpleasant or taboo."

Further, there is substantial evidence that defendant's conduct—his language and gesture—was indecent. See State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct.App. 1968). The meaning of indecent includes that "'* * * tending toward or being in fact something generally viewed as morally indelicate or improper or offensive; * * *'" See State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct.App.1969). Defendant's conduct indecently referred to male and female sex organs.

Even if his conduct was indecent, defendant claims there is nothing in the record showing his conduct tended to disturb the peace. He relies on the testimony that the girls were more shocked by the nudity of the three males than by defendant's conduct, and evidence that the girls' parents "* * * are likely to have been the ones who wanted to file a complaint * * *" He also relies on evidence that the entire episode took approximately twenty minutes and that the girls didn't leave the tennis court as a result of de-

fendant's conduct, but only after the three males appeared nude.

State v. Florstedt, 77 N.M. 47, 419 P.2d 248 (1966) equates "disturb the peace" with "breach of the peace" and defines a breach of the peace to include a disturbance which, by causing consternation and alarm, disturbs the peace and quiet of the community. Black's Law Dictionary (4th ed. 1951), states: "A *constructive* breach of the peace is an unlawful act which, though wanting the elements of actual violence or injury to any person, is yet inconsistent with the peaceable and orderly conduct of society. * * *"

[redacted] All § 40A-20-1, supra, requires in this case is indecent conduct which *tends* to disturb the peace. Conduct which is inconsistent with the peaceable and orderly conduct of society tends to disturb the peace and quiet of the community. A reasonable mind could find defendant's conduct adequate to support the conclusion that it tended to disturb the peace. Thus, there is substantial evidence that defendant's conduct did tend to disturb the peace.

The thrust of defendant's argument, however, is that the question of disturbing the peace must be determined solely by the reaction of the girls to defendant's conduct. Since the disturbance is viewed in relation to the peace and quiet of the community, the standard for which defendant contends is incorrect. State v. Florstedt, supra. Even if defendant's contentions were correct, there is substantial evidence. Defendant himself testified that the girls took offense at his reference to "balls." One girl testified she was shocked and after the three males appeared nude, defendant followed the girls, asking if they had never seen a boy like that before. This evidence supports a conclusion that, considering only the girls' reactions, defendant's conduct tended to disturb the peace.

The judgment and sentence is affirmed. It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 1275

Arnulfo ALVILLAR, Plaintiff-Appellee,
v.
James T. HATFIELD and Elizabeth M. Yoder, Defendants-Appellants.
No. 618.

Court of Appeals of New Mexico.
April 23, 1971.

[redacted]

J. Wayne Woodbury, Silver City, for defendants-appellants.

William S. Martin, Jr., C. N. Morris, Silver City, for plaintiff-appellee.

OPINION

WOOD, Judge.

In this non-jury automobile accident case, defendants admitted liability to plaintiff "for injuries sustained." Defendants' appeal is directed to damage questions. They claim: (1) the doctor's testimony should have been stricken; (2) the cause of plaintiff's condition at the time of trial was not established; (3) the extent of an aggravation of a pre-existing condition was not proved; and (4) the damage award is not supported by substantial evidence and is excessive as a matter of law.

Medical testimony.

The only medical testimony offered at trial was that of a doctor called by plaintiff. The doctor testified that in connection with his examination of plaintiff he had the benefit of the reports of two other doctors and two x-ray reports. When the doctor started to testify about the x-ray reports, defendants' objection was sustained.

The doctor then related the complaints he had received from plaintiff and the objective findings from his examination. Subsequently, the doctor gave his "conclusion." This, according to the doctor, was based "* * * solely on my knowledge of Pete Alvillar as a patient since 1950." The accident occurred in February, 1969. The doctor's examination for purposes of trial was the day before the trial, which began May 26, 1970. The doctor testified he had treated plaintiff "about every three to six months" since 1950.

On his direct examination, the doctor testified that plaintiff's condition at trial did not necessarily involve an arthritic condition but that was "one of the things" to be considered. On cross-examination he testified he couldn't be sure, from his physical examination, that plaintiff's present condition was osteo-arthritis or sprain. As to which of these two items, he relied on the x-ray reports. He stated that "part" of his conclusion was based on his acceptance of the x-ray reports as quoted in the reports of two other doctors.

Defendants moved "* * * that the entire testimony of the Doctor be stricken. * * *" They contend the trial court erred in failing to do so.

Plaintiff's complaints to the doctor, and the history the doctor obtained from plaintiff, were admissible testimony. N.M.U.J.I. 15.2; Waldroop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d 521 (1956). The doctor's objective findings, based on his examination of plaintiff, were admissible testimony.

Defendants' objection to the doctor's testimony went to the answers, elicited on cross-examination, that the doctor's conclusions were based "in part" on reports not in evidence. These answers did no more, however, than contradict direct examination testimony that the conclusions were based "solely" on the doctor's knowledge of plaintiff. The fact that cross-examination answers indicated the doctor's conclusions were based on inadmissible evidence, did not require that the conclusions on direct examination be stricken. Where, as here, there were contradictions in the testimony of the witness, the trial court was required to reconcile the contradictions and say which was the truth. Hughes v. Walker, 78 N.M. 63, 428 P.2d 37 (1967); compare Lucero v. Los Alamos Constructors, Inc., 79 N.M. 789, 450 P.2d 198 (Ct.App.1969).

Since the doctor gave admissible testimony, the trial court properly refused to strike the doctor's "entire testimony."

The cause of plaintiff's present condition.

Defendants are only liable for the injuries they inflicted on plaintiff. Morris v. Rogers, 80 N.M. 389, 456 P.2d 863 (1969). We proceed on the basis that the cause of plaintiff's condition, at the time of trial, was required to be established by medical testimony. See Martin v. Darwin, 77 N.M. 200, 420 P.2d 782 (1966); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

Defendants contend all of the doctor's testimony should have been stricken and, therefore, there is no medical evidence of causation. We have held that all of the doctor's testimony could not have been properly stricken.

Defendants also contend there is no medical evidence of causation if consideration is limited to portions of the doctor's testimony which was admissible. We disagree. The doctor gave his opinion that plaintiff's condition at trial "came from" the automobile accident. This opinion was based on the history received from plaintiff and the "findings" when the doctor examined the plaintiff. The opinion was on the basis of a reasonable medical probability. This is substantial medical evidence of causation. Compare Morris v. Rogers, supra.

Aggravation of a pre-existing condition.

Morris v. Rogers, supra, states:

"* * * Where the injury is an aggravation of a pre-existing condition, plaintiff must prove the extent of the

aggravation because the aggravation is the injury that has been inflicted. * * * Further, the extent of the aggravation must be established with reasonable certainty. * * *"

The doctor's testimony, undisputed, is that plaintiff complained of pain in both of his arms in March, 1963, and that the doctor diagnosed this as a "very mild" arthritic condition. The doctor characterized this condition as "[v]ery slowly progressive." The doctor wasn't sure, from his physical examination, whether plaintiff's condition at trial was osteo-arthritis or sprain. Nevertheless, his opinion was that plaintiff's prior arthritic condition had been aggravated.

Defendants contend the extent of the aggravation was not proved. We disagree.

One of the ways of proving the extent of the aggravation is by comparative testimony. Morris v. Rogers, supra; Martin v. Darwin, supra. The doctor's testimony shows the pre-existing condition to consist of complaints of pain in both arms diagnosed as a mild, slowly progressive arthritic condition.

Plaintiff's present complaints were of "constant pain in his neck since the accident," weakness of grip in the right arm with inability to lift things he formerly could, marked headaches "since the accident," numbness in the right arm (only) "all the time," and "at times" severe pain, and a "constant dizzy feeling." These changes in the complaints are corroborated by non-medical witnesses. Compare Martin v. Darwin, supra.

The doctor's findings were: marked tenderness and spasm of the muscles and spinous processes of the cervical vertebrae which was most apparent in the mid-cervical area; marked weakness in the grip of the right hand as compared to the left hand; decreased sensation to light touch over the right hand; marked pain on flexion and extension of the neck; extremes of rotation of the neck caused "severe pain" and increased numbness in the arm; on depression of the right shoulder there was aggravation of the numbness and pain in the entire right arm. The doctor testified these findings showed tenderness and disarrangement of the nerve roots of the right neck; that this was consistent with the tenderness he found at the base of the skull, in the scapula and the thoracic and lumbar regions of the spine.

The doctor concluded "there has been a marked aggravation of the symptoms." While the previous arthritic condition was slowly progressive, there had been a "marked worsening;" "[t]here was something that made it get so markedly worse." The doctor's opinion was this marked change resulted from the automobile accident.

The comparative testimony, which is substantial and uncontradicted, shows the extent of the aggravation of the pre-existing condition.

Under this point, defendants also complain about the trial court's findings. Because the evidence of the pre-existing arthritic condition was undisputed, they assert the trial court was required to find this pre-existing condition existed and also find the extent of the aggravation of this pre-existing condition. This issue does not involve the proof before the trial court; it involves the form of the findings made by the trial court.

If requested, the trial court was required to find the ultimate facts necessary to determine the issues. Section 21–1–1(52)(B)(a)(6), N.M.S.A.1953 (Repl.Vol. 4); Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970). An ultimate fact in this case would be that plaintiff was injured as a result of the collision. Such a finding was made.

Because this case involves the aggravation of a pre-existing condition, another ultimate fact would be the extent of the aggravation since that is the injury inflicted by defendants. Compare Rutledge v. Johnson, supra. No such finding was made. However, neither side requested a finding as to the extent of the aggravation. Defendants' requested findings, which

were refused, went only to evidentiary matters or the asserted failure to prove the extent of the aggravation. The trial court did not err in refusing to make evidentiary findings. McCleskey v. N. C. Ribble Company, 80 N.M. 345, 455 P.2d 849 (Ct.App. 1969). Nor did it err in refusing to find the extent of the aggravation had not been proved since the undisputed comparative testimony established the extent of the injury.

Since the trial court was not requested to find the extent of the aggravation, defendants are not in a position to complain of the absence of such a finding. Nosker v. Western Farm Bureau Mutual Ins. Co., 81 N.M. 300, 466 P.2d 866 (1970).

The damage award.

The trial court awarded $15,000.00 damages.

Defendants assert the award is not supported by substantial evidence and is excessive as a matter of law. In support of this contention they review the evidence most favorable to their position. This, of course, is incorrect. The evidence is to be reviewed in the light most favorable to support the damage award. Rutledge v. Johnson, supra; Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969); Maisel v. Wholesome Dairy, Inc., 79 N.M. 310, 442 P.2d 800 (Ct.App.1968).

The trial court found that the injury plaintiff suffered in the accident was "permanent." Defendants assert, and requested a finding, that there is no evidence that plaintiff's aggravated condition is permanent. We agree, since permanent injury means permanent disability or permanent damage. Morris v. Rogers, supra; Garcia v. Southern Pacific Company, 79 N.M. 269, 442 P.2d 581 (1968). There is no evidence that plaintiff suffered either permanent disability or permanent damage as a result of the collision.

The doctor was not asked about permanent injury. The doctor testified that plaintiff "will get worse in time," but the doctor was not asked about the length of time involved or about any future worsened condition. The trial court awarded damages for "injuries, disability, pain and suffering." We cannot determine from the record whether the award for "injuries" included damages based on the erroneous finding of permanent injury.

The evidence of plaintiff's physical symptoms caused by the accident, of the change in his ability to work, and of his pain, is substantial and supports the damage award. However, no claim is made that these items show a permanent injury. See Morris v. Rogers, supra. Because we cannot determine whether a portion of the damage award is based on the erroneous finding of "permanent injury," we cannot affirm the damage award.

The judgment is reversed. The cause is remanded with instructions to make new findings as to plaintiff's damages, excluding any damages for a "permanent injury," and enter a new judgment consistent with the findings. The new findings are to be made on the basis of the record, without taking additional evidence. Compare Morris v. Rogers, supra.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

484 P.2d 1279

STATE of New Mexico, Plaintiff-Appellee,

v.

Leo CHAVEZ, Defendant-Appellant.

No. 532.

Court of Appeals of New Mexico.
March 19, 1971.
Rehearing Denied April 14, 1971.
Certiorari Denied May 5, 1971.

Joseph A. Roberts, Chavez & Roberts, Santa Fe, for appellant.

James A. Maloney, David L. Norvell, Attys. Gen., John A. Darden, Asst. Atty. Gen., Santa Fe., for appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of an aggravated battery that inflicted great bodily harm on the victim. Section 40A-

3–5, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969). Defendant contends: (1) the statute is unconstitutionally vague; (2) there is no evidence that defendant's acts caused great bodily harm; (3) the court erred in failing to instruct the jury that "great bodily harm" had to be of a permanent nature; and (4) the jury should have been instructed on a lesser included offense.

Section 40A–3–5, supra, reads:

"A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

"B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

"C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony."

Alleged unconstitutional vagueness.

Subdivision A of the above quoted statute defines the crime of aggravated battery. Whether the crime is a misdemeanor or a felony depends largely, as shown by subdivisions B and C, on the nature of the injury inflicted. Defendant says the severity of punishment depends on "a result, not an act." Defendant asserts the statute "* * * is contrary to the general purpose of criminal statutes which is [to] proscribe acts * * *." He claims "* * * a person must have a reasonable degree of foreseeability as to the effects of his act. * * *" In substance, defendant contends the statute is unconstitutionally vague because he could not foresee the degree of his crime when he committed it.

Defendant also argues that § 40A–3–5, supra, is unconstitutionally vague, as a whole, when compared to § 40A–3–4, N.M.S.A.1953 (Repl.Vol. 6) which, in defining a simple battery, does not include an intent to injure. He contends that simple battery "* * * is a petty misdemeanor, and aggravated battery is a misdemeanor unless there is present the element of great bodily harm."

The two statutes, §§ 40A–3–4 and 40A–3–5, supra, specifically define the crimes involved. Each step—the simple battery, the aggravated battery which is a misdemeanor and the aggravated battery which is a felony—is clearly defined. Specific acts are prohibited in each of these three crimes. Further, the argument that the severity of the punishment depends on the result rather than the act, is fallacious. If the defendant did not commit the acts identified in § 40A–3–5(C), supra, his aggravated battery is not defined as a felony.

State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct.App.1969) states:

"The 'vagueness' rule requires that the statutory language convey a sufficiently definite warning of the proscribed conduct. If the language is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, then the statute violates due process. * * *"

The statutes here involved convey a definite warning of the proscribed conduct. Section 40A–3–5, supra, is not unconstitutionally vague either when its subsections are compared or when the entire section is compared with § 40A–3–4, supra. Compare State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct.App.1969).

Evidence of great bodily harm.

Defendant was charged with aggravated battery that inflicted great bodily harm. In the instruction defining the material elements of the crime, the jury was told that one of the elements to be proved beyond a reasonable doubt was that defendant "* * * did inflict great bodily harm upon Manuel Archuleta,." The instruction accords with § 40A–3–5, supra.

Defendant claims: "The main factual issue of this appeal is the lack of evidentiary proof as to the cause of the loss of the left eye of Manuel Archuleta. The main legal issue in this point is whether New Mexico adopts the rule of proximate cause in criminal cases, or adopts the rule of direct causation in criminal cases."

The evidence shows that defendant struck his victim in the eye during a fight. According to the victim the eye was removed some months later because of an infection. There is no medical testimony connecting the infection with defendant's blow to the victim's eye. The trial court sustained defendant's objection when the lay victim attempted to testify as to the causal connection. We agree with defendant that there is no evidence of a causal connection between the blow and the removal of the eye. Compare State v. Ewing, 79 N.M. 489, 444 P.2d 1000 (Ct.App.1968).

There is evidence that during the fight another person kicked the victim in the face. Defendant seems to argue that this kicking shows an intervening cause between defendant's blow and the removal of the victim's eye. The kicking incident is simply not pertinent to the issue; there is no evidence that the kicking involved the eye or in any way caused the removal of the eye.

There is evidence that after defendant hit the victim in the eye, apparently with his fist, the victim "couldn't see anything" and was never again able to see with that eye. This evidence connected defendant's blow with the loss of sight in the victim's eye.

The issue the jury was to decide was whether defendant's admitted battery inflicted great bodily harm on his victim. Rephrased, it is whether that battery caused the great bodily harm. New Mexico Supreme Court decisions seem to indicate that "proximate cause" is sufficient; that a defendant's act need not be a direct (that is, immmediate) cause. State v. Fields, 74 N.M. 559, 395 P.2d 908 (1964); State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961). We do not concern ourselves with the type of causation in this case because the loss of sight was great bodily harm. That loss of sight, under the evidence, was proximately and directly caused by defendant.

Failure to instruct that great bodily harm must be permanent.

Defendant contends the instruction is erroneous that tells the jury there must be proof beyond a reasonable doubt that defendant inflicted great bodily harm on his victim. The asserted error is that the instruction should have told the jury the great bodily harm must be of a permanent nature.

There is no merit to the contention. The trial court defined "great bodily harm" to the jury. The definition was consistent with the statutory definition, § 40A–1–13, N.M.S.A.1953 (Repl.Vol. 6). Omitting the references to a high probability of death and to serious disfigurement, great bodily harm was defined to include an injury "* * * which results in permanent or protracted loss or impairment of the function of any member or organ of the body."

Great bodily harm is thus defined to include a permanent loss or impairment (a permanent injury). To say that great bodily harm, which includes a permanent injury, must be of a permanent nature is a redundancy. Further, the inclusion of the words requested by defendant would have been confusing to the jury, since by statutory definition, § 40A–1–13, supra, the loss or impairment is not required to be permanent. A protracted loss or impairment is sufficient.

At a minimum, here, there is a protracted loss of sight when the victim never again had sight in the eye struck by defendant.

Lesser included offenses.

The issue submitted to the jury was whether defendant had committed an aggravated battery which inflicted great bodily harm on the victim. Defendant claims the trial court erred in failing to submit forms of verdict which included lesser of-

fenses. He claims the jury should have been instructed on the offense of simple battery. This claim, however, was not presented to the trial court and, therefore, will not be reviewed. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970); State v. Carrillo, 80 N.M. 697, 460 P.2d 62 (Ct.App. 1969), cert. denied 397 U.S. 1079, 90 S.Ct. 1532, 25 L.Ed.2d 815 (1970).

Defendant contended before the trial court that aggravated battery amounting to a misdemeanor should be submitted to the jury as a lesser included offense. This misdemeanor is committed when the injury inflicted by the aggravated battery is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment. Section 40A-3-5(B), supra.

Defendant has the right to have the jury instructed on lesser included offenses if there is some evidence tending to establish the lesser included offenses. State v. Anaya, 80 N.M. 695, 460 P.2d 60 (1969); State v. James, 76 N.M. 376, 415 P.2d 350 (1966); State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct.App.1969). Defendant claims there is evidence that the victim's injury was temporary. The claim is erroneous. The only evidence is that the victim never again had sight in the eye struck by defendant. There is no evidence that the injury was temporary. The trial court properly refused to instruct on aggravated battery as a misdemeanor. State v. Anaya, supra.

There is an additional reason why this point is without merit. Although defendant asked the trial court to instruct on the asserted lesser included offense, he offered no instruction on this subject. Thus, there is no basis for a review under this point. State v. James, supra.

The judgment and sentence is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 1283

STATE of New Mexico, Plaintiff-Appellee,

v.

Barry Lee FOSTER, Defendant-Appellant.

No. 637.

Court of Appeals of New Mexico.

April 23, 1971.

Ray Tabet, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of robbery and aggravated battery, defendant appeals. Sections 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6) and 40A-3-5, N.M.S.A.1953 (Repl.Vol. 6, Supp. 1969). The issues concern: (1) change of venue; (2) various evidentiary matters; and (3) a trial amendment to the aggravated battery charge.

Change of venue.

Defendant moved for a change of venue claiming that because of public excitement or local prejudice an impartial jury could not be obtained in Bernalillo County. The basis for the motion was "extensive publicity resulting from the case" and "extensive publicity resulting from his conviction" in another case a few weeks earlier.

At the hearing on the motion defendant introduced, as evidence, copies of newspaper articles. These articles were mostly concerned with accounts of testimony given at the earlier trial. One of the articles also states: "Pending against Foster are robbery and aggravated battery charges stemming from a May 27 service station holdup which saw the attendant doused in gasoline and set afire by the fleeing robber." Defendant characterizes the quoted material as "[t]ypical of the publicity that was given." Defendant asserts the publicity was by newspaper articles, television stories and "shots of Mr. Foster taken by T.V. reporters."

In denying the motion, the trial court found that the evidence did not justify a change of venue, and there was no public excitement or local prejudice that would indicate an impartial jury could not be obtained in Bernalillo County. The trial court could properly reach this result because the evidence presented by defendant was limited to the newspaper articles and because those articles, in themselves,

neither established public excitement nor prejudice, making a fair trial impossible. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct.App.1969), cert. denied, 398 U.S. 904, 90 S.Ct. 1692, 26 L.Ed.2d 62 (1970).

Defendant does not attack the decisions in *Deats* and *Lindsey*. Instead, he contends that evidence, introduced by the State in opposition to the motion, had no probative value. We are not concerned with the quality of the evidence offered by the State, because the trial court could deny the motion on the basis of the evidence offered by defendant. Defendant had the burden of persuasion, and defendant's evidence was not persuasive of the probability that a fair trial could not be obtained in Bernalillo County. Deats v. State, supra.

Evidentiary matters.

(a) Admission of photographs.

Defendant complains of the admission of five photographs which show portions of the service station where the robbery took place. He asserts the photographs were improperly admitted because there was no showing as to who took the photographs, when they were taken and whether they accurately and fairly represented the scene at the time of the crime. It is doubtful that all of these objections were presented to the trial court; however, we will assume all of these objections are properly before us.

The victim of the crime had described its occurrence, testifying as to the location of various items in the service station; the location of the robber and the victim's location when certain events occurred. The victim did not know who took the photographs or when they were taken (he was in the hospital), but he did testify that each of the photographs fairly and accurately represented the things shown in the photographs and fairly and accurately represented what he had described in his testimony. This was sufficient foundation for the admission of the photographs. United States v. Hobbs, 403 F.2d 977 (6th Cir. 1968), Annot., 9 A.L.R.2d 899 (1950); Millers' Nat. Ins. Co., Chicago, Ill. v. Wichita Flour Mills Co., 257 F.2d 93 (10th Cir. 1958); compare State v. Webb, 81 N. M. 508, 469 P.2d 153 (Ct.App.1970), and cases cited therein.

(b) Admission of evidence about blood.

The first officer to arrive at the service station after the crime testified that three of the photographs of the station showed blood. He also testified that a wrench, which he found at the scene, had a substance on it which "appeared to be blood." Defendant contends this testimony should not have been admitted because of lack of a proper foundation.

No scientific tests were made to establish the identity of the substance testified to be blood. Defendant complains that the officer's testimony was improperly admitted because it was not shown that the officer "was able to form such an opinion." This contention misconstrues the evidence.

The officer testified that upon arrival he saw the victim who had been burned, and who was bleeding. He observed "* * * blood splattered all over the floor and the walls, on items, on the cash box, on the counter, * * *" and a large trail of blood leading from the cash box towards the rear of the office. He had seen fresh blood in numerous investigations. It was bright red when he saw it. He testified: "It was blood. I saw it." He "preserved" the scene, and observed the photographs being taken.

His testimony that the photographs showed blood, and that there was blood on the wrench was properly admissible. The foundation for this testimony was based on his observations and his experience. This foundation was sufficient. Compare Reid v. Brown, 56 N.M. 65, 240 P.2d 213 (1952); State v. Miller, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969).

(c) Identification evidence.

Defendant complains of the admission of various testimony going to the identification of defendant. This testimony involves (1) the victim identifying defendant from photographs; (2) the victim identifying defendant at a lineup; (3) a witness identifying the defendant at a lineup; (4) the persons in the lineup not being the same as those in the photographs; (5) the persons in the lineup and the persons in the photographs not having the identical hair-style as defendant. Defendant asserts that showing the photographs to the victim and the witness before conducting the lineup "imprinted" a suggestion that defendant was the person who committed the crimes.

All of these complaints are of no avail to defendant. No objection was made to the admission of the testimony about which defendant now complains for the first time. Since the complaints now made were not presented to the trial court, they have not been preserved for review. State v. Chavez (Ct.App.), 82 N.M. 569, 484 P.2d 1279, decided March 19, 1971; State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App. 1970).

Further, our review of the record shows identification of defendant was not suggested by the photographs, nor to the persons identifying defendant in the lineup, nor by the lineup procedures; nor were any of these items conducive to irreparable mistaken identification. See State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.1970). The record before us shows a fair police investigative procedure.

The victim and the witness were shown seven photographs. The victim identified defendant; the witness was not sure. The victim and the witness viewed the lineup separately and identified defendant in the lineup independent of one another. Both had been told, by the police, that the persons in the lineup were not necessarily the same persons as those in the photographs. The hair-styles were not sufficiently distinct, except in one of the photographs (which was not defendant), to suggest an identification. No extreme variation in height nor body build is shown by the lineup photograph.

(d) Sufficiency of the evidence.

Defendant contends that if the foregoing evidence is excluded the evidence is insufficient to sustain the conviction. We have held the foregoing evidence was properly admitted over claims made for its exclusion. However, even if the foregoing evidence had never been presented, the evidence is sufficient.

The victim, a service station attendant, was robbed, beaten and set on fire with gasoline. This took place about 4:00 a. m. No one else was present at the station when a person drove into the lighted area of the station and asked to have the car's oil checked. This customer stood within six or seven feet of the attendant while the oil was checked and followed the attendant into the station when the attendant went after oil. The crime then occurred. The attendant testified that he recognized the customer as one who had been to the station before; that he had a good look at him before he went for the oil; and that defendant was the person involved. Compare State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (Ct.App.1968).

Defendant seems to assert that his alibi evidence, to the effect that he was in Hobbs, New Mexico when the crime occurred, should have been believed. Both the victim, and the witness who identified defendant as being at another service station one-half mile from the station involved two hours before the crime, contradicted the alibi. The issue was one of credibility and was for the jury. State v. Ford, supra.

Trial amendment to the charges.

The aggravated battery charge in the indictment was that defendant "* * * did inflict bodily harm or death could be inflicted by setting the said Arthur Jerry Wallace afire." A doctor testified as to the victim's injuries. He testified there was some permanent disfigurement as a re-

sult of the burns. He testified, in answer to a hypothetical question, that the burns could have caused death or serious bodily injury. He also testified that in this case the victim did not have that type of injury because he did not inhale the gases from the fire, "* * * but patients with this kind of burn frequently are very severely injured." The doctor also testified that at time of trial the victim was not disabled.

At the conclusion of the doctor's testimony, and for the purpose of having the indictment conform to the evidence, the State moved to amend the aggravated battery charge. The motion was granted. As amended, defendant was charged with committing the aggravated battery "'* * * in a manner whereby great bodily harm or death can be inflicted, * * *'" See § 40A-3-5(C), supra. The amendment is authorized by § 41-6-37, N.M.S.A.1953 (Repl.Vol. 6).

Defendant does not claim the trial court erred in authorizing the amendment. The issue under this point involves the denial of two defense motions, both of which are based on § 40A-3-5(B), supra. This portion of the aggravated battery statute makes the crime a misdemeanor, instead of a felony, where the injury inflicted "* * * is not likely to cause death or great bodily harm. * * *"

Defendant moved that the indictment be dismissed on the basis that the doctor's evidence showed the victim's injuries were not disabling and "* * * the prosecution has failed to prove that the defendant is guilty of any charge other than a misdemeanor, * * *" By defendant's own argument, the trial court properly refused to dismiss the indictment, as amended. If, as defendant asserts, the doctor's testimony "proved" an aggravated battery that was a misdemeanor, rather than a felony, this would only go to limiting the issues to be submitted to the jury. If the misdemeanor was proved, the indictment should not be dismissed. Compare § 41-6-33, N.M.S.A.1953 (Repl.Vol. 6). Another answer to this question is that it was for the jury to determine whether the injuries inflicted were not likely to cause death or great bodily harm (the misdemeanor), or whether the aggravated battery was committed in a manner whereby great bodily harm or death could be inflicted (the felony).

Defendant also moved for a continuance and for leave to have the victim examined by a physician to determine the extent of the injury. Defendant asserts his motion for continuance was for the purpose of determining strategy to meet the "surprise" testimony of the doctor. The trial court denied the motion for continuance on the basis that the defendant had not been prejudiced in his defense upon the merits. See § 41-6-37, supra.

Asserting the trial court erred in refusing to grant a continuance, defendant contends there was "sufficient question" concerning the injuries; that he should have been permitted to have the victim examined by a physician of his own choice in order to meet the amended indictment. We disagree.

There is nothing to show that the defense was surprised by the doctor's testimony, nothing to show that the defense did not know what the doctor's testimony would be or could not have learned about the testimony in advance of trial. Trial was on September 28th; the last examination on which the doctor's testimony was based was September 13th. No claim is made that defendant was unable to learn what the doctor's testimony would be in advance of trial. Compare State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct.App.1970); State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970).

Nor is there anything in the record showing defendant was prejudiced in his defense on the merits. Even if the doctor's testimony might be read to raise a question as to the degree of the aggravated battery, this could have favored the defendant because, if so read, it opened the possibility that defendant's crime was a misdemeanor rather than a felony.

Further, the question of the injury inflicted in committing the aggravated battery was involved in the charge prior to the trial amendment. Since the trial amendment did no more than clarify the ambiguous language of the original indictment, and since the manner of committing the aggravated battery was an issue in the case from the beginning, defendant's effort to have the case continued to have the victim examined by a doctor was an effort to do what could have been done prior to trial.

Section 41-6-37(4), supra, states: "No appeal * * * based on any such * * * variance shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits." Here, there is no affirmative showing of prejudice; the only showing in the record is that the defendant was not prejudiced by the amendment to the indictment.

The judgment and sentence is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 1288

STATE of New Mexico, Plaintiff-Appellee,

v.

Jessie GUTIERREZ, Defendant-Appellant.

No. 608.

Court of Appeals of New Mexico.

April 16, 1971.

Certiorari Denied May 12, 1971.

Thomas E. Jones, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Special Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Appealing his conviction of burglary, § 40A–16–3, N.M.S.A.1953 (Repl.Vol. 6), defendant raises six issues. They are: (1) continuance; (2) sufficiency of the evidence; (3) expert testimony; (4) advice of rights; (5) a refused instruction; and (6) verdict based on passion and prejudice.

Continuance.

Defendant was arrested February 10, 1969. An attorney was appointed to represent him the same day. He was arraigned March 17th. Trial was set for June 17th; notice to that effect was mailed by the District Attorney's office on May 14th. Defendant's counsel obtained a continuance on the basis that defendant had not cooperated with counsel and counsel was unprepared for trial.

The case was then set for trial on July 29th, but defendant disqualified the designated judge, thus obtaining further delay.

The case was next set for trial on December 5th but this was vacated at the request of the State. The next trial date was December 19th. Defendant sought a continuance "* * * until some future date at which time the Defendant will be more competent to assist in his defense. * * *" The continuance was granted.

The case was tried February 2, 1970, almost a year after the arrest date and the date defendant was provided with counsel. Defense counsel sent defendant notice of this trial date on January 17, 1970. Defendant apparently made no reply to this notice, with the result that on the morning of trial and during the trial, counsel found it necessary to interview witnesses.

Here, defendant claims the trial date was premature; he claims the trial should not have taken place when it did because defendant had not cooperated with counsel in preparing for trial.

Section 21–8–9, N.M.S.A.1953 (Repl.Vol. 4) states in part: "A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; * * *" Here, the claim that the trial shouldn't have been held on February 2, 1970, is based on defendant's failure to cooperate with his counsel. Implicit in this claim is the view that trials should not be held except at the convenience of a defendant. That is not the law. Compare State v. Guy, (Ct.App.), 82 N.M. 483, 483 P.2d 1323, decided April 2, 1971. There was no error in trying the case on February 2, 1970.

Sufficiency of the evidence.

Defendant asserts the State failed to prove the corpus delicti in that it failed to demonstrate either that something was stolen or the ownership of property involved. This argument is based on a misunderstanding of the crime of burglary.

Section 40A–16–3, supra, requires an unauthorized entry of a structure "* * * with the intent to commit any felony or theft therein." Defendant was charged with unauthorized entry with an intent to commit a theft in the structure entered—here, a school cafeteria. The crime of burglary was complete at the moment defendant made an unauthorized entry with intent to commit a theft. To prove the burglary, the State was not required to prove either that defendant stole something or ownership of any articles stolen. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967); State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970); State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App.1967).

There is substantial evidence of an unauthorized entry with intent to commit a theft. A window in the cafeteria building had been broken. Defendant was seen emerging from the cafeteria building on a Sunday evening carrying a box. The frozen food locker in the cafeteria had been emptied. Frozen food was found in the cafeteria and outside the cafeteria door. Almost 100 pounds of frozen food was found next to the fence surrounding the school grounds. Defendant was headed in the direction of the frozen food near the fence when apprehended.

Expert testimony.

There is evidence that defendant was a narcotics addict. Dr. Penley testified as to the ability of a narcotics addict to function and as to defendant's mental capacity on the day of the crime. Defendant seeks a reversal on the basis that Dr. Penley's testimony was "incredible." There is no need to examine Dr. Penley's testimony. If this testimony was unworthy of belief, defendant has no one to blame but himself. He interjected his addiction into the trial; he called Dr. Penley as a defense witness. Defendant's complaint of prejudice from evidence that he brought into the case provides no basis for appellate relief. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970); State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969).

Advice of rights.

Defendant claims the arresting officer failed to advise him of his constitutional rights prior to interrogating him. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

The only evidence concerning any questioning of defendant before being advised of his constitutional rights is the testimony of the arresting officer. Defendant testified he had no conversation with the arresting officer before being advised of his rights.

According to the officer: he came up to defendant and asked defendant if he was the janitor, the defendant replying "yes;" he asked if defendant would let him in with a key and the defendant said "yes;" they started walking toward the door; defendant started to put his hands in his pockets and the officer told him not to do so; when they got to the door defendant said he didn't have a key. The officer testified that defendant's "no key" remark shocked him and "* * * I said, you are a burglar, aren't you, and he said yes, I am." The officer then arrested defendant.

The circumstances, as shown by the officer's testimony, show no coercive effect on defendant's admission that he was the burglar. The testimony was not inadmissible under Miranda v. Arizona, supra. State v. McLam, 82 N.M. 242, 478 P.2d 570 (Ct.App.1970); compare State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct.App. 1969); and the third statement in State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct.App. 1969). Further, defendant did not object to the officer's testimony; his claim of not being properly advised of his rights is raised for the first time in this appeal. Even if the officer's testimony should not have been admitted defendant is in no position to complain. State v. Smith, 80 N. M. 126, 452 P.2d 195 (Ct.App.1969).

Refused instruction.

The trial court refused to give a requested instruction to the effect that

involuntary drunkenness, from either alcohol or drugs, would excuse or justify criminal behavior. We do not consider the correctness of the legal rule which defendant sought by the requested instruction. We do not consider the legal rule because there was no factual basis for the rule; specifically, there was no evidence of involuntary intoxication. State v. Romero, 73 N.M. 109, 385 P.2d 967 (1963); compare State v. Herrera, (Ct.App.), 82 N.M. 432, 483 P.2d 313, decided March 12, 1971.

Verdict based on passion and prejudice.

Defendant asserts the verdict was based on passion and prejudice. He claims the evidence is insufficient to convince reasonable people that he committed the burglary; therefore, the jury convicted him because he was a narcotics addict. Our answer has two parts: (1) substantial evidence shows he committed the burglary, and (2) the record does not establish any passion against or prejudice to defendant from the evidence that he was an addict. This claim is pure speculation and is without merit.

The judgment and sentence is affirmed. It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

484 P.2d 1291

STATE of New Mexico, Plaintiff-Appellee,

v.

Danny BALDONADO, Defendant-Appellant.

No. 627.

Court of Appeals of New Mexico.

April 30, 1971.

Robert B. Stephenson, Nordhaus & Moses, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Ray Shollenbarger, Sp. Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of rape and aggravated assault. Sections 40A–9–2 and 40A–3–2, N.M.S.A.1953 (Repl.Vol. 6). The issue involves the victim's out-of-court identification of defendant from a photograph. The claim is that this extra-judicial identification was unnecessarily suggestive and conducive to irreparable mistaken identification. See State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970).

During the rape, which occurred in the victim's home at night, the victim removed a wallet from a back pocket of the pants of the rapist. When police arrived to investigate the crime, she handed the wallet to an officer. She had not looked inside the wallet. The officer took a driver's license from the wallet, showed the victim the picture on the license and asked: "Is this the man?" According to the officer, the victim looked at the picture "real close" and said: "'That's the man that was in the house.'"

Later in the morning, the victim went to the police station to sign a complaint. After the victim gave a description of the intruder, another officer showed the victim pictures taken from the wallet. One was the picture on the driver's license. Another was a picture of a person in military uniform. She again identified the intruder as the person shown in the photographs; "* * * the driver's license looked more like him than the one in uniform did."

Defendant argues that showing the photographs to the victim suggested an identification. "* * * She naturally assumed that the picture taken from the billfold must be the picture of her attacker." In support of this contention, he cites various cases. None need be reviewed because all are distinguishable by their facts.

The facts here show the only light in the room was from a heater. The victim stated: "* * * the room was bright enough that I could see"; that she was able to see the defendant by this light; that she could see the room well.

The victim's testimony is to the effect that the intruder was in her presence for approximately an hour and forty minutes. At the police station she described the intruder by height, style of haircut and "big lips."

According to the victim, she had never seen her assailant prior to the crime, and did not see him again until the time of trial. At the trial, the victim picked the defendant out from a group of people and testified she identified him from the memory she had of him from the night of the rape. She never identified anyone other than defendant.

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) states:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, * * * The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, * * * Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. * * *"

Here, it is not suggested that it was unnecessary to resort to photographic identification. The assault with a knife and the rape had occurred only a short time earlier. The perpetrator was at large. It was essential that the officer swiftly determine whether he was on the right track. The justification for the officer asking "is this the man" was compelling.

There was little chance, under the circumstances of the case, that showing the victim the driver's license photograph led to misidentification of defendant. The victim had been with the rapist more than an hour and a half. She had seen the rapist by the available light throughout this period of time. She took a good look at the driver's license photograph before making the identification. The question "is this the man" does not suggest identification. The only suggestive aspect is that the victim knew the driver's license came from the wallet she had taken from the rapist's pocket.

There was no tentative identification and no identification of any other person. Notwithstanding cross-examination, the victim displayed no doubt as to her identification of defendant. Further, she picked defendant from a group of people in the courtroom. Compare Simmons v. United States, supra.

We hold the officer's conduct was not impermissibly suggestive. Under the circumstances of this case we cannot say there is a substantial likelihood of misidentification. Thus, answering defendant's specific claim, it was not error to admit evidence of the out-of-court identification of defendant from the photographs, and the in-court identification was not inadmissible because of taint by an illegal pretrial identification.

The judgment and sentences are affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

484 P.2d 1293

Thomas Leo WARREN, Plaintiff-Appellee,

v.

James H. ZIMMERMAN, Individually, and Charles Zimmerman, a minor, Defendants-Appellants.

No. 616.

Court of Appeals of New Mexico.

April 2, 1971.

Certiorari Denied May 12, 1971.

Jay L. Faurot, James L. Brown, Farmington, for appellee.

Eugene E. Klecan, Albuquerque, for appellants.

OPINION

SPIESS, Chief Judge.

This appeal is from an order granting a new trial entered upon a timely motion filed by plaintiff following a judgment upon a jury verdict in defendant's favor.

Plaintiff has moved to dismiss the appeal upon the ground that the order granting a new trial is not appealable. We so hold, and dismiss the appeal. Our Rules of Civil Procedure relating to a party's motion for a new trial, material here, are set forth in § 59(a) and (b) [§ 21-1-1(59) (a) (b), N.M.S.A.1953, Repl.Vol. 4] of the Rules of Civil Procedure. The pertinent portion of the rules follows:

> "A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted. * * *"

> "A motion for a new trial shall be served not later than ten days after the entry of the judgment. * * *"

It appears to be conceded, and we think correctly so, that an order granting a new trial following a jury verdict but before entry of judgment on the verdict is not

appealable. Scott v. J. C. Penney Company, 67 N.M. 219, 354 P.2d 147 (1960).

The defendant takes the position that an order granting a new trial after entry of judgment on the verdict is appealable. In so asserting, he relies upon the following language of Supreme Court Rule 5(2) [§ 21-2-1(5) (2), N.M.S.A.1953, Repl.Vol. 4].

> "Appeals shall also be allowed by the district court, and entertained by the Supreme Court, in all civil actions, from such interlocutory judgments, orders or decisions of the district courts, as practically dispose of the merits of the action, so that any further proceeding therein would be only to carry into effect such interlocutory judgment, order or decision. Appeals shall also be allowed by the district court, and entertained by the Supreme Court, from all final orders affecting a substantial right made after the entry of final judgment."

Defendant argues that his appeal is authorized because it is a final order "* * * affecting a substantial right made after entry of final judgment. * * *"

From our research we reach the conclusion that a question of our jurisdiction is presented. Our jurisdiction is limited under the rule upon which defendant relies to final orders affecting a substantial right made after entry of final judgment. Finality of the judgment affected is necessary to confer a right of review. In this instance the finality of the judgment was suspended upon the filing of the motion for new trial. In Moore's Federal Practice, (Second Edition) Vol. 6A, page 3853, the author, upon substantial authority, states:

> "A motion for new trial that is timely and properly made suspends the finality of the judgment and tolls the running of the time for taking an appeal. If the motion is denied, the full time for appeal commences to run anew from the date of the entry of the order denying the motion. If the motion is granted, or if the court orders a new trial on its own initative, [sic] the finality of the judgment is destroyed and an appeal may not be taken until the entry of a final judgment following the new trial. * * *"

The provisions of our Rule 59 are substantially the same as those of Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 59. These Rules were the subject of consideration by Professor Moore in his comment which we have quoted. We further call attention to Supreme Court Rule 5(1) [§ 21-2-1(5) (1), N.M.S.A.1953 (Rpl.Vol. 4)], which provides: "* * * If a timely motion is made pursuant to any of the District Court rules hereinafter enumerated, the running of the time for appeal is terminated and the full time for appeal fixed in this section *commences to run* and is to be computed from * * * *denying* a motion for a new trial under Rule 59 * * *" The language of this rule indicates that the granting of a new trial is not appealable.

The Rule 5(2), *supra*, upon which defendant relies, in our opinion is not applicable because the judgment affected by the order granting a new trial was not a final judgment.

Defendant next asserts that the motion to dismiss the appeal should be denied because the order grants a new trial upon errors of law and practically disposes of the merits.

This contention is based upon the portion of Rule 5(2), *supra*, allowing an appeal from an interlocutory order which practically disposes of the merits of the action so that any further proceedings would only be to carry into effect the interlocutory order.

In our view, an order granting a new trial is not generally such an interlocutory order as practically disposes of the merits of the action because the order granting a new trial contemplates another trial at which the issues will be determined and in itself does not dispose of the merits of the action.

Defendant argues that the order granting a new trial was granted because the court considered that two errors had been com-

mitted; (1) instructing the jury on contributory negligence, and (2) in ruling upon the admission of certain medical records. These errors, defendant says, were errors of law and not matters which would have warranted the court in exercising a discretion in granting the new trial. We are not shown that the matters considered by the trial court as sufficient to warrant a new trial are so disassociated from evidentiary facts which could be presented that the outcome of the case is determined on the entry of the new trial order. Consequently, defendant has not shown that the new trial order practically disposes of the merits of the action. In re: Richter's Will, 42 N.M. 593, 82 P.2d 916 (1938) is cited as authority by defendant for the proposition that an order granting a new trial based upon errors of law is applicable.

In our view the decision In re: Richter's Will is not to be accorded the broad interpretation which defendant undertakes to apply to it. The basis of this decision is expressed in the following language.

> "* * * For purposes of our review, it is as though the trial court upon setting aside the verdicts had entered judgment for appellees. A pure question of law is presented which we are disposed to settle now. The granting of a new trial for the reasons set forth in the trial court's opinion, viewed in the light of appellant's announcement that he has no more evidence to offer, is such an order 'as practically disposes of the merits of the action,' * * *"

We have not been shown, nor are we able to determine from the record presented here that the granting of a new trial in the instant case can be treated as equivalent to setting aside the verdict and entering judgment for plaintiff. We do not consider Milosevich v. Board of County Commissioners, 46 N.M. 234, 126 P.2d 298 (1942), as requiring us to hold that the new trial order in the case is appealable. The appeal is accordingly dismissed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

484 P.2d 1295

STATE of New Mexico, Plaintiff-Appellee,

v.

Raymond SANCHEZ, Avelino Sanchez, Defendants-Appellants.

No. 583.

Court of Appeals of New Mexico.
April 23, 1971.
Dissenting Opinion May 7, 1971.

Leon Taylor, Albuquerque, for appellants.

David L. Norvell, Atty. Gen., Santa Fe, Frank N. Chavez, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

Raymond Sanchez was convicted of burglary and larceny. Avelino Sanchez was convicted of burglary, larceny and unlawfully taking a vehicle. Sections 40A–16–3, N.M.S.A.1953 (Repl.Vol. 6), 40A–16–1, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969), and 64–9–4, N.M.S.A.1953 (Repl.Vol. 9, pt. 2). Both defendants appeal. The issues involve: (1) probable cause for arrest and (2) sufficiency of the evidence.

Probable cause for arrest.

Defendants moved to suppress evidence taken from the car in which they had been riding shortly before their arrest. Suppression of this evidence was sought on the basis there was no probable cause for their arrest. By "probable cause" for arrest we mean "reasonable ground for belief of guilt." State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct.App.1970). See State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136 (1967).

The officer testified he received a radio report that a burglary was in progress at a specified residence; "[t]hat two subjects in a foreign dark green car were seen at the area. * * *" Enroute to the residence, the officer was advised by the radio operator "* * * that the subjects were leaving and heading east on Gun Club [Road], * * *" There is no contention that the radio operator did not have probable cause to relay this information to the officer. See Whiteley v. Wyoming Penitentiary Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). This was just prior to 10:00 a.m.

The officer proceeded east on Gun Club Road. He observed a small green foreign car with two persons in it turning south onto Isleta from Gun Club Road. It was the only green car on the road. At this point, he recognized Raymond as a passenger in the car. The officer followed the green car until it pulled into the driveway of a known "fence." At this point, he recognized Avelino as the driver of the car. He had known both defendants previously. Raymond got out of the car and went up to the door of the "fence's" house, then returned to the car.

The car then started out of the driveway. The officer testified: "* * * and when they saw me approaching they backed off, went back into the driveway and defendant Raymond Sanchez jumped out of the car and ran." Avelino stayed in the car. When the officer got up to the car he saw a television set, two guns and a pair of binoculars. The officer arrested Avelino "for burglary." This was at approximately 10:00 a.m. Raymond was also arrested "for burglary" a short time later.

Defendants correctly point out that the arresting officer "* * * did not have a description of the reported burglars * * *, did not know what items (if any) were stolen * * * and had only a vague general description of the car the burglars were said to be driving. * * *" Defendants state: "* * * No probable cause for arrest existed, but

at the most mere suspicion. * * *" We disagree.

The officer was informed of a burglary in progress; that two men were involved; that they left the burglarized residence in a green foreign car headed east on a certain road. The officer located such a car headed east on the identified road. This was the only car of such description on the road. He followed that car; there were two men in it; those men were the defendants. All of this occurred within the time period of "shortly before" until "approximately 10:00 a.m." These facts were sufficient for the officer, as a man of reasonable caution, to believe the defendants were the men who committed the burglary. The officer had probable cause for arrest. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); State v. Deltenre, supra; State v. Hilliard, supra; compare State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969). There being probable cause for arrest, the trial court did not err in denying the motion to suppress.

Sufficiency of the evidence.

It is not disputed that a burglary and a larceny occurred, and that the car involved had been taken from the owner without his consent. By motions for a directed verdict of acquittal, defendants challenged the sufficiency of the evidence. Whether the trial court properly denied these motions is the issue under this point.

Defendants claim there was insufficient evidence to tie them to the crimes of burglary and larceny; Avelino makes the same claim in connection with the unlawful taking of the car. Defendants assert: "* * * The only proof presented that could tie the defendants to the crime with which they were charged was the presence of stolen property in the car in which they were riding. * * *" They rely on State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct.App.1970), where it is stated: "* * * recently stolen property found in the exclusive possession of a defendant will not alone support a conclusion of guilt. * * *"

Here, there is more than possession of recently stolen property. The evidence, reviewed previously herein, connects the defendants with the residence that was burglarized and from which the property was taken.

As to the car charge, Avelino overlooks the definition of the crime. Section 64-9-4, supra, states in part: "Any person who shall take any vehicle intentionally and without consent of the owner thereof shall be guilty of a felony * * *." Avelino was driving the car, stolen approximately an hour prior to the arrest; the owner testified he gave no consent to Avelino to have the vehicle in his possession. As a part of his alibi defense, Avelino testified he had borrowed the car from an unidentified person several miles from the point the car was taken. Nevertheless, Avelino's testimony is evidence of an intentional taking. The only item for which there is no direct evidence is that of criminal intent, that is, a conscious wrongdoing. See State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969). The inference of conscious wrongdoing could properly be inferred from the evidence of the place where the car was taken, the admission that Avelino had taken the car, and the evidence that no consent had been given.

Defendants, however, claim their convictions rest on circumstantial evidence which fails to meet the requirements of the circumstantial evidence rule. As stated in State v. Beachum, supra, the circumstances "* * * must point unerringly to the defendant, and be incompatible with, and exclude every reasonable hypothesis other than his guilt * * *." In this case, the evidence of the time factors, distances, observations of defendants, locations, and possession of the stolen goods points unerringly to defendants and excludes every reasonable hypothesis other than guilt.

The judgment and sentences of Avelino Sanchez are affirmed. The convictions of Raymond Sanchez are affirmed.

However, the record shows that Raymond Sanchez was convicted of Counts II and III and acquitted of Count I. He was not sentenced for his conviction under Count III but was sentenced under Counts I and II. The cause is remanded for the purpose of imposing a sentence upon Raymond Sanchez consistent with the Counts under which he was convicted.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge.

I join in the affirmance of the burglary and larceny convictions but dissent from the affirmance of the conviction of Avelino Sanchez for unlawfully taking a vehicle.

SUTIN, Judge (dissenting).

A dissenting opinion is the expression of a difference of opinion in the philosophy of the law. Public interest and the legislative policy of adopting criminal statutes, apart from the criminal code, are involved. Whether this dissent has any value or whether it will have any future effect, depends upon the passage of time. A review of dissenting opinions in New Mexico proves that in some instances, they have made effective the principle that law is justice.

Avelino Sanchez was indicted, convicted and sentenced for the unlawful taking of a vehicle, contrary to § 64–9–4(a), N.M.S.A. 1953 (Repl.Vol. 9, pt. 2). He was sentenced for a period of not less than one year nor more than five years, the sentences to run consecutively not concurrently with convictions and sentences for burglary and larceny.

Section 64–9–4(a), supra, reads as follows:

> "(a) Any person who shall take any vehicle intentionally and without consent of the owner thereof shall be guilty of a felony. The consent of the owner of the vehicle to its taking shall not in case be presumed or implied because of such owner's consent on a previous occasion to the taking of such vehicle by the same or a different person."

Count I of the indictment reads as follows:

> "On or about the 8th day of December, 1969 in the County of Bernalillo, State of New Mexico, the said AVELINO SANCHEZ and RAYMOND SANCHEZ, did take a vehicle, towit: A 1964 Toyota Corona, New Mexico License No. 2–K7552, intentionally and without consent of Sosten H. Mares, owner thereof."

The criminal complaint filed the same day the indictment was returned contains identical language. There was no charge that the acts constituting the defense were "unlawfully or feloniously" done, nor does this language appear in the statute. A penal statute must be strictly construed, since every man should be able to know with certainty when he is committing a crime. State v. Buford, 65 N.M. 51, 331 P.2d 1110 (1958).

Neither this Count I nor the statute states a criminal offense.

We want to approach this problem from two points of view. First, assuming the statute to be constitutional, (1) was the indictment and information valid? (2) Was there substantial evidence that Avelino Sanchez was guilty? Second, is this statute constitutional?

1. Was the Indictment and Information valid, and was there Substantial Evidence that Avelino was Guilty?

The only evidence in the record on this subject was that Mr. Mares, the owner of the car, did not know who took his car from its parked position, but he did not give Avelino permission to remove his car. Approximately an hour thereafter, Avelino was driving the car. There was no evidence of "criminal intent." This is an essential element of the "crime." State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App.1969).

No instructions were given the jury on "criminal intent." This is mandatory. State v. Craig, 70 N.M. 176, 372 P.2d 128 (1962). The only instructions on the above statute and information were as follows:

"* * * To this indictment the defendants have pleaded Not Guilty, and this plea of Not Guilty puts upon the state the burden of proving to your satisfaction and beyond a reasonable doubt all the material allegations of the indictment. The indictment itself is not evidence before you but is merely the formal presentment or charge upon which the defendants are put to trial."

* * * * * *

"(INSTR. NO. 2) You are instructed that the definitions of the crimes with which the defendants are charged are as follows:

"As to Count I: Any person who shall take any vehicle intentionally and without consent of the owner thereof shall be guilty of the crime of Unlawful taking of a vehicle."

* * * * * *

"(INSTR. NO. 6) You are instructed that larceny includes the concept of criminal intent. In addition, it includes an intention to permanently deprive the owner of possession of his property. Such intention, to permanently deprive the owner of possession, is not an essential element of a statute prohibiting the intentional taking of a vehicle without the consent of the owner."

The trial court did not instruct the jury that the taking of the vehicle must be knowingly and feloniously done as set forth in State v. Austin, supra. If criminal intent is a constituent part of the crime to be charged, the failure to allege such intent that the acts constituting the offense were "unlawfully and feloniously done" is a fatal defect. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941); § 41-6-16, N.M.S.A.1953 (Repl.Vol. 6).

All of this means (1) that the indictment and criminal complaint were fatally defective; (2) that "criminal intent" was not an issue in the case; and (3) that "criminal intent" is not an essential element to prove a felony in New Mexico. In view of this error, it is wrong to impose a consecutive penalty on Avelino.

2. Is the Statute Constitutional?

State v. Austin, supra, held § 64-9-4(a) constitutional. No authority is cited to support this conclusion. It appears to be the only constitutional decision on this statute in judicial history. The Supreme Court previously held § 64-9-4(b), N.M.S.A.1953 (Repl.Vol. 9, pt. 2), constitutional. State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960). This section provides that "Any person who shall steal any automobile tire, * * * from an automobile shall be guilty of a felony." This is an anti-theft provision. "The word to 'steal' and commit 'larceny' mean one and the same thing." State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

In *Austin*, the court held that the legislature cannot forbid the doing of an act and make its commission a crime without the presence of criminal intent. It decided that criminal intent, although not in the statute, was required under the statute. Nevertheless, it believed the trial court solved the problem by charging the jury that the taking of the vehicle must be knowingly and feloniously done. Therefore, the "defendant has been found guilty of conscious wrongdoing in taking the vehicle." The opinion concluded: "Section 64-9-4(b), [sic (a)], supra, is not unconstitutionally vague or uncertain."

In effect, State v. Austin, supra, added the words "knowingly and feloniously" to the statute. It now reads:

"(a) Any person who shall 'knowingly and feloniously' take any vehicle intentionally and without consent of the owner thereof shall be guilty of a felony."

Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952), defines felonious as follows:

"* * * Webster's International Dictionary defines 'felonious' as 'malicious,'

villainous, wicked, traitorous, perfidious; in law * * * done with intent to commit a crime.' A widely accepted instruction to jurics of the meaning of 'feloniously' as used in informations and indictments in New Mexico is that the act was done wrongfully and wickedly, and that the accused, if convicted, may be punished by imprisonment in the penitentiary. Grand larceny is a felony in this state."

District courts cannot solve constitutional problems by instructing a jury under a void statute. Courts of appeal cannot clothe themselves in legislative robes and make language criminal. State v. Austin, supra, should be overruled. The courts must interpret the laws, not make the laws.

In De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694 (1922), an act of the legislature was held unconstitutional. The state contended that, if the act contained further words, the constitutional objection would be obviated. The state argued that the intent of the legislature was established by testimony in the case and such intent necessitated the use of these additional words in reading the act. The court said:

"To uphold such a proposition would be to say that a court may take testimony as to legislative intent in passing an act, and, having ascertained such intent to its own satisfaction, it may interpolate in the statute provisions which are not contained therein, and which may be exactly contrary to what was the actual intent. What the Legislature intends is to be determined, primarily by what it says in the act. It is only in cases of ambiguity that resort may be had to construction. Courts cannot read into an act something that is not within the manifest intention of the Legislature, as gathered from the statute itself. To do so would be to legislate, and not to interpret. There is no ambiguity in this statute, and it neither requires nor admits of construction. * * *"

This language has been followed in judicial tradition in various shades. We must not amend statutes by judicial construction because this is a legislative, not a judicial function. State v. Gallegos, 48 N.M. 72, 145 P.2d 999 (1944).

In 1948, the Supreme Court held the embezzlement statute unconstitutional. State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948). The reason for its decision was that the statute omitted essential elements of the crime of embezzlement. Of particular importance to the public is the following language:

"A penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it *must* know that his act is criminal when he does it." [52 N.M. at 18, 189 P.2d at 995]. [Emphasis added.]

State v. Prince, supra, had a dissenting opinion, claiming that the element of fraudulent intent may be read into the statute. This has been an effective dissent because the courts, thereafter, adopted this rule by distinguishing the *Prince* case.

State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct.App.1969), held the arson statute unconstitutional because it was not a reasonable exercise of the police power. The statute involved was parallel to the automobile statute. It read in part: "Arson consists of the intentional damaging by any explosive substance or setting fire * * *." The court's analysis of the arson statute covers the instant case like a glove. It proves that judicial thought changes with authorship.

Can a person who intentionally borrows a neighbor's or a friend's car without consent to deliver a child to a hospital, run an errand, or seek relief of some nature, actually know that his act is criminal when he does it? Does a son who intentionally takes his father's car without consent to see a movie know that his act is a felony?

State v. Diamond, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921), gives the answer.

"Where the statute uses words of no determinative meaning, or the language is,

so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." [27 N.M. at 485, 202 P. at 991].

See also State v. Buford, supra.

Laws 1953, ch. 138 is "An Act Relating to Motor Vehicles and Trailers; Establishing a Division of Motor Vehicles within the Bureau of Revenue; Defining the Powers and Duties of the Division; and Providing: * * * *6. Anti-Theft Provisions.*"

This Act contains 125 sections, thirteen articles, and repealed many previous enactments of the legislature, including § 68–151, N.M.S.A.1941, being Laws of *1919,* ch. 150, § 28, providing penalty for use of vehicle without the owner's consent; § 68–149, being Laws of *1917,* ch. 66, § 1, providing penalty for taking vehicle for temporary use without permission; and § 68–150, being Laws of *1917,* ch. 66, § 2, giving district courts exclusive jurisdiction in cases concerning the taking of a vehicle for temporary use without permission. The statutory history on this subject began in 1915. Chapter 98, Laws of 1915.

For a period of 54 years, no charges were filed and convictions appealed which required an interpretation of the statutes. State v. Austin, supra, opened the door in 1969.

Article IX of the 1953 Act is entitled *Special Anti-Theft Laws,* and covers §§ 86 to 93. Section 89 is the provision involved in the present case, and is entitled Unlawful Taking of a Vehicle. But § 89 is not Anti-Theft, and is not "Unlawful Taking." The legislature intended § 89 to be "Anti-Theft."

"Theft" is not defined in New Mexico. It gives the appearance of being identical with larceny. See § 40A–16–1, N.M.S.A. 1953 (Repl.Vol. 6, Supp.1969), where the title of the Act of larceny refers to "theft of a firearm." It has different meanings. Unauthorized uses of automobiles are not Anti-Theft laws. 52A C.J.S. Larceny § 1(2). Anti-Theft laws must mean laws against stealing, larceny, felonious taking and removing with intent to deprive the owner thereof, obtaining by false pretense, trick or artifice, etc. See Words & Phrases Vol. 41(A), p. 93, et seq.; 52A C.J.S. Larceny, §§ 1(2) and 1(3); 50 Am.Jur. 2d Larceny, § 2. "Theft" means larceny or stealing. The above statute does not contain any such language. The legislature intended § 64–9–4(a), supra, to be a criminal statute with criminal elements—anti-theft provisions.

When the statute was first adopted in 1915, the motor vehicle must have been a precious article in New Mexico not to be used by anyone other than the owner for any purpose without his consent. Perhaps it was easy to drive away a car in 1915. The statute has never contained within its language any reason why a felony exists when a member of the family takes the car without papa's consent, or a neighbor drives another's car down the street to visit a friend, or takes a child to a hospital for care, or does not wrongfully deprive the owner of possession of the car without the owner's consent.

In his final argument to the jury, the assistant district attorney stated:

"* * * [O]f course you will have to determine whether Avelino Sanchez actually *stole* this car or whether, as he said, some friend loaned it to him with all the property in it with no questions asked. If you decide there was a *theft* of the car and Avelino was the person *stealing* the car, then you need to decide whether Raymond was with him. * * * It is obvious that one of them *stole* that car. * * *" [Emphasis added.]

Statements of stealing the car are sprinkled throughout the argument. This indicates belief on the part of the assistant district attorney that § 64–9–4(a) was a

"theft" or "larceny" statute and "criminal intent" was necessary.

If criminal intent is required and proved, guilt can be established under the larceny statute. Section 40A–16–1, N.M.S.A.1953 (Repl.Vol. 6). This section provides that "Larceny consists of stealing of anything of value which belongs to another." Perhaps the district attorney could not prove Avelino stole the Toyota Corona. But he could argue this matter even though Avelino was only driving the car without Mares' consent. Therefore, Avelino must go to the penitentiary.

Section 64–9–4(a), supra, is unconstitutional. It violates public interest by making criminal, acts which are not theft and are not unlawful or felonious. Motor vehicles are not items of property which can escape from the meaning of theft and larceny. If motor vehicles can escape, then the legislature can add horses, bicycles, flowers, water hoses and lawn mowers.

I, accordingly, respectfully dissent.

484 P.2d 1405

Herman LEVINE, Administrator of the Estate of David Allen Levine, Deceased, Plaintiff-Appellant,

v.

GALLUP SAND AND GRAVEL COMPANY, Inc., a corporation, Robert Spencer and Tony Kozeliski, Defendants-Appellees.

No. 568.

Court of Appeals of New Mexico.
April 30, 1971.
Certiorari granted May 19, 1971.

Lorenzo A. Chavez, Melvin L. Robins, George Jones, III, Albuquerque, for appellant.

Denny, Glascock & McKim, Gallup, Joseph E. Roehl, Allen C. Dewey, Farrell L. Lines, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for appellees.

OPINION

SPIESS, Chief Judge.

The principal issue presented by this appeal is whether, in a civil action, a poll of the jury may be demanded by a party as a matter of right, or whether the request for a jury poll is to be treated as discretionary.

The action was one seeking recovery of damages for wrongful death. Judgment on the verdict was rendered on May 28, 1970, for the defendant, and, in addition to the general verdict, the jury answered two special interrogatories favorable to defendant.

After the verdict and special interrogatories had been returned in court and read by the judge, appellant requested that the jury be polled, to which the court responded: "That's a discretionary matter. I decline to poll the jury."

Thereafter, judgment was entered upon the verdict and on June 15, 1970, notice of appeal was filed. On June 25th, 1970, a motion was filed by appellee requesting the court to reconvene the jury to the end that it could be polled. It appears that on July 1st, 1970, the jury was reconvened "for the purpose of polling the jury on Special Interrogatory No. One: Special Interrogatory No. Two and on the verdict of the jury."

Rule 48(b), § 21-1-1(48) (b), N. M.S.A.1953 (Rpl.Vol. 4) provides:

"* * * Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is his verdict; if upon such inquiry or polling, more than two [2] of the jurors disagree thereto, the jury must be sent out again but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case."

Except for the comment by the court in State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955) this is a case of first impression in this state. There are a substantial number of cases in other jurisdictions which disclose a division of authority between the two theories advanced here. The majority view is that a poll of the jury may be demanded as a matter of right. See Annot. 71 A.L.R.2d at page 644, and cases therein cited.

Abbott's Civil Jury Trials, 907 (5th Ed., 1935), contains the following statement, in support of which a number of authorities are cited:

"Either party has an absolute right to have the jury polled on the rendering of their verdict, whether sealed or oral, at any time before it is recorded, unless the right has been expressly waived."

In James v. State, to Use of Dass, 55 Miss. 57, 30 Am.Rep. 496 (1877), the court said:

"* * * Examining the jury by the poll is the only recognized means of ascertaining whether they were unanimous in their decision, and the right to do this must exist. It is affirmed in criminal cases, and is equally applicable in civil cases. In no other way can the right of parties to the concurrence of the twelve jurors be so effectually secured as by entitling them to have each juror to answer the question, *'Is this your verdict?'* in the presence of the court and parties and counsel. By this means any juror who had been induced in the jury-room to yield assent to a verdict, against his conscientious convictions, may have opportunity to declare his dissent from the verdict as announced. Parties should have the means to protect themselves against the consequences of undue influences of any sort, which, employed in the privacy of the jury-room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury."

This statement has, in substance, been referred to in a number of later cases. In view of the beneficial purpose served by a jury poll, together with the substantial judicial support accorded it as a right of parties to litigation, it should, in our opinion, be treated as a matter of right and we do so hold.

Appellee additionally contends that the request for a poll of the jury was not properly preserved because appellant failed to state his position to the trial court that the right should be treated as absolute and not discretionary. We disagree. In our view, appellant's demand was clearly sufficient to make known to the court the action which he desired the court to take, and it therefore, complied with Rule 46 of the Rules of Civil Procedure (§ 21-1-1(46), N.M.S.A.1953 (Repl.Vol. 4).

Appellee further contends that appellant's request for a jury poll was improper because it failed to specify whether the poll was being requested only as to the general verdict, or whether it was to include the answers to the special interrogatories.

In accordance with Rule 48(b), either party may require the jury to be polled. A juror can be asked only "if it is his verdict;"—"his verdict" as applied to special interrogatories coupled with a general verdict in a broad sense means to us the con-

clusion of the jury upon the issues submitted. The general words imply that the jury may be polled upon the entire verdict consisting of the general verdict and special interrogatories. See Wells v. Lone Star S.S. Co., 1 S.W.2d 925 (Tex.Civ.App. 1927); and Creighton v. Kiehl, 60 Ohio App. 86, 19 N.E.2d 653 (Ct.App.1938); Compare Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940).

We are of the further opinion that polling of the jury after it had been recalled which, as stated, occurred over a month following the rendition of the verdict and fifteen days after the notice of appeal had been filed, was not timely and did not cure the error.

The judgment of the trial court is reversed with directions to grant appellant a new trial.

It is so ordered.

HENDLEY, J., and DEE C. BLYTHE, District Judge, concur.

485 P.2d 352

TOWN OF CLAYTON, New Mexico, Plaintiff-Appellee,

v.

S. D. MAYFIELD and Gracie L. Mayfield, Defendants-Appellants.

No. 9155.

Supreme Court of New Mexico.

May 24, 1971.

John P. Isaacs, Clayton, E. Byron Singleton, Amarillo, Tex., for appellants.

Krehbiel & Alsup, Clayton, for appellee.

OPINION

COMPTON, Chief Justice.

From an order enjoining appellants from operating a junk yard upon premises located within the Town of Clayton, New Mexico, and directing appellants to abate the nuisance by removing the accumulated junk therefrom, the appellant, S. D. Mayfield, has appealed.

Appellant has raised several points of alleged error. The controlling issue, however, is whether the actions of the appellant constitute an abatable common law nuisance. The trial court specifically found that appellant's operation of the junk yard constituted a common law public nuisance as being contrary to the public health, safety and welfare.

Appellant asserts that the finding has no substantial support in the evidence. The junk yard was unfenced. There is evidence substantial in character that the junk yard constituted a fire and health hazard due to the accumulation of combustible materials in and around the cars; that the accumulation of water in and under the cars created a breeding ground for mosquitoes; that the accumulation of old cars were readily accessible, and attractive to young children, thus posing a safety hazard. Appellant himself testified that he intended to burn the old cars on the premises while processing them and that due to the nature of the combustible material in the cars, a great deal of smoke would be created. And there is evidence that the value of residential property in the area had decreased due to the presence of appellant's operation.

It is firmly established in this jurisdiction that nuisances that adversely affect the public health, welfare or safety may be enjoined. Mahone v. Autry, 55 N.M. 111, 227 P.2d 623, and cases cited therein.

Appellant asserts that appellee had an adequate remedy at law through the

enforcement of one of various town ordinances. It is noted that all the ordinances referred to by him contain penal provisions for violations. The fact that acts constituting a public nuisance are punishable criminally does not deprive equity of its power to enjoin a public nuisance where there is ample proof of irreparable injury to the public health, welfare or safety. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273. We think this is a proper case for injunctive relief.

A discussion of other points urged by appellant would serve no beneficial purpose. The judgment should be affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

485 P.2d 353

John E. HOCKETT and Mary Belle Hockett, his wife, Plaintiffs-Appellees,

v.

John O. WINKS and Lucille C. Winks, his wife, Defendants-Appellants.

No. 9094.

Supreme Court of New Mexico.

May 10, 1971.

Rehearing Denied June 1, 1971.

Olmsted & Cohen, Santa Fe, for appellants.

Jones, Gallegos, Snead & Wertheim, Santa Fe, for appellees.

OPINION

OMAN, Justice.

This is a suit filed in Rio Arriba County, New Mexico, to recover damages arising out of an agreement for the sale and purchase of property. Defendants were the sellers, and plaintiffs the purchasers. Following a trial to the court without a jury, a judgment was entered against defendants. Defendants appeal. We reverse.

The first issue to be resolved is that of the theory upon which plaintiffs pleaded and tried their case in the court below. Defendants take the position this is a suit for claimed fraud and deceit, and, consequently, plaintiffs had the burden of establishing each essential element of the tort by clear and convincing evidence. McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967); Visic v. Paddock, 72 N.M. 207, 382 P.2d 694 (1963); Sauter v. St. Michael's College, 70 N.M. 380, 374 P.2d 134 (1962).

Plaintiffs, on the other hand, urge they are entitled to rely upon the principle announced in Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954), which principle plaintiffs assert "is a different cause of action from" the tort of fraud and deceit. We agree the principle announced in Ham v. Hart, supra, is not consistent with the tort of deceit upon which plaintiff relied in Sauter v. St. Michael's College, supra, but we do not agree plaintiffs are entitled to rely upon the principle announced in Ham v. Hart, supra.

It is apparent to us from the record that plaintiffs did proceed in deceit, and the trial court so treated the case. A few of the matters in the record which lead us to this conclusion are: (1) in their complaint plaintiffs alleged and relied upon claimed false and fraudulent representations and fraudulent concealment of certain defects; (2) in a "Memorandum in Response to Order for Pretrial Conference," plaintiffs stated that defendants made false and fraudulent representations and concealed known latent defects, and stated the legal issue on the question of liability was "[w]hether * * * the fraud of the defendants caused plaintiffs' damages"; (3) in their requested findings of fact, plaintiffs requested the trial court to find, and the trial court did find, that certain representations made by defendants were false, were known by defendants to be false, were made by defendants with intent to deceive plaintiffs, and plaintiffs relied upon same to their damage; (4) in their requested conclusions of law, plaintiffs requested, and the court concluded accordingly, that defendants committed a tortious act in fraudulently inducing plaintiffs to enter into the contract in question; and (5) the trial court concluded, without question or objection from plaintiffs, that the fraudulent acts had "been established by clear and convincing evidence."

Plaintiffs rely upon the following language in Rein v. Dvoracek, 79 N.M. 410, 444 P.2d 595 (Ct.App.1968): "Even though the trial court may have erred in applying the actionable fraud rule of the Sauter case in some of the findings and conclusions, the result reached was not altered thereby, * * *." This is not the case now before us. The trial court in this case did not confuse the rules, but made findings and conclusions consistent with the actionable deceit rule of the Sauter case, which was the rule under which plaintiffs here pleaded and tried their case. They may not properly change the theory of their case on appeal. Pfleiderer v. City of Albuquerque, 75 N.M. 154, 402 P.2d 44 (1965); Board of Education, etc. v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968).

However, insofar as the opinion in Ham v. Hart, supra, held that the principle of equity applicable to the rescission of contracts is applicable in the tort of deceit (or fraud and deceit as it is sometimes called), undertook to modify the essential elements of the tort of deceit, or sought to create a new tort predicated upon the stated principle of equity, we disavow and hereby overrule that opinion.

The question next presented on this appeal is simply whether the evidence was sufficient to establish clearly and convincingly each essential element of the tort of deceit. A review of the record convinces us that some of the trial court's findings are not supported by substantial evidence [see for a definition of substantial evidence, McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968)], and none of the essential findings are supported by clear and convincing evidence. Evidence is clear and convincing in support of the essential elements of deceit only if it instantly tilts the scales in the affirmative on each element, when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the charges as to each element are true. Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955).

The judgment should be reversed with directions to the trial court to enter judgment in favor of defendants and dismiss plaintiffs' complaint with prejudice.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

485 P.2d 355

Amy B. COLE, formerly Amy B. Adler, Plaintiff-Appellant,

v.

Scott ADLER, Defendant-Appellee.

No. 9152.

Supreme Court of New Mexico.
April 26, 1971.
Rehearing Denied June 1, 1971.

Grantham, Spann, Sanchez & Rager, Albuquerque, for plaintiff-appellant.

Rodey, Dickason, Sloan, Akin & Robb, James C. Ritchie, L. Lanning Sigler, Albuquerque, for defendant-appellee.

OPINION

COMPTON, Chief Justice.

Appellant filed this action in Bernalillo County District Court seeking divorce, division of property and custody of the three minor children of the parties. A separation agreement entered into by the parties

was approved by the trial court in the final decree. Custody of the three children of the parties was awarded to appellant in accordance therewith. Thereafter, appellant changed her domicile to California and a supplemental agreement was executed by the parties and approved by the court, whereby custody of the children remained in the appellant in California during the regular school term each year with the appellee to have their custody in New Mexico during the summer months.

In August, 1969, the appellee refused to return the youngest child, Brian Adler, to California and filed a motion to modify the decree to obtain custody of this child. Appellant resisted the motion and upon a hearing, the court modified the prior decree and supplemental agreement and awarded custody of the child to appellee with visitation rights in the appellant. Appellant has appealed from this order.

Appellant challenges the sufficiency of the evidence to warrant a finding by the trial court that a change of custody was for the best interest and welfare of the child. We find the evidence to be substantial. Compare State v. Armstrong, 82 N.M. 358, 482 P.2d 61; Samora v. Bradford, 81 N.M. 205, 465 P.2d 88; McCauley v. Ray, 80 N.M. 171, 453 P.2d 192; Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625. The evidence amply supports the finding of the trial court. The evidence showed that the child had not been able to function properly while in school in California due to various emotional problems precipitated from the environment in which he had been living. These problems were alleviated to a great extent when the boy was with the appellee and had begun attending school in Albuquerque on a regular basis, with special assistance.

Trial courts are vested with wide discretion in determining whether a custodial decree should be modified. Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570. In making such determination the welfare of the child is the controlling factor. Terry v. Terry, 82 N.M. 113, 476 P.2d 772; Fox v. Doak, 78 N.M. 743, 438 P.2d 153. The evidence shows that the trial court was guided by this criterion in changing custody.

The order of the trial court should be affirmed.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

485 P.2d 357

FORT SUMNER MUNICIPAL SCHOOL BOARD, Appellant-Respondent,

v.

Frances Eileen PARSONS and New Mexico State Board of Education, Appellees-Petitioners.

No. 9263.

Supreme Court of New Mexico.

May 19, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 559, 82 N.M. 610, 485 P.2d 366, be and the same is hereby returned to the Clerk of the Court of Appeals.

485 P.2d 357

STATE of New Mexico, Plaintiff-Appellee,

v.

Alcario N. GALLEGOS, a/k/a Alex Michael Gallegos, Defendant-Appellant.

No. 9262.

Supreme Court of New Mexico.

May 19, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 602, 82 N.M. 618, 485 P.2d 374, be and the same is hereby returned to the Clerk of the Court of Appeals.

485 P.2d 357

STATE of New Mexico, Plaintiff-Appellee,

v.

John Wesley PAUL, Defendant-Appellant.

No. 9260.

Supreme Court of New Mexico.

May 19, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 566, 82 N.M. 619, 485 P.2d 375, be and the same is hereby returned to the Clerk of the Court of Appeals.

485 P.2d 358

Matias L. CHACON, as Administrator of the Estate of Henry C. Salazar, Sr., Deceased, Plaintiff-Appellant,

v.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Defendant-Appellee.

No. 580.

Court of Appeals of New Mexico.

April 9, 1971.

Rehearing Denied May 6, 1971.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Joseph A. Roberts, Chavez & Roberts, Santa Fe, for plaintiff-appellant.

Bob Barberousse, Jones, Gallegos, Snead & Wertheim, Santa Fe, for defendant-appellee.

OPINION

SPIESS, Chief Judge.

Matias L. Chacon, Administrator of the estate of Henry C. Salazar, Sr., deceased (appellant), appeals from the granting of summary judgment in an action against Mountain States Mutual Casualty Company (Mountain States). Questions presented upon appeal are (1) whether there existed disputed questions of material fact, and (2) whether the facts, if undisputed, would support the summary judgment.

Appellant's complaint was based upon a contention that appellee, Mountain States, had acted in bad faith in resorting to arbitration to secure a determination of its liability under uninsured motorists coverage, which resulted in appellant's damage.

In considering the motion for summary judgment the trial court had before it the pleadings, affidavits, together with exhibits which formed a part of the pleadings and the affidavits. The uncontroverted material facts before the court are as follows: Mountain States issued a policy of automobile insurance to Salazar, Sr. The policy provided uninsured motorist coverage to the limit of $5,000.00, and contained an arbitration clause which could be resorted to at the option of either party in the event of disagreement with respect to the right

or amount of recovery under the uninsured motorist provision. The arbitration clause provides:

> "ARBITRATION. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this part, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this part."

While this policy was in force the insured, Salazar, Sr., became involved in an automobile accident with one Serrano. No settlement having been effected between Salazar, Sr. and Serrano, or between Salazar, Sr. and Mountain States under the uninsured motorist provision of the policy, Henry C. Salazar, Jr., the son of the insured, completed forms calling for arbitration as between the insured and Mountain States. These forms were mailed, together with a check in the sum of $50.00, to American Arbitration Association. The Association declined, however, to proceed with arbitration and the check was destroyed. There is no showing as to why the Association declined to proceed with the arbitration.

Thereafter, an attorney representing the insured, Salazar, Sr., wrote Mountain States asking its permission "to sue the uninsured motorist in order to establish liability." Mountain States declined to authorize such suit indicating that the rights of the parties were governed by the arbitration clause.

Thereupon, Henry C. Salazar, Jr., designating himself as a representative of Salazar, Sr., deceased, commenced an action in the district court of Rio Arriba County numbered 10102, for recovery of damages against Serrano. To this action Mountain States was joined as a party defendant under an allegation that it (Mountain States) "* * * is deemed a necessary and indispensable party defendant should recovery be made by the Plaintiff against the defendant, SAMMY MANUEL SERRANO." Mountain States moved to dismiss the complaint as to it on the ground that the complaint "* * * fails to state a cause of action against Mountain States Casualty Company upon which relief can be granted."

A demand for arbitration was then made by Mountain States as against Salazar, Sr. Notice of the time and place of hearing was given by the arbitrator to the interested parties, hearing was held and an award in favor of Mountain States and against Salazar, Sr., was made upon a finding that "* * * the sole cause of the accident in question was the negligent operation of a motor vehicle by the Respondent, Henry C. Salazar, Sr. * * *" The award was not challenged.

Thereafter an order was entered in Cause No. 10102 granting Mountain States' motion and dismissing the action as to it, from which no appeal was taken.

Appellant states: "The crucial issue in this matter is the issue of bad faith by the Defendant insurance company in resorting to arbitration because of a possible counterclaim. It is the contention of appellant that this action of bad faith by appellee (Mountain States) prevented a judicial determination and the possible recovery of damages over and above $5,000.00 against Sammy Manuel Serrano."

We do not understand that resorting to arbitration as between Mountain States and appellant could have prevented a judicial determination of liability and damage between the appellant and Serrano. There is nothing in the policy before us indicat-

ing that consent on the part of Mountain States is essential to the maintenance of such action. The policy simply provides that:

> "No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company."

We see no reason, nor has any been suggested to us indicating that resort to arbitration on the part of Mountain States would affect its liability to defend a claim or counterclaim which might have been asserted by Serrano against appellant. The arbitration proceedings demanded by Mountain States and to which the interested parties, including appellant, participated and in which an award was made, did prevent a judicial determination as between appellant and Mountain States. Design Engineering Corporation v. Jenkins, 74 N. M. 603, 396 P.2d 590 (1964).

In our view, the record upon which the summary judgment was entered contains nothing from which it could reasonably be said that Mountain States was actuated through bad faith in resorting to arbitration. No facts, in our opinion, are disclosed which can reasonably be interpreted as indicating bad faith on the part of Mountain States. Conduct to be characterized as bad faith must be based upon unfaithfulness to a duty of an obligation that is owing. Cernocky v. Indemnity Insurance Company of North America, 69 Ill.App.2d 196, 216 N.E.2d 198 (1966).

It seems to us that Mountain States had no duty or obligation to submit the issue of liability as between it and appellant to a court rather than through arbitration as specified in the policy, nor can it be charged with bad faith in pursuing the arbitration proceeding to which appellant participated.

In support of his position appellant has cited Levy v. American Automobile Insurance Co., 31 Ill.App.2d 157, 175 N.E.2d 607 (1961), and Andeen v. Country Mutual Insurance Company, 70 Ill.App.2d 357, 217 N.E.2d 814 (1966).

In *Levy* the question presented and determined was whether plaintiff's action in reducing his claim to judgment against the uninsured motorist without first obtaining the written consent of the insurance company as required by the terms of the policy was valid. The parties had negotiated but refused to arbitrate. Thereafter the plaintiff had sued the uninsured party without obtaining consent of the insurance company and had reduced his claim to judgment establishing liability on the part of the uninsured motorist. It is apparent that the facts and issues in *Levy* do not involve any issue in the case at bar.

In *Andeen* the assured, without obtaining consent of the insurance company, obtained a judgment against the uninsured motorist. The insurance company contended that it was not liable because judgment had been entered against the uninsured motorist without its consent. This contention was based upon the language of the policy involved which is not similar to the policy in the case at bar. It was likewise contended that the judgment against the uninsured motorist was not binding upon the insurance company. As to this contention the court pointed out that the policy contained no such provision. The questions determined in *Andeen* are not before us in the case at bar.

A number of other cases have been cited by appellant some of which relate to the failure or refusal of an insurance company to settle a claim within the policy limits. Others, although involving uninsured motorist coverage do not, in our opinion, lend support to appellant's position here.

Appellant has cited a number of incidents from which he says conflicting infer-

ences as to bad faith on the part of Mountain States can reasonably be drawn thus precluding summary judgment. Hewitt-Robins, Inc. v. Lea County Sand and Gravel, Inc., 70 N.M. 144, 371 P.2d 795 (1962).

We have carefully considered each of these incidents and do not agree that an inference, or inferences of bad faith on the part of Mountain States can reasonably be drawn therefrom.

Appellant next contends that "* * * the evidence before the Court, regardless of inferences, would support a finding by the Trial Court that Defendant was not entitled to judgment as a matter of law."

He argues that agreements to arbitrate future disputes are void as against public policy, citing State ex rel. Duke City Lumber Company v. Wood, 81 N.M. 285, 466 P.2d 562 (1970).

Appellant takes the position that in view of this case "* * * the only proper way to determine a party's rights under the facts that are before the Court is to bring the matter to a judicial determination." We disagree.

In the *Duke City Lumber Company* case the court was called upon to enforce an agreement to arbitrate against the will of one of the parties to the agreement. In the present case a completed arbitration had occurred, both parties having participated and submitted their "proofs and allegations" to the arbitrator and an award was made.

This situation falls within Design Engineer Corporation v. Jenkins, supra, holding that parties under such circumstances are conclusively bound by the award. Hence, having participated in the proceedings appellant is in no position upon the grounds stated to challenge the proceedings or award.

In our opinion, the summary judgment was properly rendered and it should be affirmed.

It is so ordered.

HENDLEY, J., and DEE C. BLYTHE, District Judge, concur.

485 P.2d 361

Roger PATTISON, dba Yerba Feed Pens, Plaintiff-Appellant,

v.

A. T. FORD and Roosevelt County Electric Cooperative, Inc., a Corporation, Defendants-Appellees.

No. 619.

Court of Appeals of New Mexico.

April 30, 1971.

James C. Compton, Portales, for appellant.

Jay Morgan, Portales, for appellees.

OPINION

WOOD, Judge.

Plaintiff sought damages for alleged fraud in connection with two boilers and the cost of electrical service. Defendants moved to dismiss the complaint. In granting the motion, the trial court stated: "* * * assuming, for the purpose of the motion, that all allegations pleaded by the plaintiff are true, he is not entitled to the relief prayed for." Thus, the dismissal was for failure to state a claim upon which relief can be granted. Section 21-1-1(12)(b)(6), N.M.S.A.1953 (Repl.Vol. 4). The issue, then, in plaintiff's appeal, is whether "* * * it appears that plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. * * *" Jones v. International Union of Operating Engineers, 72 N.M. 322, 383 P. 2d 571 (1963). In deciding this issue, we examine the reasons relied on by the trial court in dismissing plaintiff's complaint.

The complaint alleges negotiations for electrical service were instituted by defendant Ford, acting on behalf of the electric cooperative; that Ford figured the cost of operating three boilers, eight hours per day, and figured 7,200 kw hours at a cost of 8 mills per kilowatt [sic], or $57.60 per day. It is alleged that this cost was figured on a blank agreement for electrical service, on a form prepared by the cooperative, and that "* * * a copy of said agreement for electric service, with the figuring as to the cost per kilowatt hour by the defendant Ford, and as represented to plaintiff, * * *" is Exhibit A to the complaint.

Subsequently, plaintiff signed a contract for electrical service, identified as Exhibit C to the complaint. Plaintiff alleges he did not read the contract before signing it because of Ford's "prior representations;" that the present "demanded charge" is four times the eight mill rate "quoted by the defendant Ford in his official capacity;" "* * * [t]hat plaintiff was assured by the defendant Ford, at the time of their first negotiations and thereafter, that all of the electricity charges would be as hereinabove represented * * *;" that "* * * [b]y reason of the specific statements and figures presented by the defendant Ford, * * *" plaintiff purchased the boilers and contracted for electrical service from the cooperative.

The elements of fraud are stated in Prudential Insurance Company of America v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967), and Sauter v. St. Michael's College, 70 N. M. 380, 374 P.2d 134 (1962). No claim is made and the complaint was not dismissed on the basis that the elements of fraud were not pleaded.

The trial court ruled that "* * * plaintiff has failed to allege any legal excuse to read the electric service agreement so signed by him. * * *" This is incorrect. Plaintiff alleged he was induced to enter the contract by Ford's prior fraud. As to fraud in the inducement see McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967). There are circumstances where a failure to read a contract, before signing it, does not bar recovery for fraud. See Davis v. Campbell, 52 N.M. 272, 197 P.2d 430 (1948); Morstad v. Atchison, T. & S. F. Ry. Co., 23 N.M. 663, 170 P. 886 (1918); Vermont Farm Mach. Co. v. Ash, 23 N.M. 647, 170 P. 741 (1918). Since, under facts provable under the claim, plaintiff might recover even though he failed to read the contract, the trial court erred in dismissing on this ground.

The trial court ruled that "* * * plaintiff is charged with knowledge of the schedule of rates contained in the contract, as shown by the exhibits. * * *" This

basis for dismissal is erroneous because the contract in the record before us, which is Exhibit C, contains no schedule of rates. A schedule of rates is a part of Exhibit A but there is nothing in the exhibits, nor in the complaint, indicating this schedule applies to the contract signed by plaintiff. The only cost figures in Exhibit C refer to a minimum kilowatt "demand" for billing purposes and a minimum monthly charge. Both minimums exceed the comparable minimums stated in Exhibit A. Defendants, in their brief, explain these charges and assert they do not represent a change in rates over the "preliminary figuring," but nothing in the record supports these assertions. We do not go outside the record. State v. Andrada (Ct.App.), 82 N.M. 543, 484 P.2d 763, decided March 26, 1971. With these discrepancies between Exhibits A and C, we cannot state that plaintiff would not be entitled to relief under any state of the provable facts.

The trial court ruled that: "* * * the form of agreement for electrical service and the large power service schedule, a copy of which is attached to the complaint as Exhibit 'A', and the contract signed by the plaintiff for electric service, a copy of which is attached to the complaint as Exhibit 'C', show the schedule of the charges to be made. * * *" We have previously pointed out that Schedule C does not show a schedule of charges; that it refers only to a minimum monthly charge and a minimum kilowatt "demand," both of which conflict with Schedule A and are unexplained in the record. Thus, any showing as to the charges to be made must appear in Schedule A.

One sheet of Exhibit A shows the calculation of 7200 kw hours at 8 mills per kilowatt hour. The same sheet contains the notation: "72 hrs = 10% load factor to get 8 mil [sic] rate." Defendants contend this notation shows the number of hours plaintiff would have to operate his equipment, and at what load factor, in order to reach an eight mill rate. Thus, defendants assert the notation on which they rely should be accepted as true, without any evidence concerning that notation. They disregard plaintiff's claim of a "quoted rate" of 8 mills.

Exhibit A contains a sheet which itemizes various items of equipment. Defendants state this is a listing of electrical equipment, other than the boilers. They assert plaintiff has ignored the amount of electrical energy this other equipment would use. The complaint, however, alleges that "all of the electricity charges would be as hereinabove represented;" that is, at the eight mill rate.

There are two sheets in Exhibit A which lend support to the view that the eight mill rate was part of a graduated scale of "energy" rates and that the energy rate was to be distinguished from a "demand" rate. Defendants assert that the various sheets in Exhibit A show plaintiff was furnished with information setting out the demand charges and the energy charges. The complaint alleges, however, that the "demanded charge" is four times the "quoted" eight mill rate. The fact that "demand" charges appear in Exhibit A does not answer plaintiff's claim that he was quoted an eight mill rate for all electrical charges.

Specifically, part of Exhibit A, on which plaintiff relies, does appear to contradict the "representations" on which plaintiff also relies. With this apparent contradiction, it cannot be held, without any explanation as to the figuring or the representations, that the figuring contained in Exhibit A "shows the schedule of charges to be made." Nor can we hold, in the light of the allegations of the complaint, that plaintiff cannot recover under any state of facts provable under the claim.

The order of dismissal is reversed. The cause is remanded with directions to set aside the order of dismissal and reinstate the complaint on the docket.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

485 P.2d 364

Helen P. LENNING, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Appellee.

No. 545.

Court of Appeals of New Mexico.

May 7, 1971.

Jerry Wertheim, Jones, Gallegos, Snead & Wertheim, Santa Fe, for appellant.

E. P. Ripley, Santa Fe, for State Bd. of Ed.

John W. Bassett, Jr., Atwood, Malone, Mann & Cooter, Roswell, for Roswell Bd. of Ed.

OPINION

HENDLEY, Judge.

The Local Board (Roswell Independent School District) refused to re-employ a tenure teacher (Mrs. Helen Lenning) for the school year 1970–71. The State Board (State Board of Education) affirmed the Local Board's decision. The teacher appeals direct to us pursuant to § 77–8–17, N.M.S.A. 1953 (Repl.Vol.1968).

We affirm.

The teacher contends that the grounds for which she was not re-employed are really unsatisfactory work performance and, accordingly, she was not afforded the procedural safeguards regarding conferences of State Board Rule 2–A, (Tenure) adopted October 16–17, 1968 and filed in the State Records Center on November 4, 1968 which provides in part:

"Pursuant to Section 77–8–18, NMSA, 1953, the New Mexico State Board of Education hereby adopts the following procedures to be followed by local boards prior to service of a notice of termination upon certified tenure personnel at the end of a school year for unsatisfactory work performance:

"1. Three (3) conferences shall be held with certified personnel with tenure prior to service of notice of termination upon them for unsatisfactory work performance at the end of a school year.

"2. Such conferences shall be held with the individual's immediate supervisor or such other person as the local board may designate.

"3. Written record shall be kept of all such conferences specifying the areas of unsatisfactory work performance, all action taken to improve such performance and all improvements made. These records shall be signed by both parties to the conference. In the event of refusal to sign, a notation shall be made of the

refusal. A copy of such record shall be given to the certified person."

The teacher was served with a notice of refusal to re-employ. The notice specified grounds relating to:

"* * * Incompetency, insubordination, breach of the terms of your 'Teacher's Contract' with the Roswell Independent School District, violation of Article 5130(5) of the Regulations of the Roswell Independent School District concerning the administration of corporal punishment by a teacher, and improper and unprofessional conduct. * * *"

The Local Board, after hearing, made Findings of Facts supporting each charge. The Local Board made Conclusions of Law regarding incompetency, insubordination, breach of teacher's contract, violation of Local Board regulation in administering corporal punishment, and actions which constituted improper and unprofessional conduct, and stated that each conclusion independently was good and sufficient cause for refusing to re-employ.

The State Board found no substantial departure from the procedures and regulations prescribed by the State Board, that there was evidence to substantiate the Local Board findings, and concluded that the decision of the Local Board should be affirmed.

We shall assume the Local Board's decision of refusal to re-employ was on the grounds of unsatisfactory work performance. Was there a substantial departure from Rule 2–A? We think not.

Subsection 2 of Rule 2–A requires that the conferences shall be held with the individual's immediate supervisor. The (immediate supervisor) principal attempted to meet with the teacher. The first time involved the teacher's evaluation wherein the principal was critical of the teacher striking students on the shoulder and head. The principal also referred to the teacher's need of improvement in dealing with colleagues, pupils and patrons, in handling problems and her instability. The teacher refused to sign the evaluation and returned it with a note stating that she would not sign until she had a conference with the personnel director or superintendent. The next attempt by the principal to confer with the teacher occurred when the teacher lowered a student's scholastic grade due to the student's attitude or deportment. A lowering of the grade for that reason was against school policy. The teacher refused to confer with the principal and told him "to tell it to her lawyer." No further conferences were attempted.

Although not necessary to support our conclusion the record shows that the President of the Local Board sitting as the presiding officer at the Local Board hearing stated into the record without objection:

"* * * March 17th the Superintendent responded to Mrs. Lenning's letter of March 14th, and also identified [sic] that after numerous conferences, that a conference would be available to her, and on March 24th there was a conference held between Mr. Cox, Mr. Luginbill and Mrs. Lenning * * *."

Rule 2–A subsection 2 is specific in that the conference must be with either the immediate supervisor (the principal) or someone else designated by the Board. The record does not disclose a designee.

Implicit in the rule is the requirement that the teacher cannot thwart the law or regulation by refusing to confer. The clear meaning of the rule is to assist the teacher in her duties as a teacher. In view of her refusal to confer, she cannot now be heard to complain of the failure to give her three conferences with the proceedings reduced to writing. The maxim of long standing in Anglo-American jurisprudence that "one may not profit by his own wrongdoing" is most appropriate.

The teacher also contends that the finding of the State Board regarding the findings of the Local Board was not supported by the record. We have carefully reviewed the record and conclude that the findings are supported by substantial evidence in every detail. Davis v. Padilla, 79 N.M. 753, 449 P.2d 661 (1969).

Accordingly, the conclusion of the State Board, that the decision of the Local Board refusing to re-employ the teacher for the school year 1970–71 should be affirmed, is supported by the findings. The actions of the State Board were neither arbitrary, capricious, unlawful, unreasonable (Board of Education of Village of Jemez Springs v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968)) nor unfair. Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., and DEE C. BLYTHE, District Judge, concur.

485 P.2d 366

FORT SUMNER MUNICIPAL SCHOOL BOARD, Appellant,

v.

Frances Eileen PARSONS and State Board of Education, Appellees.

No. 559.

Court of Appeals of New Mexico.

April 23, 1971.

Certiorari Denied May 19, 1971.

Charles S. Solomon, Santa Fe, for appellant.

Jerry Wertheim, Jones, Gallegos, Snead & Wertheim, Santa Fe, for appellee Frances Eileen Parsons.

E. P. Ripley, Santa Fe, for N.M. State Board of Education.

OPINION

WOOD, Judge.

The Local Board (Fort Sumner Municipal School District) decided not to reemploy a tenure teacher although retaining two non-tenure teachers. Mrs. Parsons, the tenure teacher, appealed to the State Board of Education. The State Board reversed the Local Board's decision. The Local Board has appealed directly to this court. See § 77-8-17(F), N.M.S.A.1953 (Repl.Vol. 11, pt. 1). The appeal presents questions as to: (1) how new evidence before the State Board is to be considered; (2) whether the Local Board's decision is supported by substantial evidence; and (3) the nature of the State Board's review.

How new evidence before the State Board is to be considered.

The Local Board was faced with a decreased enrollment of students and the concomitant decrease in funds. It determined that the school curriculum could be preserved but that the number of classes offered in certain subjects should be reduced. The reduction in classes was principally in areas in which Mrs. Parsons was certified to teach—English and Language Arts and Social Studies. With the reduction in classes, it was necessary to reduce the faculty. The Local Board determined that the faculty above the sixth grade level would have to be reduced by two. This reduction was reached by the resignation of one teacher and the decision not to re-employ Mrs. Parsons.

Although Mrs. Parsons was not to be reemployed, the Local Board retained two non-tenure teachers, Lewis and Williams. As a part of their duties, both non-tenure teachers were to teach subjects that Mrs. Parsons was qualified to teach. The evidence before the Local Board shows the subjects assigned to Lewis and Williams, which Mrs. Parsons was certified to teach, amounted to approximately one-half a full time teaching load.

Between the time of the Local Board hearing and the State Board hearing, Mrs. Parsons was certified to teach additional subjects. This "new evidence" was admitted by stipulation at the State Board hearing. Section 77-8-17(D), N.M.S.A.1953 (Repl.Vol. 11, pt. 1) authorizes the State Board to consider new evidence, but it does not state how the new evidence is to be considered.

At oral argument, Mrs. Parsons contended the State Board could weigh this new evidence as against the evidence presented at the Local Board hearing, and having weighed the evidence, reach an independent result. We doubt that the State Board could proceed in this manner. The State Board has the control, management and direction of public schools, but only as "provided by law." N.M.Const. Art. XII, § 6(A). Section 77-8-17(D), supra, does not appear to authorize the State Board to weigh new evidence presented to it as against evidence presented at the Local Board hearing. However, we do not decide the question of weighing the evidence. The question of "independent result" is discussed and decided in the third issue of this opinion.

The State Board's decision, reversing the Local Board is: "* * * the record does

not contain substantial evidence supporting the [Local] Board's decision not to re-employ Eileen Parsons, a tenure teacher, when non-tenure teachers were employed in areas in which she is qualified to teach." The wording of this decision shows the State Board did not weigh the new evidence against the evidence presented at the Local Board hearing. The State Board determined there was no substantial evidence to support the Local Board's decision. In reaching this result, the only effect the State Board could have given the new evidence was to consider it as if it had been presented at the Local Board hearing.

Considering the new evidence before the State Board as if it had been presented at the Local Board hearing, the evidence then shows the subjects assigned to Lewis and Williams, which Mrs. Parsons was certified to teach, amounted to more than one-half, but less than a full-time, teaching load. This evidence is largely uncontradicted.

For purposes of this appeal, we do not consider the fractional teaching load aspect. Rather, we assume that the uncontradicted evidence shows the non-tenure teachers, between them, were to teach the equivalent of a full-time teaching load in subjects Mrs. Parsons was qualified to teach.

Whether the Local Board's decision is supported by substantial evidence.

In holding the Local Board's decision was not supported by substantial evidence, the State Board focused on the fact that non-tenure teachers were retained although Mrs. Parsons, a tenure teacher, was not re-employed. The State Board did so because of Swisher v. Darden, 59 N.M. 511, 287 P.2d 73 (1955).

In *Swisher* the Local Board informed the tenure teacher that she would no longer be employed because the department in the school at which she was teaching was being closed at the end of the school term. This notification was by letter dated February 9, 1953. The New Mexico Supreme Court stated:

> "* * * Admittedly, the Booker T. Washington School was closed for economic reasons. But more was required. Absent grounds personal to the teacher, to terminate her services it was necessary to show affirmatively that there was no position available which she was qualified to teach. The only grounds advanced were set forth in the letter dated February 9, 1953, and it is silent in this respect. On the contrary, there is evidence that several positions were available and were held by non-tenure teachers. * * *"

See Hensley v. State Board of Education, 71 N.M. 182, 376 P.2d 968 (1962).

Here, there were no grounds "personal to the teacher" for the non re-employment of Mrs. Parsons. The Local Board specifically found that Mrs. Parsons' teaching had been satisfactory.

Because Mrs. Parsons' teaching had been satisfactory, and because the retained non-tenure teachers were to teach subjects that Mrs. Parsons was qualified to teach, Mrs. Parsons argued to the State Board that she has shown a position was available to her. She did not have to make such a showing. Swisher v. Darden, supra, prevents her non re-employment in this case unless there was an affirmative showing that no position was available to her.

In holding there was no substantial evidence before the Local Board of "no position" available to Mrs. Parsons, the wording of the State Board's decision shows that it considered the tenure teacher vs. non-tenure teacher aspect of the evidence to be controlling. In doing so, the State Board appears not to have considered other findings of the Local Board.

These findings are: (1) the Local Board aimed at preserving the curriculum in order to offer its students the best academic program possible. (2) In a small school, such as Fort Sumner, it is necessary to employ teachers who are certified to teach in more than one field. (3) Non-tenure teacher Lewis is certified to teach English

and Spanish and will teach in those fields. (4) No teacher was certified to teach any foreign language except Spanish. (5) To be accredited by the North Central Association, a school system is required to offer one foreign language. (6) One teacher, other than Lewis, is certified to teach Spanish, but that teacher is the only teacher certified to teach in the field of Special Education. (7) Non-tenure teacher Williams is certified to teach U.S. History and planned to become certified to teach Physical Education and Athletics during the summer; Williams' rehiring was conditioned on obtaining this additional certification. (8) The school, by law, was required to offer Physical Education and it was desirable to offer Athletics to the ninth grade (which Williams taught) because of the large number of students participating in the athletic program. (9) No other certified teachers were available to teach Physical Education and Athletics.

The essence of these findings is that there was no one but Lewis to teach Spanish and no one but Williams to teach Physical Education and Athletics. Mrs. Parsons was not qualified to teach these subjects. If Mrs. Parsons was re-employed, the Local Board would be unable to offer either Spanish, required for accreditation, or Physical Education, required by "law." The evidence on which these findings are based is also largely uncontradicted.

Thus, the Local Board, in its opinion, was faced with the problem of either failing to re-employ a tenure teacher or not offering required subjects. One witness, characterizing the situation as "a very distasteful problem," said there was no solution other than failing to re-employ Mrs. Parsons unless there were additional resignations.

The brief of the State Board, joined in by Mrs. Parsons, emphasizes the public policy of retaining experienced teachers through indefinite tenure during satisfactory performance by the teacher. Hensley v. State Board of Education, supra; see Ortega v. Otero, 48 N.M. 588, 154 P.2d 252 (1944). Mrs. Parsons takes the view that even in the interest of preserving the curriculum, a Local Board may not retain a non-tenure teacher even though the non re-employed tenure teacher "* * * is not qualified to teach in all the same areas as the non-tenure teacher. * * *" Specifically, she takes the position that "security of employment" for the tenure teacher is the controlling consideration.

The Local Board's position is: "The tenure laws in situations requiring a reduction of teachers cannot be the mechanism to subordinate the rights and welfare of the public and school children or to destroy the right of school boards to determine educational policy. * * *" Compare § 77-4-2, N.M.S.A.1953 (Repl.Vol. 11, pt. 1).

In our opinion, the answer to this point does not require a choice by this court as to which of the allegedly competing public policies is paramount. The question is whether there was substantial evidence supporting the Local Board's decision. That question is to be decided within the guidelines of Swisher v. Darden, supra.

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970). The Local Board's conclusion reads:

> "That good cause exists for terminating the employment of Mrs. Eileen Parsons, as a part of the necessary reduction of faculty, in that classes she is now teaching are being cut and that these classes can be cut without affecting the academic program adversely, whereas other subjects, to be taught by non-tenure teachers being re-hired, cannot be cut without seriously affecting the academic program."

This conclusion is consistent with the requirement of Swisher v. Darden, supra—that there be an affirmative showing of no position available to Mrs. Parsons at which she was qualified to teach. There is such a showing because if she was re-employed the academic program would be

seriously affected. Substantial evidence, largely uncontradicted, supports the Local Board's conclusion. It had authority to reach this conclusion under § 77-4-2, supra, ¶¶ (A) and (D).

This court may review the State Board's decision to determine whether the State Board's action was unreasonable. In holding the Local Board's decision was not supported by substantial evidence, the State Board acted unreasonably. Wickersham v. New Mexico State Board of Education, supra.

Nature of the State Board's review.

The State Board and Mrs. Parsons urge, however, that the State Board's decision should be affirmed because substantial evidence supports the State Board's decision. This contention mistakes the nature of the State Board proceeding.

Our statutes no longer provide that the State Board decides the issues between contending parties. Compare Swisher v. Darden, supra. The State Board controls the public schools as provided by law. N.M. Const. Art. XII, § 6(A). Section 77-8-17 (C), N.M.S.A.1953 (Repl.Vol. 11, pt. 1) states the State Board is to conduct a "review proceeding."

Section 77-8-17(D), supra, states what is to be done at the review proceeding. It may take "new evidence." This was discussed earlier in this opinion. It shall "* * * review all procedures and regulations followed by the local school board * * *." There is no issue in this case concerning procedures and regulations. "* * * The state board shall also determine whether or not there is evidence in the transcript to substantiate the findings of the local school board that cause exists for refusing to re-employ * * * the person * * *." Section 77-8-17(D), supra. Here, the State Board reviewed the evidence and unreasonably determined there was no substantial evidence to support the Local Board's decision.

The issue is not whether there is substantial evidence to support the State Board's decision. Since the State Board reviewed the Local Board's decision, as provided by law, the issue in this court is whether the State Board's decision, after such a review, is arbitrary, unreasonable, unlawful or capricious. Wickersham v. New Mexico State Board of Education, supra. Here, the State Board's action was unreasonable. This holding decides the appeal. It decides the appeal because the State Board, by law, is not authorized to reach an independent result. The State Board's authority is to review the Local Board's decision as provided in § 77-8-17 (D), supra, and on the basis of that review, affirm or reverse the Local Board's decision. Section 77-8-17(E), N.M.S.A. 1953 (Repl.Vol. 11, pt. 1).

The decision of the State Board is reversed. The cause is remanded to the State Board with instructions to set aside its decision and enter a new decision affirming the Local Board.

It is so ordered.

SPIESS, C. J., concurs.

I concur in the result and will file a specially concurring opinion at a later date.

SUTIN, Judge (specially concurring).

The purpose of this special concurring opinion is to advise the teaching profession that its quarrel on reemployment is with the legislature and the State Board of Education, and not with the courts.

First, this court discussed the question of "How new evidence before the State Board is to be considered." This was not an issue on appeal. In its decision, the State Board recited "that new evidence as to appellant's certification was stipulated in the record by the parties." The stipulation was:

> "It is stipulated and agreed between counsel for the parties that the Appellant, Eileen Parsons, is, *as of this date*, certified to teach the subjects of U. S. History and Vocational Economics, these certifications having occurred *subsequent* to the date of the hearing before the Board

which, as I recall, was May 22nd, 1970." [Emphasis added].

Section 77-8-17(D), N.M.S.A.1953 (Repl. Vol. 11, pt. 1), provides in part:

"* * * The state board may consider new evidence not presented at the hearing conducted by the local school board when there is a showing that, *although due diligence was used, the new evidence was unknown or unavailable to present at the hearing conducted by the local school board.* A transcript shall be made of all new evidence considered by the state board." [Emphasis added].

This provision does not include new evidence not in existence at the time of the Local Board meeting. It covers new evidence unknown or unavailable at the time of the Local Board hearing. Mrs. Parsons was certified to teach U. S. History and Vocational Economics subsequent to the hearing before the Local Board. Due diligence of Mrs. Parsons could not produce this "new evidence" at the time of the Local Board meeting. This "new evidence" was created by Mrs. Parsons after the Local Board hearing to find a "position" available in the school. Neither the State Board nor Mrs. Parsons could rely upon this "new evidence" to support her position.

Second, the opinion does not disclose that in 1967, the legislature gave to the Local Board a new power, the right to refuse to *reemploy* tenure teachers by conducting a hearing and finding "good and just cause for refusing to re-employ the person." Section 77-8-12(C) and (D), N.M.S.A. 1953 (Repl.Vol. 11, pt. 1). This statute favors the Local Board and not the teacher, but we do not inquire into the policy or justness of acts of the legislature. Wickersham v. New Mexico State Board of Edducation, 81 N.M. 188, 191, 464 P.2d 918 (Ct.App.1970). Previously, the Local Board only had the right to *discharge* for "good and just cause." Section 77-8-14. In both statutes, the Local Board, in the exercise of its sound discretion, could determine the question of "good and just cause," and make findings thereof. The State Board, in its sound discretion, could determine whether the evidence at the hearing substantiated the findings of the Local Board and whether "good and just cause" existed. Section 77-8-17(C), (D) and (E). These are also new provisions.

In view of these new sections, I do not concur in adopting the law set forth in previous decisions. We have a duty to interpret these new statutes in line with Article XII, Section 6 of the Constitution under the subject of "The Nature of the State Board's Review."

Third, the court discussed "The Nature of the State Board's Review."

The State Board of Education was created by the people as a constitutional agency before the people created the Court of Appeals. Article XII, Section 6, provides in part:

"The State Board of Education shall determine public school policy and vocational educational policy and shall have control, management and direction of all public schools, *pursuant to authority and powers provided by law.*" [Emphasis added].

The State Board of Education is a part of the executive department of the state government—one of its agencies—and as such it is subject to legislative control. The words "provided by law" may be a law enacted by the people exercising the initiative or by the people acting through the legislature. The legislature may provide for the extent of the authority and powers of the State Board. State ex rel. Public Service Commission of Montana v. Branno, 86 Mont. 200, 283 P. 202, 208 (1929).

Article XII, Section 6 conferred on the State Board such limited, judicial powers as the legislature granted it. This does not constitute an unconstitutional infringement upon the judicial branch of the government. McCormick v. Board of Education, 58 N. M. 648, 660-661, 274 P.2d 299 (1954). Subsequently, this court further said:

"* * * [T]hat, within the limited area prescribed by Art. 12 of the constitution,

the decisions of the board of education are final and conclusive as between the parties, and not subject to review. This conclusion, however, does not deprive the courts of jurisdiction of the many *purely legal questions* which may arise in connection with the teacher tenure act, and other educational acts, such as the question here presented as to whether or not appellee had tenure; and, as suggested in the discussion of the preceding point, the action of the State Board of Education *would be subject to review* on the ground that it was wholly arbitrary, unlawful, *unreasonable* or capricious." [58 N.M. at 661, 274 P.2d at 307]. [Emphasis added].

In Lopez v. State Board of Education, 70 N.M. 166, 372 P.2d 121 (1962), the court said:

"In the absence of a statutory definition of the term, it was the function of the State Board of Education *in the exercise of its sound discretion to determine the question of 'good cause.'* And, its determination is conclusive unless the *evidence* discloses that it acted unlawfully, arbitrarily or capriciously. Hence, our review of the record will be limited to a determination whether the action of the state board was unlawful, arbitrary or capricious." [70 N.M. at 167, 372 P.2d at 121–122]. [Emphasis added].

In State ex rel. School Dist. No. 29 v. Cooney, 102 Mont. 521, 59 P.2d 48 (1936), the court said:

"Both the state board and superintendent and the local board are quasijudicial bodies or officials, and both exercise discretionary powers [citing cases], and when such powers are exercised in the manner prescribed by law, no right of review exists." [59 P.2d at 51].

Thus far, we must remember that the State Board of Education is a constitutional quasi-judicial body of the executive department with discretionary powers. We must now determine, (1) what powers of review were granted the Court of Appeals, and (2) what authority and powers were granted the State Board of Education by the legislature.

(1) Appellate jurisdiction of the Court of Appeals grants to the court the right to review "decisions of those administrative agencies of the state where direct review by the court of appeals is provided by law; and decisions in any other action as may be provided by law." Section 16–7–8(F) and (G), N.M.S.A.1953 (Repl.Vol. 4). The State Board of Education is not an administrative agency of the state because it is created by the constitution, not by the legislature. Jurisdiction may be found under the provision of subsection (G). The only provision for review from the decision of the State School Board is § 77–8–17(F), N.M.S.A.1953 (Repl.Vol. 11, pt. 1). It simply says: "Any party aggrieved by a decision of the state board after a review proceeding pursuant to this section may appeal the decision to the court of appeals * * *." The legislature did not fix any scope of review of quasi-judicial decisions as it has done in other nonconstitutional, administrative agencies. For example, see § 4–32–22, N.M.S.A.1953 (Repl.Vol. 2, Supp. 1969), entitled "Scope of Review" under "Administrative Procedures Act;" § 72–13–39(C), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1969), under the "Tax Administration Act."

When no scope of review is provided by law, what powers can the Court of Appeals grasp to review decisions of the State Board of Education?

In Board of Education v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968), this court said:

"* * * Our review of the State Board's action is limited to determining whether the State Board acted arbitrarily, unlawfully, *unreasonably* or capriciously." [79 N.M. at 337, 443 P.2d at 507]. [Emphasis added].

In Wickersham v. New Mexico State Board of Education, supra, this court said:

"Our review, under § 77–8–17, supra, is limited to a determination of whether the State Board's decision is arbitrary, *unreasonable*, unlawful or capricious.

* * * * * *

"This does not mean that the evidence question will not be reviewed. If the State Board affirmed a Local Board decision, and the Local Board's decision was not supported by substantial evidence, the State Board's decision would be *unreasonable*. [81 N.M. at 190]. [Emphasis added].

* * * * * *

"In asking us to weigh the evidence, the teacher asks us to substitute our judgment for the judgment of the State Board. *This we are not permitted to do.* * * * It is not the province of this court to retry the case brought before it on appeal from the State Board.

"We may not weigh the evidence since our function is limited to a review of the State Board's decision. In conducting that review, we consider only whether the State Board's decision was arbitrary, *unreasonable*, unlawful or capricious." [81 N.M. at 191, 464 P.2d at 920]. [Emphasis added].

In the instant case, the majority opinion says:

"Here, the State Board reviewed the evidence and *unreasonably* determined there was no substantial evidence to support the Local Board's decision.

"The issue is not whether there is substantial evidence to support the State Board's decision. Since the State Board reviewed the Local Board's decision, as provided by law, the issue in this court is whether the State Board's decision, after such a review, is arbitrary, *unreasonable*, unlawful or capricious. * * * Here, the State Board's action was *unreasonable*. This holding decides the appeal. It decides the appeal because the State Board, by law, is not authorized to reach an *independent result*. The State Board's authority is to review the Local Board's decision as provided in § 77–8–17 (D), supra, and on the basis of that review, affirm or reverse the Local Board's decision." [Emphasis added].

The trouble with these decisions is that they rely on decisions prior to the creation of the Court of Appeals and its power of review.

The time has now come to try and decide "The Nature of the State Board's Review." We should try to develop a uniform rule.

We must not forget that the State Board of Education is a constitutional, quasi-judicial body with discretionary powers to determine the question of "good cause" found in the Local Board hearing.

What are the limits of the power of the Court of Appeals to review the decisions of the State Board of Education?

Article XII, Section 6 of the Constitution grants the State Board its powers "pursuant to authority and powers provided by law." Since the legislature did not provide a scope of review, our power of review is limited to whether the State Board acted "pursuant to authority and powers provided by law." If it did, we affirm because its decision is final and conclusive. If it did not, we reverse.

(2) What authority and powers were granted the State Board by the legislature?

Under § 77–8–17(C), (D) and (E), supra, the legislature provided that "[t]he state board shall conduct a review proceeding" and at this review proceeding, "[t]he state board shall also determine whether or not there is evidence in the transcript to substantiate the findings of the local school board that cause exists for refusing to re-employ or discharging the person."

It "shall render a written decision affirming or reversing the decision of the local school board." We are, therefore, bound by the constitution. We must determine as a matter of law whether the State Board's decision complied with the above statute.

The State Board held a review proceeding and rendered its decision reversing the Local School Board. We are not permitted to substitute our judgment for the judgment of the State Board. We do not review the evidence or weigh the evidence before the Local Board or the State Board. We can only determine if the State Board acted according to authority and powers granted by the legislature. The State Board found:

> "* * * [T]he record does not contain substantial evidence supporting the [Local] Board's decision not to re-employ Eileen Parsons, a tenure teacher, [when non-tenure teachers were employed in areas in which she is qualified to teach."] (Brackets added).

If the bracketed words had been omitted, I would dissent because the decision would have complied with the law. The State Board acted honestly and in good faith. But the reason for its decision that the record did not contain substantial evidence was that the Local Board refused to re-employ Mrs. Parsons because nontenure teachers were employed in her place. This was not the issue before the Local Board. The State Board did not comply with its statutory powers upon the "good and just cause" issue before the Local Board. It did not determine whether the evidence in the transcript substantiated the thirty-two (32) findings of the Local School Board. Therefore, I specially concur.

It would greatly impair the government and the efficiency of the common schools if the honest judgment and the discretion of a constitutional state board, exercised in good faith, could be reviewed and reversed. State v. Cooney, supra. We must pay homage to this principle under the present statutory structure.

485 P.2d 374

STATE of New Mexico, Plaintiff-Appellee,

v.

Alcario N. GALLEGOS a/k/a Alex Michael Gallegos, Defendant-Appellant.

No. 602.

Court of Appeals of New Mexico.
April 23, 1971.
Certiorari Denied May 19, 1971.

Douglas T. Francis, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

In 1958, defendant, a juvenile, was transferred from juvenile court to district court,

tried and convicted for armed robbery. He filed a motion for postconviction relief which was denied without a hearing. No appeal was taken. His second motion for postconviction relief under § 21–1–1(93), N.M.S.A.1953 (Repl.Vol. 4) was also denied without a hearing. Defendant appeals from the denial of this second motion.

The trial court denied the second motion on the basis that it was a successive motion which the court was not required to entertain. Section 21–1–1(93) (d), supra. We need not decide whether defendant's second motion was a successive one that need not be considered. See State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968); State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967), and State v. Flores, 79 N.M. 412, 444 P.2d 597 (Ct.App.1968).

The second motion was properly denied because it stated no basis for postconviction relief. This motion, and the prior one, claimed that defendant was not furnished counsel at the juvenile transfer proceeding, nor advised of any right to counsel in that proceeding. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968) assumed that a right to counsel existed in connection with transfer proceedings but over this judge's dissent, held that such a right can be waived. *Neller* states:

> "* * * that waiver is accomplished when, upon arraignment with counsel in district court, no objection is made to the failure to be represented by counsel during the juvenile court investigation."

The record shows that a waiver, as defined in *Neller*, occurred in this case. Thus, no grounds for postconviction relief are stated in the second motion. Since no grounds for relief are stated, the trial court did not err in refusing to hold an evidentiary hearing on the motion. State v. Lobb, supra.

The order denying relief without a hearing is affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

485 P.2d 375

STATE of New Mexico, Plaintiff-Appellee,

v.

John Wesley PAUL, Defendant-Appellant.

No. 566.

Court of Appeals of New Mexico.
April 2, 1971.
Rehearing Denied May 5, 1971.
Certiorari Denied May 19, 1971.

John V. Coan, Jack L. Love, Albuquerque, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Leila A. Andrews, Asst. Atty. Gen., for appellee.

OPINION

DEE C. BLYTHE, District Judge.

The defendant appeals from his conviction of armed robbery, raising questions concerning line-up identification, sufficiency of the evidence to support the grand jury indictment, and admission of evidence of "casing" of the store which later was robbed. We affirm.

Despite the line-up identification issue, the defendant was convicted wholly on circumstantial evidence. None of the eyewitnesses to the crime was able to identify him as being one of the three robbers, although his physical characteristics were similar to those of a masked gunman they did describe. The evidence which linked the defendant with the crime included the finding of his fingerprint on a vodka bottle in the getaway car, which was wrecked in the store's parking lot with some of the stolen money still inside. This car was identified by appearance and by license number as being the same one used by the suspicious characters who "cased" the store earlier. A small Negro with a gun in his hand, later identified in the line-up as being the defendant, tried to commandeer a car near the robbery scene a short time after the robbery occurred; he had a cut on his hand and his teeth were bloody. In the wrecked getaway car was a nylon stocking knotted on one end, similar to that worn by the gun-wielding robber. The money taken in the robbery was in the car, which also contained a paper plate containing the remains of some barbequed ribs and potato

salad similar to a meal purchased by the defendant a short time before the robbery.

Appellant's first point is:

"THE COURT SHOULD HAVE HELD A HEARING OUTSIDE THE JURY'S PRESENCE TO DETERMINE WHETHER THE LINEUP WAS UNLAWFUL, AND SHOULD HAVE EXCLUDED EVIDENCE OF THE LINEUP IDENTIFICATION."

The facts which are necessary to present a question for review by the appellate court are those facts established by the record and any fact not so established is not before us on appeal. Section 21–2–1 (17) (1), N.M.S.A.1953 (Repl. Vol. 4 (1970)); State v. Colvin, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971).

We do not reach defendant's first contention. There is nothing in the record on which to base defendant's allegation. Only Manuel Sanchez and the defendant testified about the lineup identification procedure. Sanchez testified that about 7 p. m. (a few minutes after the robbery) on November 10, 1969, he and his brother-in-law were trying to start a stalled car about two blocks from the store which was robbed. A Negro man approached the car, got in and asked for a ride. Sanchez refused, whereupon the Negro pointed a gun at him. Just then a police patrol car passed, and the Negro got out of the car and ran down the alley. Sanchez noticed that the Negro had a cut on his right hand, was bleeding from his teeth, and was about 5 feet 6 inches tall.

Sanchez testified about the line-up procedure. He said that there were six or seven Negroes in the line-up; that he thought three or four of them were taller than himself (5 feet 7 inches); that he thought more than one was young; and that he made his identification of the Negro who approached his car with a gun on the basis of a cut on the hand and bloody teeth.

The defendant testified he was in a line-up but the record does not indicate it was the same line-up viewed by Mr. Sanchez. Even assuming it was the same line-up, we do not know whom Mr. Sanchez pointed out in the courtroom. The record only shows that the man picked out of the line-up was sitting in the courtroom. This does not show that the identification was of the defendant.

On the in-court identification Mr. Sanchez testified:

"Q. Now, you say you identified this person. Who did you identify him as?

"A. The person sitting right there, I think.

"Q. Now, do you see in the courtroom this afternoon the same person that ran up to your car with the gun?

"A. Yes.

"Q. Would you point him out please?

"A. Sitting right there.

"Q. The Negro with the white shirt on?

"A. Yes, sir."

Next, appellant asserts,

"THE INDICTMENT SHOULD HAVE BEEN QUASHED BECAUSE THE LEGAL EVIDENCE BEFORE THE GRAND JURY WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT THE DEFENDANT COMMITTED THE OFFENSE."

In so contending, appellant admits that we would have to overrule or distinguish State v. Chance, 29 N.M. 34, 221 P. 183 (1923) in order to reverse on this ground. He suggests that we might distinguish the two cases on the basis that in *Chance* the court was concerned with the secrecy of the grand jury proceedings whereas here the transcript of the grand jury proceedings was revealed to the defense and made an exhibit in the case, hence no need for secrecy exists. However, secrecy was not the only or the most important consideration in *Chance,* where the court pointed out the procedural problems involved and the lack of statutory authority for the

courts to review the sufficiency of the evidence adduced before grand juries.

To be sure, the statutes on the subject have been changed since *Chance* was decided in 1923, but they are essentially similar to those there involved and still do not provide for judicial review of the sufficiency of the evidence considered by the grand jury. See §§ 41–5–10 and 41–5–11, N.M.S.A.1953, as amended by Laws of 1969, ch. 276, §§ 10 and 11.

Since the legislature in amending the laws pertaining to grand juries in 1969 still did not see fit to give the courts authority to review the sufficiency of evidence to support grand jury indictments, and since it is deemed to have had State v. Chance, supra, in mind when it enacted the new statutes, we see no reason to overrule or distinguish *Chance*. We note also that the Supreme Court of the United States had adopted a rule similar to that in *Chance*. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1955).

Another and shorter answer to the contention that the indictment should have been quashed is that defendant's motion (to dismiss) was filed after the defendant had pleaded not guilty to the indictment. We have long held that pleading to an information waives the right to a preliminary hearing or any formal defects therein, e. g., State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967); State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.1969) cert. denied 80 N.M. 198, 453 P.2d 219 (1969). By the same rationale, and the weight of authority, a motion to quash an indictment must be made before arraignment and plea. 42 C.J.S. Indictments and Informations § 199, pp. 1168, 1169; 41 Am.Jur.2d, Indictments and Informations, § 281, p. 1053.

For his final point, appellant states:

"THE EVIDENCE OF THE CASING OF THE PREMISES PERMITTED THE JURY TO BASE AN INFERENCE ON AN INFERENCE, AND WAS OTHERWISE IMMATERIAL."

The victims of the robbery testified that over a period of about 30 days before the robbery three of four Negroes excited their suspicions by loitering around the store which had very few Negro customers. Three of the victims testified to seeing these Negroes in or around a car which later turned out to be the getaway car. One even copied down the license number. None of the victims identified the defendant as being one of these Negroes who appeared to have reconnoitered or "cased" the store. Therefore, appellant contends, all this testimony was immaterial and prejudicial.

It was important to the state's case to connect the robbers with the car which was found wrecked on the store's parking lot shortly after the robbery. The robbers were not observed leaving in it, but the victims, from prone positions in the back of the store, heard the squeal of tires and then a crash. As previously stated, money identified as having been taken from the store was found in the car, as was a stocking mask such as one robber wore. The identification of the money was not by serial numbers but only by the way it was held together in certain quantities by rubber bands. Thus the "casing" of the premises by various Negroes, even though not identified as including the defendant, was material because they were using the purported getaway car.

Under this point, though not mentioned in it, appellant argues that the court improperly refused to give an instruction tendered by him relating to circumstantial evidence and particularly having reference to basing an inference upon an inference. The particular portion of the instruction to which appellant directs his argument is as follows:

"An inference of fact which is essential to establishing an offense cannot be rested upon an inference, nor can presumption be superimposed on presumption in order to reach ultimate conclusion of guilt."

The trial court did give an instruction on circumstantial evidence, the correctness of which is not challenged. The trial court, in our opinion, correctly declined to give appellant's tendered instruction, and, in particular, the portion thereof which we have quoted.

The evidence presented and to which we have referred does not properly suggest the necessity of cautioning the jury as suggested by the proposed instruction. The evidence connecting defendant with the crime is circumstantial and, as such, may properly serve as a basis for an inference of fact essential to the establishment of the offense. See State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964).

Since we find no error, the conviction should be affirmed.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

485 P.2d 735

Patricia L. CHAVEZ, Plaintiff-Appellee,
v.
Paul R. CHAVEZ, Defendant-Appellant.
No. 9126.

Supreme Court of New Mexico.
May 28, 1971.

Ussery, Burciaga & Parrish, Albuquerque, for defendant-appellant.

Ramon Lopez, Albuquerque, for plaintiff-appellee.

OPINION

STEPHENSON, Justice.

Defendant-appellant (Husband) appeals from an order reinstating plaintiff-appellee's (Wife) alimony from the date of the purported annulment of a subsequent marriage. We reverse.

The parties were formerly husband and wife. During the pendency of divorce proceedings, they entered into a contract settling their differences. The contract dealt with the usual subjects—division of community property and debts, recognition of separate property, custody and support of the children and the like. Further, Husband agreed to pay Wife "* * * $70.00 per month as and for alimony for her lifetime except that in the event of her remarriage said payments shall cease."

The contract was presented to the court for its approval and by its final decree entered in February, 1968, the court made the essential findings regarding it, the contract

was attached as an exhibit, and in the decretal portion was approved and confirmed. The decree was not appealed and became in all respects final.

Following a brief courtship and a ceremony vaguely recalled, on October 26, 1968, Wife married one Roul King. Husband ceased paying alimony from the time of the nuptials, although no order authorizing cessation was entered. The marriage was consummated, but being beset with problems, Wife consulted counsel and inquired as to whether her alimony could be reinstated if the second marriage were to be annulled. On January 10, 1969, Wife filed suit against Mr. King, alleging that he had "* * * represented himself to be a conscientious and dependable person, that he had $11,000 in a bank, that he was employed and would provide for, maintain and support" Wife, but that these representations were untrue. She prayed that the marriage be declared null and void. A decree was entered by default so declaring on March 21, 1969.

On April 30, 1969, Wife filed a petition which simply alleged the provisions of the decree vis-a-vis alimony, the marriage to Mr. King and the annulment thereof, and that she was "* * * entitled to have her rights to alimony in the * * * final decree reinstated."

The court below made findings of fact as to the decree, the subsequent marriage and the annulment. It further found that Husband had refused to pay alimony since the annulment (which was not alleged though undisputed) and that Husband was financially able to pay alimony (which was neither alleged nor supported by any evidence). It concluded that Wife was entitled to alimony "* * * as the marriage to Roul King was void ab initio." An order was entered by which alimony was "reinstated" commencing the day following the annulment decree. This appeal followed.

Husband has consistently asserted that the annulment was void. Validity of the annulment is implicit in the court's decision. The annulment proceedings appear doubtful, but we need not pass upon their validity. The annulment was supposedly predicated upon fraud, and therefore the court's conclusion that the second marriage was void *ab initio* is in error. Flaxman v. Flaxman, 57 N.J. 458, 273 A.2d 567 (1971); 52 Am.Jur.2d "Marriage" § 30. Even granting an aura of validity to the annulment proceedings, the marriage was no worse than voidable.

Alimony is the support which a court decrees in favor of a wife as a substitute for, and in lieu of, the common law or statutory right to marital support during coverture. In New Mexico, men are not legally obliged to support the wives of others, and instances in which alimony should be continued after remarriage have been characterized as being "* * * extremely rare and exceptional." Mindlin v. Mindlin, 41 N.M. 155, 66 P.2d 260 (1937). Wife has the burden of proving some extraordinary condition. Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956); Mindlin v. Mindlin, supra.

Both Mindlin and Kuert indicate, probably in deference to form and policy, that a husband should make application to the court to be relieved of the payments, which was not done in this case. That issue is not presented to us, since Wife makes no complaint of the cessation of alimony, but rather seeks "reinstatement," the relief granted by the trial court. The case was presented and disposed of upon the theory that the cessation was proper.

It is clear that this is not a case in which a wife seeks modification of a decree based upon altered personal, family or economic circumstances. To the contrary, she seeks "reinstatement" of the alimony provisions of the decree in its original form. There were no allegations of any changed circumstances in this sense, nor any modification of the decree sought.

The sole issue is whether, under the circumstances of this case, the purported annulment revived Husband's obligation to pay alimony. In resolving this issue, we

are concerned with alimony only, unadulterated by other troublesome features such as arise where periodic payments are in lieu of a property award or are in consideration of a property settlement agreement or constitute a lump sum award payable in installments or include sums for the support of minor children.

The revival of alimony following annulment of a remarriage has been considered in a number of cases with various results predicated upon differing rationales. See Annot., 48 A.L.R.2d 270, 296 (1956) and 48 A.L.R.2d 318, 329 (1956).

We prefer the straightforward approach taken by the court in Flaxman v. Flaxman, supra, the facts of which were almost identical to the case at bar.

In Flaxman, in conjunction with a scholarly review of the authorities, the court, in holding that alimony was not revived, pointed out that the first husband is entitled to rely on the wife's remarriage and reorder his personal and financial affairs accordingly. Otherwise a husband whose wife has remarried could never be certain that financial support for his former wife would not shift back to him. His affairs would be in limbo. By the same token, the remarried wife has the option of seeking annulment or divorce (and alimony) from the second husband. If annulment revived alimony from the first husband, she would be in a position to choose between two sources of support. She ought not have this control, the vicissitudes of the second marriage not being attributable to the first husband.

We are led to the same result by the terms of the final decree. The rules to be followed in arriving at the meaning of judgments and decrees are not dissimilar from those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change its meaning or even to construe it. "It must stand and be enforced as it speaks." Hollingsworth v. Hicks, 57 N.M. 336, 258 P.2d 724 (1953). See also Chronister v. State Farm Mutual Automobile Ins. Co., 72 N.M. 159, 381 P.2d 673 (1963); Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948).

To us, the provisions of the decree concerning alimony seem perfectly clear and unambiguous, providing, as they do, that "* * * in the event of her remarriage said payments shall cease." By the decree, cessation of alimony did not turn on the status of the remarriage as being valid. It simply provided that in a certain event, alimony would cease; the event occurred and the alimony ceased.

The trial court is directed to set aside its order and enter judgment in favor of Husband.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

485 P.2d 737

CITY OF LAS VEGAS, Plaintiff-Appellee,

v.

Leland James MOBERG, Defendant-Appellant.

No. 639.

Court of Appeals of New Mexico.

May 14, 1971.

Leon Karelitz, Las Vegas, for defendant-appellant.

Roberto L. Armijo, Las Vegas, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

The defendant, Moberg, was convicted by the municipal court of the City of Las Vegas of violating the city ordinance No. 3–3, which reads as follows:

"DEADLY WEAPONS. It shall be unlawful for any person to carry deadly weapons, concealed or otherwise, on or about their persons, within the corporate limits of the City of East Las Vegas. Deadly weapons shall consist of all kinds of guns, pistols, knives with blades longer than two and half inches, slingshots, sandbags, metallic knuckles, concealed rocks, and all other weapons, by whatever name known, with which dangerous wounds can be inflicted."

The complaint charged the defendant with the violation of the ordinance by number and specifically by "carrying a concealed and deadly weapon." Following conviction by the municipal court, defendant appealed to the district court and was there accorded a trial "de novo" (§ 38–1–13, N.M.S.A.1953, (Rpl. Vol. 6).

The evidence presented at the trial in the district court established, without dispute, that defendant went to the booking room of the city police department of the city of Las Vegas to report the theft of certain items from his automobile. At the time, defendant was carrying a pistol in a holster. The pistol was in plain view at all times. It appears that both parties at the trial in the district court treated the complaint as charging simply the carrying of a deadly weapon. No contention is made that the evidence supported the carrying of a concealed weapon. Defendant was found guilty by the district court of violating the particular ordinance through carrying a deadly weapon, which, in this case, as stated, was in plain view. Sentence was imposed.

Defendant has appealed and challenges the constitutionality of the ordinance as it is applied to carrying arms openly and in plain view. He asserts that in this respect the ordinance is repugnant to Article II, Section 6 of the Constitution of the State of New Mexico. This section provides:

"The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."

It is a generally accepted principle that a municipal ordinance which denies rights protected by constitutional guaranty is void to the extent, at least, that it purports to deny such rights. Berger v. City and County of Denver, 142 Colo. 72, 350 P.2d 192 (1960); City of Fort Worth v. Atlas Enterprises, 311 S.W.2d 922 (Tex.Civ. App.1958); State v. Hart, 66 Idaho 217, 157 P.2d 72 (1945). 5 E. McQuillin, Municipal Corporations, § 19.03, (1969 Revised Edition).

Ordinances prohibiting the carrying of concealed weapons have generally been held to be a proper exercise of police power. State v. Hart, *supra*; Davis v. State, 146 So.2d 892 (Fla.1962).

Such ordinances do not deprive citizens of the right to bear arms; their effect is only to regulate the right. As applied to arms, other than those concealed, the ordinance under consideration purports to completely prohibit the "right to bear arms."

It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void. State v. Rosenthal, 75 Vt. 295, 55 A.

610 (1903); and see In re Brickey, 8 Idaho 597, 70 P. 609 (1902); State v. Woodward, 58 Idaho 385, 74 P.2d 92 (1937); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921).

The case against defendant should be dismissed and defendant discharged.

It is so ordered.

WOOD and SUTIN, JJ., concur.

485 P.2d 739

Richard D. BORDEN and Ralph Barry Borden, Plaintiffs-Appellees,

v.

CREAMLAND DAIRIES, INCORPORATED and Woodrow Wilson Fox, Defendants-Appellants.

No. 601.

Court of Appeals of New Mexico.

May 14, 1971.

J. J. Monroe, Joe Diaz, Iden & Johnson, Albuquerque, for defendants-appellants.

John P. Salazar, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for plaintiffs-appellees.

OPINION

SPIESS, Chief Judge.

This action resulted from a collision between a moving automobile and a parked truck. The automobile was owned by plaintiff, Richard D. Borden, and was being driven by his son, Ralph Barry Borden (Barry). The truck was owned by Creamland Dairies, Incorporated, and was being used at the time in the delivery of milk, or milk products, by its employee, Woodrow Wilson Fox (Fox). The defendants have appealed from a judgment adverse to them, which was rendered upon a jury verdict. We affirm.

Although two points are raised upon appeal the decisive question is whether the trial court erred in declining to hold Barry guilty of contributory negligence as a matter of law.

Facts considered in the light most favorable to Barry, Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516, (Ct.App.1969), are as follows: Prior to the collision Barry was driving the automobile in an easterly direction on Lomas Blvd., N.E. in Albuquerque, New Mexico, and defendant, Fox, had parked and left the Creamland truck in the southmost lane of the three eastbound lanes of Lomas Blvd. at a point approximately four hundred feet west from the intersection of Lomas and Girard Blvd. N.E. At the time, Fox was making delivery of milk, or milk products

in the area. The accident occurred at approximately 6:00 o'clock A.M., when the sun was rising over the mountains to the east; Barry had decided to turn right onto Girard upon reaching its intersection with Lomas. He turned the vehicle into the southmost lane of traffic and collided with the rear end of the truck. It appears from the record that there were tall trees extending along Girard Boulevard from a point near its intersection with Lomas. The rising sun behind these trees created a shaded condition on Lomas Blvd. in the area where the Creamland truck was parked. It is disclosed from the testimony that the glare of the rising sun, together with the shade cast by the trees, created a blind spot where the truck was located which prevented Barry from seeing it. Concerning this situation he testified:

"Q How would you describe the sun, the sun's brilliance on that morning?

"A I would say momentarily blinding, would be my words. I mean you could see ahead quite frequently, but at various times there was—it shone so that it created blind spots."

In further response to questions relating to the visibility of the truck Barry testified:

"A Well, my idea is that I feel that because of the sun that was in my eyes and because that truck was over in the shaded area that it actually created a blind spot somewhat similar to looking from a light room into a dark room, and that is what I think. That is what I would call the other reason which I meant at that time.

* * * * * *

"Well, I don't know if you know exactly what I am talking about, but what it actually does, like that, it almost makes a blind spot rather than not being able to see, and so you would say that it was blinding. It makes it appear as if things were not there, so you cannot see the things that are there. Although you can kind of see in that direction, it looks like there is nothing there."

The following testimony, we think, is likewise relevant.

"Q And as you proceeded up Lomas toward the mountains, had you seen the milk truck at any time before you collided with him?

"A No, sir. I saw it just a very split second before impact, just enough to actually be aware that there was something there that we hit."

Defendants argue that a motorist blinded by lights must either stop (if his vision is cut off completely), or proceed at such rate of speed and with such control of his vehicle as to be able to stop in time to avoid any discernible object in the road ahead.

They have called our attention to a number of cases from other jurisdictions holding that circumstances similar to those involved here constitute negligence as a matter of law.

In substance, defendants contend that it is negligence as a matter of law to drive an automobile at such rate of speed that it cannot be stopped within the range of the driver's vision. This doctrine has been rejected in this jurisdiction. In Worrick v. Alarid, 75 N.M. 67, 400 P.2d 627 (1965), commenting upon the rule under consideration here, the court said:

"Although this court has refused to lay down a rule that a defendant is negligent per se if he cannot stop within the range of his vision, we have held that this constitutes a question for the jury."

Citing Duncan v. Madrid, 44 N.M. 249, 101 P.2d 382 (1940); Hisaw v. Hendrix, 54 N.M. 119, 215 P.2d 598, 22 A.L.R.2d 285 (1950). The court further said:

"We do not now intend to retreat from this position."

Again the Supreme Court, in Manufacturers & Wholesalers Idem. Exch. v. Valdez, 75 N.M. 363, 404 P.2d 562 (1965), commented as follows:

"The rule that a defendant is negligent per se if he cannot stop within the range of his vision has not been laid down in

this jurisdiction, notwithstanding the appellant's position to the contrary. We have held that the issue of negligence in such a situation is a question for the trier of the facts."

Whether Barry's conduct in proceeding when his vision was interfered with should preclude recovery on his part involves consideration of a number of factors, including the extent to which vision was interfered with; the speed and precaution taken to avoid the accident; the amount of warning available upon approaching the parked truck. The existence and effect of these elements present a question for decision by the jury. The trial court, in our opinion, correctly declined to hold Barry guilty of contributory negligence as a matter of law.

Defendants, in support of their position, rely upon Williams v. Neff, 64 N.M. 182, 326 P.2d 1073 (1958). It is also contended that the trial court erred in declining to give a particular instruction requested by defendants.

The instruction expresses the rule set forth in *Williams*. In our opinion, the facts in *Williams* are not comparable to those presented here because *Williams* involved a situation where the driver's vision became completely obscured. The rule there announced is "* * * if his (the motorist) vision becomes completely obscured, the situation certainly imposes the duty to stop." That situation, as we have shown, is not present here. The trial court correctly declined to give defendants' requested instruction.

We do not consider the other point raised by defendants because it is based upon the assumption that we hold Barry to have been guilty of contributory negligence as a matter of law.

The judgment is affirmed.

It is so ordered.

WOOD and SUTIN, JJ., concur.

485 P.2d 741

Herman SALAZAR, Appellant,

v.

STATE of New Mexico, Appellee.

No. 615.

Court of Appeals of New Mexico.

May 14, 1971.

David R. Sierra, Stockley, Sierra, Smith & Boone, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., Ray Shollenbarger, Special Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Salazar seeks post conviction relief under Rule 93 from a conviction and sentence of rape in 1958. The claims made are that at the hearing, (1) the trial court erred in failing to adopt requested findings and conclusions relative to the ultimate issue of illegal search and seizure; (2) the trial court erred in adopting two findings of fact not supported by substantial evidence. These claims will be decided together.

Does this Court have Jurisdiction over a Sentence of less than one nor more than 99 Years?

We note a question of jurisdiction. Salazar was sentenced to a term of not less than one nor more than 99 years. Was this a sentence of life imprisonment? Under § 16-7-8(D) 1953, N.M.S.A. (Repl. Vol. 4), the Court of Appeals has jurisdiction of post conviction remedies except when the sentence involved is death or life imprisonment. In State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957), Maestas was found guilty of murder in the second degree. The statutory penalty was imprisonment in the state penitentiary "'for any period of time not less than three (3) years; * * *.'" No maximum limit was set forth. The court held that the maximum limit for second degree murder was life imprisonment. Therefore, a sentence of not less than three years nor more than life was a life sentence.

The transcript of the record of Salazar's conviction in 1958 was not found. Salazar did not appeal from the conviction and never procured a copy of the record. We assume the rape statute was § 40-39-1 1953, N.M.S.A., repealed in 1963 when the new criminal code was adopted. It provided that rape "is punishable by imprisonment for not less than one (1) nor more than ninety-nine (99) years." Section 40-39-2 1953, N.M.S.A., also repealed, provided that carnal knowledge of a female child under ten years of age "shall be punished by imprisonment in the state penitentiary for life." The distinction indicates legislative intent.

We believe that a sentence of not less than one nor more than 99 years is an indeterminative sentence and not a sentence of life imprisonment. Welch v. McDonald,

36 N.M. 23, 7 P.2d 292 (1931). This court, therefore, has jurisdiction.

Was Illegal Search and Seizure Subject to Review, and was there Substantial Evidence to Support the trial court's Findings?

Salazar contends that his 1958 conviction for rape was predicated upon illegally seized evidence, a "T" shirt, admitted in evidence at trial; that the trial court, in the post conviction hearing, failed to make any finding on whether the search and seizure was valid and whether the "T" shirt was properly admitted in evidence at the 1958 trial. Salazar requested these findings. The trial court found that the evidence was lawfully admitted in that the panel truck was a tool of the crime, and the truck and its contents could have been admitted in evidence. This finding is supported by substantial evidence.

Salazar testified that he owned a truck used for a dry cleaning route. He parked and locked the truck the night he was alleged to have committed the crime of rape in this truck. A police officer who impounded the truck had it unlocked and found a "T" shirt in it which the state claimed had been used on the girl after consummation of the rape. Salazar was identified as the rapist by the girl although she claimed she did not know whether intercourse had been consummated.

The truck was used as an instrument in the perpetration of the crime. This truck could lawfully be seized and retained for its evidentiary worth. This vehicle may be search without a warrant and the search is reasonable, and the contents thereof admissible in evidence. State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968); see State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962).

Furthermore, the circumstances of the search and seizure were fully known to Salazar at the time of the 1958 trial. This fact does not give Salazar the right to relief under Rule 93. The admission in evidence of the "T" shirt, claimed to be illegally obtained, is not subject to review. State v. Fines, 78 N.M. 737, 437 P.2d 1006 (1968); Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970).

Salazar attacks State v. Fines, supra, with Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1968). Kaufman rejected the principle that illegal search and seizure was not subject to review. *Kaufman* has been expansively cited in federal and state courts. Nevertheless, the Supreme Court of New Mexico, in 1970, continued to follow State v. Fines, supra. We are bound by those decisions.

Finally, the record shows that the issue of seizure of the "T" shirt was raised and ruled on against Salazar at his 1958 trial. Salazar cannot relitigate that issue in a post conviction proceeding. Jones v. State, supra; State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968).

The trial court's decision is affirmed.

It is so ordered.

SPIESS, C. J., concurs.

WOOD, Judge (specially concurring).

I do not join in the majority opinion because a review of the evidence simply is not called for in this case and because, in my opinion, there is nothing other than speculation as to the basis on which the police acted when they impounded the truck. I join in the result because of the two legal propositions stated in the majority opinion—(1) where the circumstances of a search and seizure are known to a defendant at the time of trial, the search and seizure issue is not cognizable under the New Mexico provisions for post-conviction relief, and (2) the record shows the search and seizure issue was raised and ruled on at Salazar's trial. Accordingly, Salazar may not relitigate this issue in a post-conviction proceeding.

485 P.2d 967

S. A. BETTINI, Plaintiff-Appellant,

v.

The CITY OF LAS CRUCES, New Mexico, a municipal corporation, Defendant-Appellee.

No. 9178.

Supreme Court of New Mexico.
May 3, 1971.

Rehearing Denied June 14, 1971.

Garland, Martin & Martin, William L. Lutz, Las Cruces, for plaintiff-appellant.

George Richard Schmitt, Las Cruces, for defendant-appellee.

OPINION

STEPHENSON, Justice.

Plaintiff-appellant (Plaintiff) filed suit against defendant-appellee (City) for a refund of utility charges exacted by the City in payment of an obligation owing by Plaintiff's predecessor in title as a condition to furnishing further service. From an adverse judgment, Plaintiff appeals.

In 1965 a mortgage foreclosure suit was pending against Penguin Motor Hotel in which a judgment of foreclosure was entered on November 1, 1965. City had furnished utility services to the motel for which, after some difficulties, it was paid, except for the period from shortly before or after the entry of judgment until December 30, 1965. On that day it filed its lien for such services pursuant to § 14-22-6, N.M.S.A., 1953, in the sum of $628.08. City was not a party to the foreclosure proceedings. On January 4, 1966, Penguin Motel was sold at judicial sale to Plaintiff.

Plaintiff arranged a sale of the motel and, on May 8, 1968, applied for full commercial utility service. City refused to

furnish these services unless and until the delinquent charges were paid in full. Plaintiff, asserting that he did so under duress and protest, paid the charges and filed this suit for refund.

Plaintiff asserts that City has no lien on the motel premises, it having been in some manner adversely affected by the foreclosure judgment or sale. Under the disposition we make of the case a determination of whether there is or is not a lien is not essential. We will assume for purposes of this opinion that City had a valid and subsisting lien.

Section 14–22–1, N.M.S.A., 1953, a part of Ch. 300, Laws of 1965, provides:

"A. A municipality may require a reasonable payment in advance, or a reasonable deposit, for water, electricity, gas, sewer service, refuse collection service or street maintenance.

B. If payment of any price, rent, fee or other charge for water, sewer service, refuse collection, or street maintenance is not made within thirty [30] days from the date the payment is due, the water service may be discontinued, *and shall not be again supplied to the person liable for the payment* until the arrears with interest and penalties have been fully paid." (Emphasis ours)

Section 14–22–6, N.M.S.A., 1953, a part of the same act, provides:

"A. Any charge imposed by ordinance for service rendered by a municipal utility shall be:

(1) *payable by the owner,* personally, at the time the charge accrues and becomes due; and

(2) a lien upon the tract or parcel of land being served from such time.

B. The lien shall be enforced in the manner provided in sections 14–35–1 through 14–35–5 New Mexico Statutes Annotated, 1953 Compilation. In any proceedings where pleadings are required, it shall be sufficient to declare generally for the municipal utility service." (Emphasis ours)

Section 14–22–1(B), supra, limits the right of the municipality to withhold service from "* * * the person liable for the payment * * *." Statutory words are presumed to be used in their ordinary and usual sense. Nunn v. Nunn, 81 N.M. 746, 473 P.2d 360 (1970); State v. Reinhart, 79 N.M. 36, 439 P.2d 554 (1968); Valley Country Club, Inc. v. Mender, 64 N.M. 59, 323 P.2d 1099 (1958). The ordinary person reading the quoted words from § 14–22–1(B), supra, would not ascribe to them a meaning which would include subsequent owners of property who were not themselves obligated to the municipality. We are of the opinion that the ordinary and usual meaning attributable to the quoted words in the context in which they are used is not such that they may be expanded to include subsequent owners.

It is City's position that, even though the utility charges in question were incurred by a predecessor in title, under the holding of this court in State ex rel. Scotillo v. Water Co., 19 N.M. 27, 140 P. 1056 (1914), L.R.A.1915A, 242 (1915) and § 14–22–1(B), supra, Plaintiff was a "person liable" within the meaning of the statute and that City was therefore entitled to withhold service as a means of exacting payment from him. We do not agree.

At the time of the decision in Scotillo, municipalities were given a lien for water rents by the provisions of § 1, Ch. 68, Laws of 1912, subsequently compiled as § 3569, 1915 Code. It was further provided by § 2, Ch. 136 of the Laws of 1909, later compiled as § 3570, 1915 Code, that such liens could be enforced by district court suits. There does not appear to have been at that time any statutory authority for withholding service comparable to § 14–22–1, supra. Thus, when Scotillo was decided, there was no statutory authority to withhold service from the person liable or from anyone else. Rather, this right was grounded upon court decisions in circumstances in which there was a statutory lien comparable to that presently provided by § 14–22–6, supra.

The question then arises as to the interpretation to be placed on § 14–22–1, supra and whether the result of Scotillo is modified thereby. There would be no question as to the right of the City here, under the decision in Scotillo to exact sums owed for utility services from a subsequent owner, were it not for the subsequent enactment of § 14–22–1, supra.

We are led to our conclusion primarily by an application of the doctrine of *expressio unius est exclusio alterius.* A typical case enunciating and applying the doctrine in New Mexico is Fancher, et al. v. County Com., 28 N.M. 179, 210 P. 237 (1922), Annot., 84 A.L.R. 964 (1933). In Fancher, a statute authorized the board of county commissioners of any county to have an index made of all instruments of record affecting real property. It further provided that the commissioners were authorized to have the index made by the county clerk. The commissioners of Grant County contracted with an outside firm to do this work, and the question was whether or not they were authorized to do so. The court held that they were not. It quoted with approval from 2 Lewis, Sutherland's Stat.Const., page 919, as follows:

> " 'Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of expressio unius est exclusio alterius.' "

Applying that doctrine to this case, when the legislature authorized the withholding of utility service in aid of collecting obligations for such service and then specified that this step could be taken against the persons liable therefor, and failed to authorize withholding service from a subsequent owner, we are led by the application of the doctrine to the conclusion that the legislature did not intend to include the subsequent owner within the purview of the statute. The legislature could easily have done so by the use of simple language.

We must presume that the legislature was informed as to existing law, not only statutory law, but common law. City Commission of Albuquerque v. State, 75 N.M. 438, 405 P.2d 924 (1965); State ex rel. Maryland Casualty Co. v. State Highway Comm'n, 38 N.M. 482, 35 P.2d 308 (1934); 50 Am.Jur. "Statutes" § 344. In § 340, it is said:

> "In the interpretation of a statute, changes made by the act in the previous state of the law may be given consideration. Indeed, one of the recognized rules of construction of statutes is to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, * * *"

Further, we must presume that the legislature, in enacting a statute, intended to change the law as it had theretofore existed. Stang v. Hertz Corporation, 81 N.M. 69, 463 P.2d 45 (Ct.App.1969), aff'd 81 N.M. 348, 467 P.2d 14 (1970); Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965). Making these assumptions, giving the words used their ordinary meaning, and declining to read into § 14–22–1 that which is not within the manifest intention of the legislature as gathered from the statute itself [Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957)], we conclude that the legislature, by the enactment of § 14–22–1, and by failing thereby to authorize municipalities to withhold service from subsequent owners, intended to modify the result of Scotillo in such fashion that so far as subsequent owners are concerned, service cannot be withheld; but rather, the municipality must rely upon its statutory lien.

City also places reliance upon its ordinances Nos. 9–1–10, regarding water charges, and 9–3–2 relating to gas charges. Ordinance 9–1–10 provides, in pertinent part:

> "For failure to pay the city may cut off water from the premises and service

shall not be restored until all delinquent charges are paid * * *"

The other ordinance contains an identical provision regarding gas, and both provide for liens for nonpayment.

Having held that the present posture of the statutes of New Mexico is such that municipalities are not authorized to withhold utility service from an individual circumstanced as Plaintiff is here, we are precluded from giving an inconsistent effect to the city's ordinances. Section 14–16–1, N.M.S.A., 1953.

Finally, Plaintiff complains of a ruling by the trial court to the effect that because there was no statutory authorization therefor, utility charges could not be paid under protest and subsequently recovered. The basic reason for the court's position was its ruling that the City had lawful authority to collect these sums from the Plaintiff in the manner we have described. Whether or not such specific statutory authorization exists does not appear to us to be controlling. Where sufficient pressure or duress is exerted under circumstances sufficient to influence the conduct of a prudent businessman, payment of monies wrongfully induced thereby ought not to be regarded as voluntary. Cadwell v. Higginbotham, 20 N.M. 482, 151 P. 315 (1915); see also Pecos Construction Co. v. Mortgage Investment Company of El Paso, 80 N.M. 680, 459 P.2d 842 (1969); Jaynes v. Heron, 46 N.M. 431, 130 P.2d 29 (1942), Annot., 142 A.L.R. 1191 (1943); Chicago v. Northwestern Mutual Life Insurance Co., 218 Ill. 40, 75 N.E. 803 (1905).

It follows that the judgment of the trial court must be reversed, with directions to withdraw the judgment heretofore entered and enter judgment in Plaintiff's favor for $628.08, together with interest thereon at the legal rate from the date of payment by Plaintiff.

It is so ordered.

TACKETT and OMAN, JJ., concur.

485 P.2d 970

Robert KATSON, Plaintiff-Appellant,

v.

John FIDEL, T. N. Fidel and Clara Fidel, his wife, and Rose Fidel, Defendants-Appellees.

No. 9199.

Supreme Court of New Mexico.

June 7, 1971.

McAtee, Marchiondo & Berry, O. L. Puccini, Jr., Albuquerque, for appellant.

J. Victor Pongetti, Iden & Johnson, Eric D. Lanphere, Albuquerque, for appellees.

OPINION

COMPTON, Chief Justice.

This action was commenced in the District Court of Bernalillo County, New Mexico, to recover broker's commission based upon the negotiation and procurement of a lease of the El Fidel Hotel in Albuquerque. Trial was without a jury, and from a judgment denying relief, the plaintiff Katson has appealed.

Appellant, a licensed real estate broker, was instrumental in negotiating a lease agreement between the defendants Fidel, as lessors, and C. W. Cole, as lessee. The lease was for twenty-five years, commencing October 15, 1958. On September 13, 1960, Katson and Fidel executed an agreement relating to Katson's commission for procuring the lease, the pertinent provision of which reads:

> "First Parties promise and agree to pay Second Party for his said services in procuring the aforesaid lease agreement, the sum of four percent (4%) on the gross amount received by Lessors, under the provisions of the aforesaid lease agreement; that said sum is to be paid monthly and is to be computed on the basis of the amount received by First Parties, including all advancements."

In March 1965, Cole, with Fidels' consent, assigned the lease to Cole Hotel, Inc. On December 31, 1965, Fidels and Cole Hotel, Inc. agreed to sublease the premises to Packard-Bell Electronics Corporation. In July 1967, Fidels' attorney notified C. W. Cole and Cole Hotel, Inc. that they were in default on the lease for failure to pay certain taxes, and for failure to keep the liquor license on the premises active. Under the provisions of the lease, Cole had twenty days in which to cure the defects, which he failed to do. On August 24, 1967, the lease terminated. On November 16, 1967, after Fidels had filed suit for declaratory judgment, the court entered judgment decreeing that neither Cole nor Cole Hotel, Inc. had any further interest in the premises, or in the lease itself.

Appellant has received no monthly commission fees since August 1967, and the primary question is whether he is entitled to a broker's commission after August 1967, when the lease terminated.

It is a general rule that a broker has earned his commission when he produces a prospect who is ready, willing and able to purchase on terms agreeable to the seller. Stewart v. Brock, 60 N.M. 216, 290 P.2d 682 (and cases cited therein). But a broker and his principal may agree to make the broker's commission payable upon a specified contingency. Harp v. Gourley, 68 N.M. 162, 359 P.2d 942; Ballas v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421. Also see 12 Am.Jur.2d, Brokers, § 205 at 948. We think it is clear that appellant's commission was payable only from the rents collected.

Appellant's contention that appellees' tenants and lessees were procured as a direct and proximate result of the efforts of the appellant is without merit. At the trial we have his testimony, as follows:

> "Q. Do I understand you correctly, Mr. Katson, you had nothing whatsoever to do with getting Packard-Bell and the Fidels together on a sublease?
>
> A. I did not. I had nothing to do."

In the absence of a contract to the contrary, a broker must be the procuring cause of a sale or transaction to be entitled to his commission. Stacey v. Whalen et ux., 33 N.M. 577, 273 P. 761; Development Sales Company v. McWilliams, 254 Md. 673, 255 A.2d 1. Also see, 12 Am.Jur.2d, Brokers, § 189 at 930. Compare Leimbach v. Nicholson, 219 Md. 440, 149 A.2d 411.

Appellant relies almost entirely on Yrisarri v. Wallis, 76 N.M. 776, 418 P.2d 852. The case is not in point, it is distinguishable on the facts. In the instant case, payment was four percent of the gross amount received by lessors, under the provisions of the lease agreement. In Yrissari, the broker's commission was payable at the time of closing.

The trial court found and concluded:

"2. The brokerage agreement entered into between the plaintiff and the defendants was a contract or a promise to pay the brokerage commission out of a particular fund, that fund being such rents as were actually received under the lease with the specific tenant procured by plaintiff.

"3. The specific fund out of which the plaintiff was to receive his brokerage commission, i. e., the actual rents received by the defendants from the lessee which the plaintiff procured for the defendants, ceased to exist as of August 24, 1967, when the defendants, as lessors, duly terminated the lease in accordance with the lease provisions for termination on account of a default of the lessee."

These findings and conclusions are supported by substantial evidence. It follows the judgment should be affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

485 P.2d 973

Jay J. HARRIS, Plaintiff-Respondent,

v.

Donovan O. COTTON, a minor, and Guy Cotton, Defendants-Petitioners.

No. 9249.

Supreme Court of New Mexico.

May 5, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 641 be and the same is hereby returned to the Clerk of the Court of Appeals.

485 P.2d 973

STATE of New Mexico, Plaintiff-Appellee,

v.

Cecil E. SEXTON, Defendant-Appellant.

No. 9275.

Supreme Court of New Mexico.

June 1, 1971.

Original Proceeding in Certiorari

Ordered that petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 586, 82 N.M. 648, 485 P.2d 982, be and the same is hereby returned to the Clerk of the Court of Appeals.

485 P.2d 974

Mary ESCOBAR, Plaintiff-Appellant,

v.

Della Romero MONTOYA, Defendant-Appellee.

No. 604.

Court of Appeals of New Mexico.

May 21, 1971.

Thomas M. Thompson, Arturo G. Ortega, William E. Snead, Albuquerque, for plaintiff-appellant.

Eugene E. Klecan, James T. Roach, Albuquerque, for defendant-appellee.

OPINION

WOOD, Judge.

Plaintiff's complaint for personal injuries was dismissed under § 21-1-1(41) (e) (1), N.M.S.A.1953, as that rule was worded prior to its amendment in 1967. For the applicable wording of the rule see Jones v. Pringle, 78 N.M. 467, 432 P.2d 823 (1967). Dismissal was on the basis that plaintiff had failed to take any action to bring the cause to its final determination for a period of at least two years after the filing of the cause. Plaintiff's appeal contends the dismissal was erroneous because "for good reason" and "for causes beyond her control" plaintiff was unable to bring the case to trial within two years.

Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970) states:

"As early as 1947 in Ringle Development Corp. v. Chavez, 51 N.M. 156, 180 P.2d 790, we held that the rule required mandatory dismissal except where tolled by statute or failure of process on account of absence of defendant from the state, *"or unless from some other good reason,* the plaintiff is unable, for causes beyond his control, to bring the case to trial.' (Emphasis added.) * * *"

The appeal is based on the negative aspect of the rule—inability to bring the case to trial within the required time. See dissenting opinion in Reger v. Preston, 77 N. M. 196, 420 P.2d 779 (1966).

Plaintiff advances two reasons to justify her inability to comply with the rule. First, she asserts she could not have brought the case to trial within two years of filing her complaint because this was a jury case, and a certificate of the district judge shows "* * * the case could not have come up for trial on said Jury Docket * * *" until more than two years after the filing of the complaint. It is doubtful that this issue is before us because the record is not clear whether this contention was presented to the trial court. Regardless, this view has been answered adverse to plaintiff's contention. The non-availability of a jury, in itself, does not prevent dismissal under the rule. Reger v. Preston, supra, and cases therein cited.

Second, plaintiff contends she could not bring the case to trial within the specified time because of "* * * the problems encountered in effecting service of process. * * *" The complaint was filed April 29, 1966; defendant wasn't served with process until November 1, 1967. The question of the ability to serve the defendant was presented to the trial court by testimony and by affidavits. Plaintiff claims the testimony and affidavits show process could not have been served earlier than it was. She asserts that failure to serve process at an earlier date was good cause, beyond her control, for not bringing the case to trial within the required time. We disagree.

Benally v. Pigman, 78 N.M. 189, 429 P. 2d 648 (1967) states:

"Although we have never specifically ruled on the question, it is certainly to be implied from our decisions that service of process is not the kind of action which would be sufficient to toll the running of the mandatory dismissal rule. Service upon a defendant is merely one step in the process of litigation and does not constitute the required diligence to bring a case to its final determination. * * *"

If service of process is not "required diligence" to bring the case to its final determination, and does not toll the running of the rule, then the late service of process, in this case, does not toll the running of the rule. Here, we are discussing only the time when service was made, and not the reason that process was served at that time.

Another aspect of the "service of process" contention, is that plaintiff was unable to serve the process earlier. This aspect involves the exception to the rule stated in Ringle Development Corporation v. Chavez, 51 N.M. 156, 180 P.2d 790 (1947). This exception applies to the inability to execute process "* * * on account of the absence of the defendant from the state, or his concealment within the state, * * *"

Plaintiff's brief states: "* * * it is uncontroverted that the Defendant was never absent from the state. * * *" While evidence before the trial court shows the inability to locate or serve defendant at two specified addresses, the evidence of defendant's residence and whereabouts in the State is uncontradicted.

This evidence shows that in the same month the complaint was filed defendant moved to a new address in Albuquerque and has lived at the new address ever since; that she has had her children in Albuquerque schools, and "* * * has not been out of Albuquerque more than 3 to 5 days at any one time * * *;" and that absences from Albuquerque were to

visit her father in Santa Fe and Espanola. There is evidence that an adjuster for defendant's insurance company was in periodic contact with defendant from the time of filing the complaint until service was made; that the adjuster was "frequently in contact" with one of plaintiff's attorneys; that the adjuster was unaware that suit had been filed until shortly before service was effected, almost seventeen months after the filing of the complaint; that the adjuster supplied plaintiff's attorney with defendant's address when this information was requested.

There is no evidence from which the trial court would have found that defendant had concealed herself within the State.

Plaintiff has not brought herself within any exception to the rule requiring mandatory dismissal. The order of dismissal is affirmed.

It is so ordered.

SPEISS, C. J., and HENDLEY, J., concur.

485 P.2d 976

Harry DEE and Bonnie Dee, Plaintiffs-Appellants,

v.

Floyd Elgin BUFORD and Corina Sophie Chavez, Defendants-Appellees.

No. 652.

Court of Appeals of New Mexico.

May 28, 1971.

Tibo J. Chavez, Chavez & Cowper, Belen, for appellants.

LeRoi Farlow, Albuquerque, for appellee Buford.

G. Thomas Harris, III, Oldaker & Oldaker, Albuquerque, for appellee Chavez.

OPINION

SPIESS, Chief Judge.

The plaintiffs, Harry Dee and Bonnie J. Dee, allegedly sustained damages by reason of personal injury in an automobile accident. At the time of the accident they were riding as guests in an automobile operated by the defendant, Buford. Summary judgment was granted upon Buford's motion,

through which he invoked the Guest Statute, § 64–24–1, N.M.S.A.1953 (Repl.Vol. 9, p. 2). Plaintiffs' appeal followed.

Under the Guest Statute the host would be liable to his guest passenger only if the accident was caused intentionally by the host, or by operation of his vehicle in heedlessness or reckless disregard of the rights of others.

Plaintiffs' position, in substance, is that the trial court erred in granting summary judgment because there were present material issues of fact supporting liability under the language of the Guest Statute. It has repeatedly been held that issues of fact may not be decided on motion for summary judgment. Evidence before the trial court when ruling upon the motion, viewed in the aspect most favorable toward plaintiff, discloses the following:

Plaintiffs and their children were en route to Phoenix, Arizona. Due to car trouble they were delayed at Socorro, New Mexico. Plaintiffs met defendant, Buford, at a lounge in Socorro and asked that he direct them to a junk car lot where they might purchase a used transmission for the repair of their automobile. Buford undertook to direct plaintiffs to a lot, and, being unable to give adequate directions, offered to drive them there in his own car. Plaintiffs accompanied Buford in his car to the lot. Upon returning, Buford intended to stop at the lounge where the parties had met, but plaintiff, Harry Dee, told Buford that they would rather go back to their car. Buford then proceeded in a northerly direction to an intersection in order to make a U turn so as to return plaintiffs to their car. The accident occurred as a result of a collision with an oncoming car as Buford was making the U turn. Describing the accident, the plaintiff, Harry Dee, testified:

"A Well, Mr. Buford pulled away from the curb, went over to the left-hand side of the street, and got over in his right lane to make his turn, and slowed down to make his turn, and pulled over. He started his turn. There was another car coming from the north, going south, a red one, a Chevy. And I figured Mr. Buford was going to stop and I figured this Chevy was going to slow down, at least when he seen Mr. Buford wasn't going to stop, and neither one of them stopped, and Mr. Buford got hit."

This plaintiff further testified that he had first seen the oncoming car "* * * [a]bout three-fourths of a block away * * *" and upon being asked where the collision occurred he testified

"Well, Mr. Buford was right in her lane when she hit him, and he hadn't stopped, and she just went into the door on my side, the passenger door."

We quote the following further testimony of this plaintiff.

"Question: Now, Mr. Dee, directing your attention again to just before the accident happened, when you first saw this red car coming toward you, did you say anything to Mr. Buford?

Answer: I said, 'Hold it.' That's what I said.

Question: This was before the impact?

Answer: This was before the impact, yes.

Question: Was this before he began making his turn, that you said this?

Answer: Just started to make his turn and I seen the other automobile coming.

Question: And you said, 'Hold it'?

Answer: Yes."

No contention was made that the accident was intentional. Plaintiffs argue that the facts before the court in considering the motion for summary judgment, together with inferences reasonably deducible therefrom present a showing that the accident was caused by Buford's heedlessness, or reckless disregard of rights of others.

The evidence does disclose a failure on Buford's part to look to the north for approaching vehicles, a failure to yield the right of way, and a failure to heed a warn-

ing. Unquestionably, this evidence would support a finding of simple negligence. Simple negligence, however, will not support liability under the Guest Statute.

We considered the quality of negligence essential to impose liability under the Guest Statute in Forsyth v. Joseph, 80 N.M. 27, 450 P.2d 627 (Ct.App.1968), and there, upon substantial authority, said:

> "Our Guest Statute has been interpreted on many occasions and applied to many different factual situations. On the basis of the facts, it is difficult to reconcile the results in all cases. However, the words 'heedlessness or a reckless disregard of the rights of others,' have a rather well-defined meaning under our Guest Statute. This meaning contemplates something other than and different from negligence, and contemplates culpability arising from conduct which is motivated by a particular state of mind. This particular state of mind is one of utter irresponsibility or conscious abandonment of any consideration for the safety of guest passengers."

We hold that the facts before the trial court upon the motion for summary judgment, taken in the light most favorable to the plaintiffs, even when considered cumulatively, disclose that there is no substantial evidence of the state of mind or quality of negligence required by the Guest Statute. See Forsyth v. Joseph, supra, and authorities referred to therein.

The plaintiffs appear also to argue that an issue of fact as to Buford's intoxication was present, which would preclude summary judgment. We do not determine the effect of such issue under the Guest Statute because, in our opinion, the record does not disclose its presence. While the record discloses the consumption of beer by Buford, there is no evidence of intoxication on his part. Plaintiff, Harry Dee, upon being questioned, testified that Buford did not appear to be intoxicated.

In our opinion, the action of the trial court in awarding summary judgment in favor of defendant, Buford, was proper and the same is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

485 P.2d 978

Ray WHITE, Plaintiff-Appellee,

v.

Paul RAGLE, Defendant-Appellant.

No. 562.

Court of Appeals of New Mexico.
May 21, 1971.

J. W. Reynolds, Robertson & Reynolds, Silver City, for defendant-appellant.

J. Wayne Woodbury, Silver City, for plaintiff-appellee.

OPINION

SUTIN, Judge.

This is a suit for a real estate broker's commission based upon an exclusive listing contract which was subsequently revoked. White recovered a judgment, and Ragle appeals.

We affirm.

Ragle's appeal is based upon alleged error in the trial court's findings of fact and conclusions of law.

Ragle makes the following claims of error on appeal, (1) that White's exclusive listing contract was not coupled with an interest, was not partially performed and was revocable at will; (2) that White was not the procuring cause of the sale; and (3) that there was an accord and satisfaction between the parties.

The trial court found that on March 3, 1965, White, Ragle and McCauley entered into a written contract whereby Ragle and McCauley employed White as a real estate broker under an exclusive agency with the exclusive right to sell real estate in Grant County. White was to receive a commission on the total selling price on the sale or exchange of any or all of the property during a five-year term from March 3, 1965.

The trial court also found that from March 3, 1965, until July 12, 1967, plaintiff exerted extensive efforts toward the sale, and expended many hours and spent substantial money toward the promotion and sale of the property which included, (1) an exchange of a portion of the property with the Town of Silver City, which portion had a substantial value without clear and convincing evidence of its unimproved value; (2) contacting many persons, and (3) being contacted by Hay who had seen White's "For Sale" sign on the property. White authorized Hay to deal directly with Ragle for the purchase of property, provided White was protected in his commission. Hay purchased the property from Ragle and was the owner at the time of trial, March 9, 1970. White was the procuring cause of the exchange and the sale.

On July 12, 1967, Ragle wrongfully and without provocation undertook to cancel White's written contract, and directed a letter of cancellation to White. This was a breach of the contract because the five-year listing period had not ended.

Late in December, 1968, and early 1969, Ragle paid White a total sum of $300.00. This did not constitute an accord because there was no meeting of the minds as to the amount to be paid, or the terms of pay-

ment. There was no tender of the balance of moneys claimed to be due under the alleged accord, by Ragle to White, in the sum of $2200.00. Although these findings were challenged by Ragle, we believe they have substantial support in the evidence.

The trial court concluded that White was entitled to recover upon one or more of the following theories (alternately or collectively):

A. White was the procuring cause for the exchange of lands between Ragle and the Town of Silver City which was substantial partial performance under the White-Ragle contract;

B. White was the procuring cause for the sale of the entire tract of land to Hay;

C. White's exclusive listing contract was coupled with an interest in the real estate (the exchange of property procured by White and White's efforts in obtaining zoning changes for Ragle's land);

D. White's contract was an exclusive agency with exclusive right of sale. White had partially performed pursuant to the contract or offer before attempted cancellation or revocation by Ragle; the contract became irrevocable during the time stated, March 3, 1965, through March 2, 1970, and binding on Ragle according to its terms.

Was the Exclusive Listing Contract Subject to Revocation at Will?

Ragle contends that the trial court's finding that the contract was irrevocable because it was coupled with an interest and that White had partially performed was totally unsupported by the law and the evidence. The contract provided:

> "EXCLUSIVE AGENCY WITH EXCLUSIVE RIGHT. Broker is hereby appointed Owner's exclusive agent, and Broker is hereby granted the exclusive right to sell the said property at the price and on the terms herein stated, or at such other price as may be accepted by Owner. In case of any sale or exchange of property to any party during the said period by any party, including Owner, Owner shall pay Broker 4½% commission of the total selling or exchange price plus sales tax."

The above provision creates both an exclusive agency *and* an exclusive right in White to sell. This is a broad grant of authority.

Marchiondo v. Scheck, 78 N.M. 440, 432 P.2d 405 (1967), was not an exclusive listing contract case. However, two authorities were cited which provide that such contracts may be revoked at will until there is action by the broker, such as partial performance, pursuant to the offer made by the contract. Hutchinson v. Dobson-Brainbridge Realty Co., 31 Tenn.App. 490, 217 S.W.2d 6 (1946); Levander v. Johnson, 181 Wis. 68, 193 N.W. 970 (1923).

It is interesting to note that *Marchiondo* is now cited in favor of the rule that "a broker's agency is not rendered irrevocable by the fact that his power to sell is made exclusive." 12 C.J.S. Brokers § 16(b), note 44, Supp. The *Marchiondo* court said:

> "Until there is action by the offeree—*a partial performance pursuant to the offer*—the offeror may revoke even if his offer is of an exclusive agency *or* an exclusive right to sell. Levander v. Johnson, 181 Wis. 68, 193 N.W. 970 (1923)." [Emphasis added].

In the present case, White had an exclusive agency *and* an exclusive right to sell. To determine revocability at will, the only issue to decide is whether there was partial performance by White. If so, the power to revoke died and White earned his commission.

Was the Contract Partially Performed?

The trial court concluded that White had partially performed pursuant to the contract or offer before the attempted cancellation or revocation by Ragle and, therefore, the contract became irrevocable.

In Marchiondo v. Scheck, supra, the court said:

"Once partial performance is begun pursuant to the offer made, a contract results.

* * * * * *

"Thus, defendant's right to revoke his offer depends upon whether plaintiff had partially performed before he received defendant's revocation.

* * * * * *

"What constitutes partial performance will vary from case to case since what can be done toward performance is limited by what is authorized to be done. Whether plaintiff partially performed is a question of fact to be determined by the trial court."

The trial court found that from March 3, 1965, the date of the contract, to July 12, 1967, the date of revocation, White exerted extensive efforts toward the sale of the property and expended many hours and spent substantial money toward promotion and sale of the property; that after March 3, 1965, pursuant to the terms of the contract, plaintiff negotiated an exchange of a portion of the property with the Town of Silver City which had substantial value; that plaintiff contacted many persons toward the sale, including adjacent landowners, prospects for the erection of a motel, shopping center, and other commercial pursuits.

[redacted] We have reviewed the record and find substantial evidence to support the trial court's findings and conclusions that White had partially performed before the date of revocation. The revocation was ineffective. Ragle later sold to Hay all of the property, including that received in the exchange for a very substantial sum.

[redacted] Exclusive agency with exclusive right provision, supra, is clear and unambiguous. The exclusive agency provision precludes Ragle from employing another broker. The exclusive right to sell protects White's real estate commission upon any sale by Ragle or anyone else. 12 C.J.S. Brokers § 94; 12 Am.Jur.2d Brokers, § 227, p. 971.

[redacted] White is entitled to his real estate commission.

Inasmuch as White partially performed and established a binding contract, it is unnecessary to consider Ragle's other claims, (1) that the exclusive listing was not coupled with an interest, and (2) whether White was the procuring cause of the exchange or sale.

Was there an Accord and Satisfaction?

Ragle contends that there was an accord and satisfaction. The trial court found that late in 1968 and early in 1969, Ragle paid White a total sum of $300.00 that did not constitute an accord because there was no meeting of the minds as to the amount to be paid, nor a meeting of the minds as to the terms of payment; that there was no tender of the balance of moneys claimed to be due under the alleged accord by Ragle to White in the sum of $2200.00. The trial court concluded that no accord and satisfaction was ever consummated; that, even if an accord had been reached, it was an "accord executory"; there was no satisfaction of it, and Ragle materially breached the terms thereof.

White testified that he could never get an agreement; that he attempted to work out a settlement but never had a meeting of the minds.

Ragle's contention is based primarily on correspondence. On May 24, 1968, Ragle offered to settle the commission problem for $2500.00, upon sale of the land and payment. On July 24, 1968, White agreed to accept the amount if it were paid immediately. On August 20, 1968, Ragle wrote that he would pay $2500.00 when he was paid some money on the land. He also offered to pay White $100 a month, beginning in September and the minute he got his "big money," he would pay off. White would not accept the offer because it had no termination date. If Ragle would fix a day certain to pay the full amount, it

would be all right. On November 26, 1968, Ragle received a notice that White wanted to withdraw his offer to settle. On December 11, 1968, January 31, 1969, and February 1, 1969, Ragle sent White $100 checks which were cashed by White. On February 22, 1969, White cancelled negotiations for settlement because the full amount was not paid immediately.

On January 22, 1968, Hay, the purchaser, executed a real estate mortgage note for $153,000, $80,000 of which was to be paid to Ragle by January 10, 1969. On February 9, 1969, Ragle gave instructions to White's attorney that when the attorney was paid the money from the Texaco people, he was to put $2300 in the Ragle account at the Grant City Bank with the right of White to get it.

White filed suit on April 30, 1969. On May 9, 1969, the Ragle-Hay real estate transaction was closed, the money paid, and it was credited in the bank on May 12, 1969.

Did this Constitute an Accord and Satisfaction?

This defense was defined in Miller v. Prince Street Elevator Co., 41 N.M. 330, 68 P.2d 663 (1937), as follows:

> "An 'accord' is an agreement, an adjustment, a settlement of former difficulties, and presupposes a difference, a disagreement as to what is right. A 'satisfaction' is a performance of the terms of the accord; if such terms require a payment of a sum of money, then that such payment has been made."

The burden of proof was clearly upon Ragle. Baker v. Shufflebarger & Associates, Inc., 78 N.M. 642, 436 P.2d 502 (1968). This burden failed.

Even if the oral and documentary evidence was sufficient to raise an issue of fact, substantial evidence sustains the trial court's findings and conclusions.

The judgment is affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

485 P.2d 982

STATE of New Mexico, Plaintiff-Appellee,

v.

Cecil E. SEXTON, Defendant-Appellant.

No. 586.

Court of Appeals of New Mexico.
April 9, 1971.
Rehearing Denied May 18, 1971.
Certiorari Denied June 1, 1971.

Scott McCarty, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Sexton was convicted and sentenced on two counts of armed robbery. The defendant appeals.

We affirm.

Sexton contends, (1) that he was entitled to a preliminary hearing and the indictment should have been dismissed; and (2) that some of Sexton's statements made in a police car were erroneously admitted in evidence and considered by the jury.

Absence of Preliminary Hearing.

Sexton was denied a preliminary hearing. A race took place between the assistant district attorney and Sexton whether Sexton should have a preliminary hearing before a grand jury indictment was returned. Sexton lost the race. The indictment was first returned and the preliminary hearing was not held. This same issue was decided contrary to Sexton's contentions in the companionate case of State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.) February 19, 1971. Sexton's claims are denied.

Erroneous Admission of Evidence.

Sexton was arrested with Burk east of Albuquerque. He was immediately advised of his constitutional rights to remain silent and have counsel during interrogation. While being returned to Albuquerque in a police car, a conversation began back and forth, between Sexton and Burk, not initiated by the police officers. The detective asked Sexton why he shot the alleged victim of the robbery, and his response was that it was an accident. Sexton was asked whether his gun was cocked and his response was that he guessed so. During opening statement to the jury, the assistant district attorney admitted that the shooting was accidental.

The question raised by Sexton is: Did Sexton waive his rights to remain silent and have counsel before these inquiries were put to him?

There is a complete absence of express waiver. There is no express statement by Sexton that he understood his rights when he received his constitutional warnings. Such express waiver or statement of understanding is not an essential link in the chain of proof. Whether an intelligent waiver occurs depends upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. United States v. Hayes, 385 F. 2d 375 (4th Cir. 1967), cert. denied, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968), cited in State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct.App.1969).

Both Sexton and Burk moved to suppress statements made by them. At the hearing on this motion, the only testimony concerning statements by Sexton is Sexton's testimony that he made no statements. At this point, no issue as to the admissibility of statements by Sexton or waiver of constitutional rights by Sexton had been raised.

At the trial, an officer testified as to Sexton's statements during the ride to Albuquerque. The only objection to this testimony was that it was inadmissible because of an illegal arrest. Subsequently, this officer testified that Sexton had been advised that he would have the right to an attorney *after he was charged.* Sexton then moved for a mistrial on the basis that he was not told that he had the right to have an attorney present during *any* ques-

tioning. Specifically, the motion for mistrial was that the testimony showed defendant's statements "were made after faulty warning."

Other officers testified, however, that Sexton had been advised that he had a right to have an attorney during any questioning.

Nowhere in the record is the issue raised to the trial court that defendant seeks to raise here—that he did not waive his right to remain silent because there is no showing that defendant understood this. Sexton never claimed, prior to this appeal, that he did not understand the advice given him as to his rights.

Defendant seeks to raise the waiver issue for the first time on appeal. He may not do so. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970); compare State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App.1969).

Sexton further contends there was no evidence in the record to sustain two portions of a long instruction to the jury, stating seven matters to be considered by the jury in determining whether the confession was admissible. Two of these seven matters are directed to "express waiver" and imposd a burden on the state, in order to use defendant's statements, that is not required by law. Sexton claims that regardless of the correctness of the instruction, it is the law of the case, and since there is no evidence of express waiver, no issue as to his statements should have been submitted to the jury. Our answer is that this issue was never presented to the trial court. Defendant's objection to the instruction never went to the question of express waiver. He may not raise it here for the first time.

The conviction and sentence are affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

485 P.2d 984

Steven J. MAYNERICH, Jr., a minor by and through Steven J. Maynerich, his father and next of friend, and Steven J. Maynerich, individually, Plaintiffs-Appellants,

v.

LITTLE BEAR ENTERPRISES, INC., a corporation, Milton Black and Ellis Hamblin, Defendants-Appellees.

No. 578.

Court of Appeals of New Mexico.

May 21, 1971.

Richard B. Cole, Civerolo, Hansen & Wolf, Albuquerque, for plaintiffs-appellants.

Charles B. Larrabee, John P. Salazar, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

SPIESS, Chief Judge.

The principal question presented upon this appeal is whether the Workmen's Compensation Act, § 59-10-1 et seq., N.M.S.A.1953 (Rpl. Vol. 9, pt. 1) precludes an illegally employed minor from maintaining a common law action against the employer seeking damages for injuries based upon negligence. The appeal is from a summary judgment in favor of the employer.

Facts before the court upon consideration of the motion for summary judgment are as follows: Steven J. Maynerich, a minor, fifteen years of age, was employed by Little Bear Enterprises, Inc., (the employer). His duties included waiting on customers in the hardware and feed departments, and performing such other tasks as were required of him. Steven was called upon from time to time to participate in the operation of a machine known as a fork lift. The fork lift was used in moving heavy objects, loading and unloading trucks. During the afternoon of July 26th, Steven was assisting in unloading hay from a truck and was directed to climb upon the fork lift to designate the placement of bales of hay after they had been unloaded from the truck. To avoid a fall from the machine Steven placed his right hand on or within certain working parts of the lift resulting in the amputation of three of his fingers and injury to the remaining fingers. At the time of injury Steven was fifteen years of age.

For the purpose of the motion for summary judgment, Steven's work with and upon the fork lift was treated as an employment "* * * dangerous to lives and limbs, * * *"

The Child Labor Law, § 59-6-5, N.M.S.A.1953 (Rpl. Vol. 9, pt. 1) provides:

> "No child under the age of sixteen (16) years shall be employed or permitted to labor at any of the following occupations or in any one of the following positions: * * * nor in any employment dangerous to lives and limbs, * * *"

As we have indicated, the trial court, in rendering summary judgment, assumed this case to be controlled by the Workmen's Compensation Act to the end that Steven was barred from maintaining a common law action, and was limited to the remedies provided by the Workmen's Compensation Act. (§ 59-10-6, N.M.S.A.1953 (Rpl. Vol. 9, pt. 1).

The Workmen's Compensation Act is based upon an employer-employee relationship. Perea v. Board of Torrance County Commissioners, 77 N.M. 543, 425 P.2d 308 (1967). The Act, (§ 59-10-12.9, N.M.S.A.1953 (Rpl. Vol. 9, pt. 1, 1969 Supp.) defines workman as follows:

> "Workman.—As used in the Workmen's Compensation Act [59-10-1 to 59-10-37], unless the context otherwise requires, 'workman' means any person who has entered into the employment of or works under contract of service or apprenticeship, with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term 'workman' shall include 'employee' and

shall include the singular and plural of both sex."

It is clear from this definition that employer-employee relationship, to which the Act applies, is one created by contract between the parties; consequently, if the employer in this case seeks to avail itself of the Workmen's Compensation Act as a bar to a common law action, then it must show a valid contract of employment between it and Steven.

In our opinion, a contract, the performance of which violates a penal statute, is illegal and at least voidable, and will not provide a basis for the assertion of rights under such contract, particularly by the party upon whom the statute imposes the penalty. See Measday v. Sweazea, 78 N. M. 781, 438 P.2d 525 (Ct.App.1968); Farrar v. Hood, 56 N.M. 724, 249 P.2d 759 (1952); Acklin Stamping Co. v. Kutz, 98 Ohio St. 61, 120 N.E. 229, 14 A.L.R. 812 (1918); also 6A Corbin, Contracts, § 1540.

The extension of coverage under Workmen's Compensation Acts to illegally employed minors is now generally provided by specific statutory provisions. See 1A Larson, Workmen's Comp., Sec. 47.52(a), page 789. Cases employing these statutes as a basis for barring a common law remedy to an illegally employed minor are of no assistance here. Our Act, by its terms contains no specific language bringing illegally employed minors within its terms.

In our view, the weight of authority, as applied to statutes similar to ours, supports the proposition that an illegally employed minor may pursue a common law action. Hadley v. Security Elevator Co., 175 Kan. 395, 264 P.2d 1076 (1953); Cox Cash Stores v. Allen, 167 Ark. 364, 268 S. W. 361 (1925); Pigg v. Stacey, 210 Tenn. 144, 354 S.W.2d 593 (1962). See also authorities cited Annot. 14 A.L.R. 818; 142 A.L.R. 1018.

Nothing in Benson v. Export Equipment Corporation, 49 N.M. 356, 164 P.2d 380 (1945), is contrary to the conclusions here expressed because in *Benson* the minor was not illegally employed at the time the injury was sustained.

We hold that Steven is not barred by the Workmen's Compensation Act from maintaining a common law action, and that the trial court erred in denying him such remedy.

We have carefully considered authorities cited by employer. They do not, however, in our opinion, compel a conclusion different from that herein expressed.

Employer contends that Steven waived any rights he may have had to pursue a common law action because he accepted workmen's compensation benefits. The record does show that Steven received certain checks (which he cashed) issued by an insurance company. He testified, in substance, that he did not know that the checks were payments under the Workmen's Compensation Act.

It is fundamental that both waiver and estoppel require knowledge of the facts by the person against whom they are asserted. First Nat. Bank of Hastings v. Davis, 123 Neb. 304, 242 N.W. 655 (1932).

In Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957), the court, in discussing the question of estoppel by acceptance of benefits, said:

> "In order to create estoppel by acceptance of benefits it is essential that the person against whom estoppel is claimed, should have acted with full knowledge of the facts and of his rights, * * *"

See Miller v. Phoenix Assur. Co. Limited, of London, 52 N.M. 68, 191 P.2d 993 (1948).

In view of the fact issue presented by the record with respect to the claim of waiver this matter is not properly subject to summary judgment.

Reversed with direction to vacate the summary judgment and proceed in a manner not inconsistent herewith.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

486 P.2d 62

BENNETT LEASING COMPANY,
Plaintiff-Appellee,

v.

Dean C. CLIFTON and B. J. Baggett,
Defendants-Appellants.

No. 9168.

Supreme Court of New Mexico.
May 28, 1971.
Rehearing Denied June 21, 1971.

Baggett & Baggett, Farmington, for defendants-appellants.

Tansey, Rosebrough, Roberts & Gerding, Farmington, for plaintiff-appellee.

OPINION

OMAN, Justice.

This is a suit on equipment leases by plaintiff as lessor against defendants as lessee. Plaintiff recovered judgment and defendants appeal. We affirm.

Plaintiff and defendants entered into written lease agreements during July and August, 1962, whereby plaintiff leased to defendants a Mack truck and Timpte float at rental rates provided in written schedules. Defendants paid an advance rental of $360.00 and monthly rental payments pursuant to the schedules for nineteen months for total rental payments of $8,482.92. Defendants failed to make the rental payments for the following seventeen months in the total amount of $6,222.35. The leases were terminated and plaintiff took possession of the equipment in August, 1965.

The agreed value of the equipment at the time of the execution of the leases was $14,800.00. Within a reasonable time after the termination of the leases, defendants secured a bona fide offer for the equipment of $7,500.00, which plaintiff refused. Plaintiff retained possession of the equipment and ultimately sold it on February 5, 1968, for either $6,000.00 or $6,250.00. However, the trial court found and considered the net resale proceeds to be $7,500.00 in accordance with the August, 1965 offer.

The foregoing recited facts are undisputed, are consistent with the facts found by the trial court, and, except for the finding as to the amount of unpaid rentals, are in no way attacked. The finding as to the unpaid rental is attacked only under the second point relied upon for reversal, and then only to the extent of defendants' claims that plaintiff had elected to retain the equipment in satisfaction of defendants' obligations and that the unpaid rental was inapplicable in computing the amount owing by defendants under the formula hereinafter discussed under the second point.

By their first point, defendants claim error on the part of the trial court in refusing their requested findings of fact numbered 24, 25 and 26. These requested findings were:

"24. This Trust Lease Vehicle Schedule is a transaction subject to Article 9 of the Uniform Commercial Code.

"25. No notice of the time and place of sale by the Plaintiffs of the security was given to the Defendants.

"26. The sale was not commercially reasonable."

Defendants' entire argument under this point relates to the sale in 1968. However, as shown by the above recited facts, the trial court found and considered the amount of $7,500.00 as the net resale proceeds, in accordance with the bona fide offer secured by defendants and rejected by plaintiff in August of 1965. This finding is not attacked and is consistent with the following requested findings by defendants:

"6. That the Defendants produced a willing buyer for the vehicles for the sum of Seven Thousand Five Hundred Dollars ($7,500.00), and the Plaintiff refused to permit the sale in August, 1965.

"7. That the Trust Leases provide in Section 3 that the Plaintiff would 'effectuate the sale', and that the Plaintiff unreasonably failed to do so.

"8. That the Defendants are entitled to credit as 'net resale proceeds' in the amount of $7,500.00.

"9. That the Plaintiff is deemed to have received the 'net resale proceeds' in the amount of $7,500.00."

Thus, under the findings of the trial court, by which we are bound, the rights of the parties were fixed as of August, 1965, and we do not reach the question of the applicability to the sale in 1968 of Chapter 50A, Art. 9, Pt. 5, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1, 1962). Compare Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970); Springer Corporation v. American Leasing Company, 80 N.M. 609, 459 P.2d 135 (1969).

Under their second point, defendants contend "The Court Erred in Making its Findings of Fact Numbered 3, 6, and 7 Which Involve the Application of a Formula in Paragraph 4 of the Trust Lease Vehicle Schedule."

Paragraph 4 of the Schedule provides:

"4. Upon receipt of the net resale proceeds as provided in Sections Three and Five of this schedule or upon receipt of advise from the Lessee of the loss of a vehicle, the Lessor shall refund to the Lessee *100%* of the amount, if any, by which the sum of the net resale proceeds plus an amount equal to *2.0%* of the agreed value of the vehicle, multiplied by the number of months (not to exceed *50* months) for which monthly rents for the vehicle shall have been paid, exceeds the agreed value of the vehicle. If such sum is less than the agreed value of the vehicle, the Lessee shall promptly pay all of such deficiency to the Lessor as additional rent. The Lessor shall determine such refunds or deficiencies in respect of vehicles sold and shall render statements therefor to the Lessee. Net resale proceeds shall be the net amount after deduction for all expenses incurred in connection with such sale."

The court's findings of fact numbered 3, 6 and 7 are as follows:

"3. The total rental charges for the thirty-six (36) months period amounted to $14,705.28. Defendants paid rental charges of $8122.93, plus $360.00 advanced rentals or a total of $8482.93, leaving a balance owing on the rental charges of $6222.35.

"6. Two per cent (2%) of the agreed value of the equipment times the number of months for which monthly payments shall have been paid, plus the net resale proceeds, exceeds the agreed value of the equipment by $3356.00.

(.02 x 14800 x 36 + 7500 — 14800 = $3356.00)

"7. The amount owed by defendants on the unpaid rental charges less the excess found in Finding Number 6 leaves a balance of $2866.35 owed by defendants."

Defendants have divided their argument under this point into two parts. The substance of the first part is that plaintiff, by refusing the offer of $7,500.00 in August, 1965, made an election under § 50A-9-505(2), N.M.S.A.1953 (Repl. Vol. 8, pt. 1, 1962) to retain the equipment in lieu of the unpaid rents and any indebtedness owing pursuant to Paragraph 4 of the Schedule.

Defendants must fail because they at no time asserted this position in the trial court, they requested no findings or conclusions in support of this position, and the position is inconsistent with their above quoted requested findings 8 and 9 and the trial court's findings which are not attacked. See Western Farm Bureau Mutual Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968); Hamilton v. Woodward, 78 N.M. 633, 436 P.2d 106 (1968); Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

The second part of defendants' argument under their point 2 is that the trial court wrongly interpreted and applied the formula set out above in Paragraph 4 of the Schedule. They first argue that the parties were proceeding exclusively under Paragraphs 3 and 4 of the Schedule. Although they do not expressly so state, their argument clearly is to the effect that they were thereby relieved of their obligation to pay the unpaid rents in the amount of $6,222.35, found by the trial court to be the balance owing by defendants on the rental charges.

A reading of the entire record convinces us that there was no stipulation by plaintiff that the parties were proceeding exclusively under Paragraphs 3 and 4 of the Schedule, or that plaintiff waived its right to the unpaid rentals. By its first amended complaint plaintiff sought recovery of the delinquent rents. By its requested findings it sought recovery of the unpaid rents pursuant to express authority so allowing in Paragraph 9 of the Schedule. In any event, defendants expressly requested a finding that the parties did not intend "* * * to operate under Section 9 of the * * * Schedule." Since they sought escape from their written contractual obligation to pay the rents, the burden was on them to establish their defense that the parties did not intend to operate under

Paragraph 9 of the Schedule. In this they failed, as evidenced by the trial court's denial of their requested finding and its finding as to the balance owing by defendants by way of rentals. Defendants have not claimed error on the part of the trial court in refusing their request. This refusal is regarded as a finding on this question against defendants. Foremost Foods Company v. Slade, 80 N.M. 658, 459 P.2d 457 (1969); Tsosie v. Foundation Reserve Insurance Company, 77 N.M. 671, 427 P.2d 29 (1967); Clark v. Foremost Insurance Co., 80 N.M. 584, 458 P.2d 836 (Ct.App.1969).

The remainder of defendants' argument is directed at the claimed error of the trial court in using the number 36 (the number of months for which defendants were obligated to pay the rentals prior to the termination of the lease in August, 1965) rather than the number 19 (the number of months for which defendants actually paid rentals) in computing the amount owing by defendants under the formula provided in Paragraph 4 of the Schedule. The trial court obviously construed the words, "for which monthly rents for the vehicle shall have been paid," to mean, "for which monthly rents for the vehicle should have been paid" or "for which lessee (defendants) is obligated to pay the rents."

The trial court's interpretation worked to defendants' advantage. As already shown, defendants owed and still owe unpaid rents of $6,222.35 as found by the trial court. By the method of computation under the formula, as urged by defendants, they owe $1,316.00. This figure, when added to the unpaid rents, totals $7,538.35. Since it is consistent with defendants' contractual rights and obligations that 36 rather than 19 be used in the formula computations, we are of the opinion the trial court's interpretation is the correct one.

The judgment should be affirmed.

It is so ordered.

McMANUS, and STEPHENSON, JJ. concur.

486 P.2d 65

Howard W. HERBERT, Plaintiff-Appellant,

v.

SANDIA SAVINGS & LOAN ASSOCIATION and Savings Financial Corporation, Defendants-Appellees.

No. 9188.

Supreme Court of New Mexico.
May 28, 1971.
Rehearing Denied June 17, 1971.

Sutin, Thayer & Browne, Irwin S. Moise, Norman S. Thayer, Albuquerque, for plaintiff-appellant.

Franks & deVesty, Albuquerque, for defendants-appellees.

OPINION

OMAN, Justice.

Plaintiff brought suit for damages allegedly arising from a breach of contract by defendants in terminating plaintiff's employment by defendants. Plaintiff appeals from a judgment for defendants entered pursuant to a motion under District Court Rule 41(b) [§ 21-1-1(41) (b), N.M.S.A. 1953 (Repl.Vol. 4, 1970)]. We affirm.

This case was tried to the district court without a jury. At the close of plaintiff's case the court sustained defendants' motion made pursuant to District Court Rule 41(b), supra. Findings of fact and conclusions of law were made and entered by the district court pursuant to District Court Rule 52(B) [§ 21-1-1(52) (B), N.M.S.A. 1953 (Repl.Vol. 4, 1970)].

Plaintiff relies upon one point for reversal, which consists of (1) an attack on certain findings of the trial court, (2) a claim of error on the part of the trial court in refusing certain requested findings, and (3) a claim that the trial court erred in concluding the contract of employment was terminable at will. At the outset he concedes his success is dependent upon overturning certain of the trial court's findings. Thus, we must determine whether the evidence was sufficient to support these findings in the light of the rule by which the trial court was obliged to view the evidence.

Since the case of Hickman v. Mylander, 68 N.M. 340, 362 P.2d 500 (1961), this court, with an exception or two, has consistently held the trial court, in ruling on a motion and making findings under Rule 41(b), supra, may properly weigh all of the evidence and give to it such weight as the court believes it deserves. Komadina v. Edmondson, 81 N.M. 467, 468 P.2d 632 (1970); Panhandle Pipe and Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969). See also White v. City of Lovington, 78 N.M. 628, 435 P.2d 1010 (Ct.App.1967). That is, a judgment dismissing an action or claim under Rule 41(b), supra, unless the trial court otherwise specifies, constitutes a judgment on the merits. Blueher Lumber Co. v. Springer, 77 N.M. 449, 423 P.2d 878 (1967). See also Komadina v. Edmondson, supra; Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962). In determining whether findings made by the trial court, as required by Rule 41(b), su-

pra, are supported by substantial evidence, the evidence in support thereof must be viewed in the same manner as evidence is viewed in support of findings made in any other case decided on the merits. This determination requires that the evidence be viewed in the light most favorable to support the findings of the trial court. Panhandle Pipe and Steel, Inc. v. Jesko, supra, Montano v. Saavedra, supra; White v. City of Lovington, supra.

It is true in Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963), the rule followed by this court prior to Hickman v. Mylander, supra, was reaffirmed. Two decisions of this court which preceded the Hickman case were cited in the Hutchison v. Boney decision as support for the statement that in passing on a motion under Rule 41(b), supra, "* * * all the evidence favorable to plaintiff's claim must be taken and considered as true, and all evidence adverse to such claim will be disregarded. * * *" Apparently the court overlooked the decisions in Montano v. Saavedra, supra, and Hickman v. Mylander, supra. In any event, the Hutchison decision, to the extent that it reaffirmed the earlier rule, was in error and is inconsistent with a number of decisions by this court which have followed the Montano and Hickman cases.

Since, as already stated, a judgment entered under Rule 41(b), supra, constitutes a judgment on the merits, unless the trial court otherwise specifies, this court also was in error in its decision in Hutchison v. Boney, supra, insofar as it sought to distinguish between findings of fact made under Rule 41(b) and findings of fact made in other proceedings leading to a judgment on the merits, and insofar as it expressed the applicability to findings of fact made pursuant to Rule 41(b) of the holding in Carney v. McGinnis, 63 N.M. 439, 321 P.2d 626 (1958), that the trial court need not consider or weigh the testimony of an adverse witness.

Plaintiff in the case now before us takes the position that testimony of an adverse witness, which is contrary to the testimony of plaintiff's other witnesses, is not to be weighed. He relies upon Carney v. McGinnis, supra. In this he is in error. As shown above, the consideration and weight to be given the testimony of an adverse witness is the same whether the proceedings leading to a judgment on the merits fall within Rule 41(b), supra, or constitute a complete trial consisting of a full presentation of evidence by both sides and the resting of their respective cases. The correct rule is stated as follows in Hutchison v. Boney, supra:

> "* * * [W]hile a party is not bound by the testimony of an adverse witness called under Rule 43(b), Rules of Civil Procedure, this means only that [the party is] free to cross-examine, contradict and impeach [this witness], and that even if [the witness'] testimony [is] not contradicted, the trial court [is] not required to accept it as true, * * * [T]he testimony of an adverse witness is evidence in the case, to be weighed with all other evidence and given such probative value as the fact finder deems appropriate. * * *"

Plaintiff attacks six findings of the trial court as being unsupported by the evidence. As already stated, he concedes these six findings must be overturned if he is to prevail in this appeal.

We see no useful purpose to be served by quoting the six findings and detailing all the evidence in support of each. However, considering the evidence in the light of the foregoing stated rules, and the six findings in their proper relationship to the other findings of the trial court which have not been attacked, we are of the opinion these six findings are supported by the evidence.

The judgment should be affirmed.

It is so ordered.

STEPHENSON, J., and JOE W. WOOD, Judge of Court of Appeals, concur.

486 P.2d 68

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri Corporation, Plaintiff-Appellant,

v.

DON RHOADES CORPORATION, a Corporation, Defendant-Appellee.

No. 9172.

Supreme Court of New Mexico.

May 10, 1971.

Rehearing Denied June 16, 1971.

Sutin, Thayer & Browne, Irwin S. Moise, Jonathan B. Sutin, Albuquerque, for plaintiff-appellant.

Stuart C. Hines, Albuquerque, for defendant-appellee.

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Bernalillo County, New Mexico, to domesticate a foreign judgment obtained by the American Institute of Marketing Systems, Inc., a Missouri corporation, designated "Aims," against defendant Don Rhoades Corporation, designated "Rhoades," in the Magistrate Court, Seventh District, St. Louis County, Missouri. Aims filed a motion for summary judgment, which was denied. The case was then tried without a jury and judgment was entered in favor of defendant Rhoades. Plaintiff Aims appeals.

Briefly, the facts are that Aims and Rhoades entered into a contract in February 1967, which will be referred to as a "residential real estate referral program for Aims' member brokers." The contract contained an automatic renewal provision on the same terms and conditions. The contract also provided that Rhoades may terminate the agreement by giving Aims thirty-day-written notice of intention to terminate. Another provision, and most important, is that:

> "* * * George M. Kinder, located at Route 3 Box 25, U.S. Hwy. 40, in Chesterfield, St. Louis County, Missouri, shall serve Aims as its nominee for the receipt of materials * * * and shall serve * * * [Rhoades] as Broker's Agent for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof."

This was a six-months contract. Rhoades did not technically comply with the cancellation provision of the contract. He did, however, pay for the first six months of the contract and this cause of action is for payment under the contract for a subsequent six-month period under the automatic renewal provision. Suit was filed in Missouri. Process was served on Kinder, agent for Aims and Rhoades. Kinder mailed the complaint and summons to Rhoades by registered mail, return receipt. Upon receipt of the summons and complaint, Rhoades contacted his local attorney, who advised that it would be necessary to defend the suit in the Missouri court, which Rhoades did not do. At the end of the subsequent six-month period, default

judgment was taken against Rhoades in the Missouri court and, after being properly exemplified and authenticated, the judgment was transmitted to Aims' attorney in Albuquerque, who filed this action against Rhoades.

This court observes that Aims has been involved in considerable litigation in other jurisdictions as a result of substantially the same type of contract as herein involved.

The issue in the instant case is whether the trial court was obligated to give full faith and credit to the Missouri judgment.

Under the posture of this case, we are most reluctant to reverse. However, it becomes necessary, as the trial court committed error in failing to give full faith and credit to the judgment of the Missouri court under the United States Constitution, Art. IV, § 1, which provides in part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *"

(Citations omitted.)

The proper forum for litigating the issues involved in this case was the Missouri court, and the trial court should have granted summary judgment, even if its conscience may have been shocked by the contract between the parties, as is ours in the instant case.

> "* * * [I]t is not the province of the court to alter or amend the contract, but rather to interpret and enforce the contract as made by the parties. * * *"

Hopper v. Reynolds, 81 N.M. 255, 466 P.2d 101 (1970).

The case is reversed and remanded to the trial court, with instructions to reinstate the case on the docket and enter a new judgment in favor of Aims in the amount of the Missouri judgment only. Each party will stand their own costs and no attorneys' fees will be allowed. It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

486 P.2d 69

Louis Lee ROBINSON, Petitioner-Appellant,

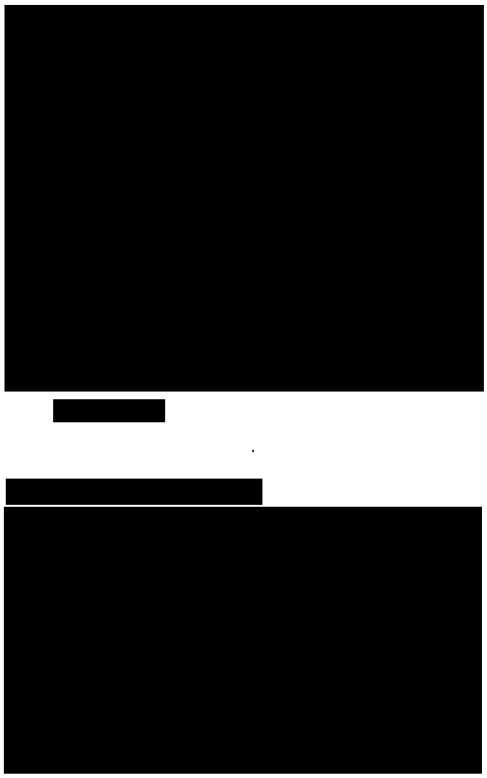
v.

STATE of New Mexico, Respondent-Appellee.

No. 649.

Court of Appeals of New Mexico.

May 28, 1971.



David W. Bonem, Quinn & Bonem, Clovis, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Jay F. Rosenthal, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Judge.

This is an appeal from a denial of post-conviction relief after a hearing. Section 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4). While certain findings of the trial court

are attacked, we need not consider them. The dispositive issue is whether the trial court could properly refuse to find that petitioner requested his court-appointed attorney to appeal his conviction. Since we hold that the trial court could properly refuse this requested finding, there is no factual basis for a claim that petitioner was denied his right to appeal his conviction. For the right to appeal, and the court-appointed attorney's obligation in connection therewith, see State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App.1969). Compare Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct.App.1971); Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App.1970).

At the hearing on the post-conviction motion, petitioner unequivocally testified that after his sentencing he asked his attorney to appeal. The attorney had no recollection of such a request. Thus, petitioner's testimony is not directly controverted. Petitioner asserts the trial court erred in not accepting petitioner's testimony as true.

Even though testimony is not directly contradicted, the trial court is not always required to accept such testimony as true. For situations where the testimony need not be accepted as true, and New Mexico decisions applying this concept, see Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970). One of the situations where the testimony need not be accepted as true is when the testimony is "* * * subjected to reasonable doubt as to its truth and veracity, by legitimate inferences drawn from the facts and circumstances of the case. * * *" Samora v. Bradford, supra.

Here, inferences from the facts and circumstances of the case subject petitioner's testimony to reasonable doubt as to its truth and veracity. These facts and circumstances are: petitioner was convicted in October, 1963; the claim concerning a request to appeal was not made until June, 1970; between these two dates, petitioner brought a habeas corpus proceeding in Santa Fe County District Court, another habeas corpus proceeding in the New Mexico Supreme Court, and a post-conviction proceeding under § 21-1-1(93), supra. See State v. Robinson, 78 N.M. 420, 432 P.2d 264 (1967).

The delay in asserting the claim now made and the failure to assert this claim in the habeas corpus and post-conviction proceedings are suspicious circumstances which cast doubt on the truth of petitioner's testimony. Patterson v. State, 81 N. M. 210, 465 P.2d 93 (Ct.App.1970); compare State v. Sandoval, 80 N.M. 333, 455 P.2d 837 (1969); State v. Chavez, 78 N.M. 446, 432 P.2d 411 (1967). Under these circumstances, the trial court was not required to accept petitioner's testimony as true and did not err in refusing the requested finding.

The order denying post-conviction relief is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

486 P.2d 70

Gregory Ronald LE DOUX, a Minor by Mary Gallegos, as Guardian and Next Friend, Plaintiff-Appellee,

v.

Debbie PETERS, a Minor and Helen Peters, her Mother, Defendants-Appellants.

No. 567.

Court of Appeals of New Mexico.

May 21, 1971.

Writ of Certiorari Issued June 18, 1971.

Leon Karelitz, Las Vegas, for defendants-appellants.

Joe A. Duran, Duran, Pearlman & Short, Albuquerque, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendants, mother and minor daughter, appeal a judgment in favor of plaintiff. Plaintiff while riding his motorcycle was struck at an intersection by an automobile owned by Helen Peters and driven by her minor daughter, Debbie Peters. Plaintiff

had the right of way and defendant failed to stop at a stop sign. Prior to the accident Debbie knew the brakes were not working sufficiently to stop the car. The issues were tried to the trial court sitting without a jury. Four points are presented for reversal. They relate to the family purpose doctrine and contributory negligence. We affirm.

"The Findings as made Do Not Support the Conclusion of Law, Impliedly Adopted that the Appellant Helen Peters' Motor Vehicle was a Family Purpose Car or the Judgment Based Thereon, and Such Findings Compel a Contrary Conclusion."

Defendant, Helen Peters, relies on Finding of Fact No. 11:

"Defendant Helen Peters purchased the 1962 Chevrolet for her personal use and convenience and, during the three or more years Defendant Helen Peters had owned her 1962 Chevrolet before the accident on May 15, 1968, she permitted her daughters to drive that vehicle, and they drove it, from time to time for brief periods and distances and then only after obtaining special permission from Defendant Helen Peters each time they used the vehicle."

She contends there are four principles, which when viewed in conjunction with the above findings, do not support a conclusion that her car was a family purpose car. The principles she would have us adopt and our answers are:

1. "(a) A parent is under no obligation to furnish his automobile for the comfort and pleasure, or general use and convenience of his family;"

This principle does not advance defendant's contention, for, despite what might have been the parental obligation, the record discloses that the mother did permit her two daughters to use the car for the convenience of the family, namely, going to and from school and church.

2. "(b) The burden is on the party asserting the applicability of the family purpose doctrine to prove that a motor vehicle is maintained by the owner for the general use and convenience of his family;"

This principle is not in line with New Mexico decisions. Our decisions have held heads of families liable under the doctrine when they did not own the automobile in question, and when the vehicle was not maintained for the general use and convenience of the family. Pouliot v. Box, 56 N. M. 566, 246 P.2d 1050 (1952); Stevens v. Van Deusen, 56 N.M. 128, 241 P.2d 331 (1951). Also, as the doctrine is applied in New Mexico when a child uses an automobile owned by his parents there is a presumption of agency arising from such ownership and use. Burkhart v. Corn, 59 N.M. 343, 284 P.2d 226 (1955). After plaintiff had established these two facts as were found by the trier of fact in finding number one that the "* * * automobile was operated by the Defendant Debbie Peters with authority from and owned by her mother, the Defendant Helen Peters," defendant had a burden of coming forward to rebut the accompanying presumption. It was for the trier of fact to determine whether defendant had done so.

3. "(c) The Fact of the parent's ownership of a motor vehicle, plus a family member's driving, does not prove family purpose, as this equally would prove a mere lending of an automobile to the minor child * * *."

As discussed in the preceding paragraph, in New Mexico ownership and use gives rise to the presumption of a family purpose doctrine. Burkhart v. Corn, supra. Furthermore, this was not an isolated instance of lending. There was testimony that the car used was used for the family's convenience to go to church and to school.

4. "(d) The family purpose doctrine is not applicable where members of the family must obtain special permission each time they use the motor vehicle, unless (as is not the situation here) the requirement of permission relates only to the owner's general parental

supervision of such family members with respect to a vehicle clearly furnished and maintained for the general use and convenience of the owner's family."

This principle does not aid defendant. She asserts that permission required for use of this automobile was not permission relating to general parental supervision. This assertion, however, is not supported by the evidence, nor by the findings of the trial court.

In light of the above we cannot say as a matter of law that defendant Helen Peters' car was not a family purpose car.

Defendant's analysis and reliance on out of state cases has been considered but does not change our opinion in view of the family purpose doctrine as developed by New Mexico case law.

"2. The Court Erred in Refusing to Find Appellant Helen Peters' Motor Vehicle was Not Maintained by Her for the General Use and Convenience of Her Family and to Conclude She Therefore was Not Liable for the Negligence of Her Daughter, Appellant Debbie Peters, While Operating the Vehicle."

As was discussed above findings one and eleven implicitly held that the automobile was a family purpose car. Requested findings and conclusions which conflict with those found by the trial court and supported by substantial evidence are properly refused. Thigpen v. Rothwell, 81 N.M. 166, 464 P.2d 896 (1970); Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct. App.1970). Defendants' claimed error then requires that we examine whether the court's finding is supported by substantial evidence.

On the stand defendant Helen Peters conceded that she permitted Debbie and another daughter to drive the car, and that on the night of the accident permission was given to Debbie because the mother would not be there to drive her. Once in a while the mother would permit defendant Debbie to use the car for errands. There was testimony that the car was used for the convenience of the family in going to school and to church and that one of the daughters would pick up the children in the car on days when the weather was bad.

In light of these facts and what constitutes the family purpose doctrine in New Mexico case law, the findings of the trial court were based on substantial evidence. It was not error to refuse contrary findings. Thigpen v. Rothwell, supra; Samora v. Bradford, supra.

"3. The Findings as Made Do Not Support the Conclusion of Law Impliedly Adopted that Appellee Le Doux was Free from Contributory Negligence or the Judgment Based Thereon, and Such Findings Compel a Contrary Conclusion."

Contributory negligence is an affirmative defense, the burden of which is on the defendant to establish. Martinez v. C. R. Davis Contracting Company, 73 N.M. 474, 389 P.2d 597 (1964); Samora v. Bradford, supra. When the trial court refuses to find an ultimate fact, such refusal constitutes a finding to the contrary against the party who had the burden of establishing that issue. Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842 (1969); State ex rel. Thornton v. Hesselden Const. Co., 80 N.M. 121, 452 P.2d 190 (1969).

On appeal defendants, Debbie and Helen Peters, point to findings of evidentiary facts which they assert demand a conclusion of contributory negligence on the part of plaintiff. These evidentiary facts are: (a) the plaintiff was probably exceeding the speed limit; (b) he entered the intersection where the accident occurred without slackening his speed; (c) he had a clear view of the cross street but did not see defendants' car until after he entered the intersection; (d) he looked straight ahead and saw the car only through the corner of his eye; (e) he did not swerve to right or left which he could have done successfully; (f) he did not brake but merely downshifted his motorcycle, which action did not increase his speed any.

The question before us is whether, with these evidentiary findings a trier of fact, as a matter of law, must conclude that the plaintiff was guilty of contributory negligence. We are not so persuaded. Whether or not one's conduct constitutes contributory negligence is generally a question of fact to be determined by the trier of fact. Stoes Brothers, Inc. v. Freudenthal, 81 N.M. 61, 463 P.2d 37 (Ct.App. 1969).

The first of the findings upon which defendants rely may said to be an act of commission; he was probably speeding; the others are acts of omission. We will consider them in those two classes. Assume that in fact plaintiff was actually speeding. This would lead to a conclusion that he was negligent as a matter of law. McKeough v. Ryan, 79 N.M. 520, 445 P.2d 585 (1968). However, since contributory negligence embraces both negligence and proximate cause, Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967), there still remains the fact determination whether such negligence was the proximate cause of the accident. Moss v. Acuff, 57 N.M. 572, 260 P.2d 1108 (1953); Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct.App. 1969). The trial court decided speed was not the cause of the accident.

The other evidentiary facts are acts of omission, possible alternatives which the plaintiff might have pursued and which arguably might have avoided the accident. Miller v. Marsh, 53 N.M. 5, 201 P.2d 341 (1948) stated:

> "One in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness required of a careful and prudent man under ordinary circumstances. * * * In such a situation the plaintiff was only required to endeavor to do in a prudent manner what seemed reasonable to him under the circumstances to avoid the collision after the discovery of his danger. * * *"

There was testimony that the plaintiff did not use his brakes because he did not have time; that he did not turn because he would have skidded underneath the car; that he tried to go through the intersection because he feared defendants' car would have run him over completely. With these facts in the record we cannot conclude that plaintiff, as a matter of law, was guilty of contributory negligence.

> "4. The Court Erred in Refusing to Find Appellee Le Doux Contributorily Negligent and to Conclude He Therefore was Barred from Recovery."

This point is closely related to the third. Defendants do not deny the negligence of Debbie Peters occasioned by improperly working brakes and failure to stop at the stop sign. However, they claim that plaintiff Le Doux, was as a matter of law, contributorily negligent. To agree with defendants' position we would have to overrule the trial court on two issues, negligence of plaintiff and proximate cause of the accident.

For the purpose of discussion let us concede that the plaintiff was speeding and so was negligent as a matter of law. McKeough v. Ryan, supra. There would still remain the issue of proximate cause. Proximate cause is a question of fact and becomes a question of law only when all the facts are undisputed and all reasonable inferences deducible therefrom are plain and consistent. Samora v. Bradford, supra. As was shown in the discussion of the third point, there was testimony which required weighing as to causation by the trier of fact. In this situation, his conclusion is binding on appeal. The trial court is the sole trier of facts. Crumpacker v. Adams, 77 N.M. 633, 426 P.2d 781 (1967).

Affirmed.

It is so ordered.

SPIESS, C. J., and DEE C. BLYTHE, District Judge, concur.

486 P.2d 75

Thomas CHAFFINS, Plaintiff-Appellant,

v.

JELCO INCORPORATED, a corporation, and Industrial Indemnity Insurance Company, Defendants-Appellees.

No. 538.

Court of Appeals of New Mexico.
April 30, 1971.
Rehearing Denied May 25, 1971.
Writ of Certiorari Issued June 18, 1971.

William F. Aldridge, Horton & Aldridge, Quincy D. Adams, Adams & Foley, Albuquerque (on rehearing), for plaintiff-appellant.

Ray H. Rodey, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff filed suit to set aside a general release of a workmen's compensation claim on the grounds of a latent injury. The trial court ruled against plaintiff and he appeals.

We affirm.

Plaintiff fell from a 30 foot power pole on July 8, 1968 and subsequently was treated by Drs. Jordan, Annala, Martinez and Bronitsky. Plaintiff's complaint was of pain and discomfort in his back. Sixteen years prior to plaintiff's fall from the power pole, he was injured in an auto accident and part of the iliac bone was removed leaving a very large scar on his back. Plaintiff signed a release on May 16, 1969 covering future workmen's compensation payments. Dr. Bronitsky saw plaintiff on July 1, 1969 at which time there was a swelling in the scar area and a drainage starting in the scar. The sinus was excised and the wound healed.

Dr. Bronitsky stated that at the time of his medical examinations prior to plaintiff's signing the general release, he could see nothing unusual about the scar and when he discharged plaintiff just prior to plaintiff's signing the release, although plaintiff was complaining of pain in the back, he assumed it was a residual of plaintiff's sprain in the fall from the pole and explained to plaintiff that he eventually expected the pain to disappear completely. Dr. Bronitsky testified that as a medical probability the draining sinus was caused by the fall from the power pole.

Defendants' doctor, Dr. Martinez examined plaintiff on November 5, 1969 and concluded:

> "* * * I am at a loss to be able to relate the draining and infected sinus with an injury which occurred many months before. I would rather speculate that the best probability is that there is some connection between the infection and the old scarred area. The ideology

[etiology] may even be independent of either of these two events. However, the least likely possibility, in my opinion, is that the fall from the pole was in any way related to this lesion. * * *"

Plaintiff challenges the trial court's findings nos. 8 and 9 which read:

"8. The occurrence of the draining sinus suffered by the plaintiff on or about July 1, 1969, and the contention that his disability was now increased is merely a claim that the injury proved more serious than at the time of the settlement than [sic] the plaintiff thought them to be, which fact was admitted by Dr. Bronitsky and any mistake about the plaintiff's physical condition at the time he settled was unilateral on the part of the plaintiff and only as to his future disability.

"9. When plaintiff filed suit to set aside the release herein on August 15, 1969, he had simply experienced a worsening of his low back condition as a consequence of an area of earlier injury in his back and more than likely the draining sinus is completely unrelated to his injury of July 8, 1968."

Plaintiff contends the trial court should have adopted his findings which were "* * * to the effect that the draining sinus condition did not manifest itself prior to the settlement; that the draining sinus condition was caused by the accident, [fall from the power pole] and that the condition was not diagnosed by the doctors who treated Plaintiff, prior to the settlement."

Latent injuries are recognized under § 59-10-13.3(A) (3), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963). Where causation is denied the workman must establish that causal connection is a medical probability by expert medical testimony. Section 59-10-13.3 (B), N.M.S.A.1953 (Repl.Vol. 9, pt. 1). Where two medical experts express contrary opinions on causation a conflict arises and such conflict must be resolved by the trier of facts. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968). If there is substantial evidence to support the verdict the findings will not be disturbed. Adams v. Loffland Brothers Drilling Company, 82 N.M. 72, 475 P.2d 466 (Ct.App. 1970).

Viewing the evidence, together with all reasonable inferences that flow therefrom, we conclude there is substantial evidence to support the findings that the draining sinus was unrelated to the fall from the power pole. Here we have two doctors who testified to contrary conclusions. The court believed Dr. Martinez.

Affirmed.

It is so ordered.

SPIESS, C. J., concurs.

DEE C. BLYTHE, District Judge (dissenting).

I am compelled to dissent, for five reasons: (1) Dr. Martinez' report does not furnish a sufficient basis for a finding of lack of causal connection; (2) the trial court did not make a clear-cut finding on causation; (3) the trial court's findings were not separately numbered and stated; (4) the trial court did not mark plaintiff's requested findings of fact and conclusions of law "refused", or enter an order to this effect; and (5) it is apparent that the trial court based its decision, not on lack of causation, but on an erroneous belief that the general release necessarily covered a later-discovered injury in the same body area.

Under Mayfield v. Keeth Gas Company, 81 N.M. 313, 466 P.2d 879 (Ct.App.1970), the defendants' medical evidence on causation in a workmen's compensation case must be substantial, even though it need not meet the plaintiff's statutory burden, where causation is denied, to "* * * establish that causal connection as a medical probability by expert medical testimony." § 59-10-13.3(B), N.M.S.A.1953. (Repl. Vol. 9, Part 1). Is the defendants' medical evidence substantial in this case? The portion of Dr. Martinez' report quoted in

the majority opinion shows that, at best, it was sufficient to raise some questions, using such expressions as "I am at a loss" and "I would rather speculate." It takes a lot of inference to convert this into an opinion of lack of causation. Further, the quoted portion is inconsistent within itself and is actually consistent with plaintiff's contention where it says, "I would rather speculate that the best probability is that there is some connection between the infection and the old scarred area."

This is not a case in which the trial judge saw and heard two medical experts give conflicting opinions. Dr. Bronitsky testified in person for the plaintiff, and as the majority opinion concedes, his testimony on causation met the statutory requirement. Dr. Martinez did not testify in person; his written report was read into evidence by stipulation, and therein lies one source of our problem. Had he been testifying in person, his opinion no doubt would have been elicited, and it might very well have been as interpolated by the majority. But it should not be the function of this court to remedy the deficiency. Since no question of "eyeballing" the witness to determine his credibility is involved, we are in as good a position as the trial court to evaluate the written evidence. Baker v. Shufflebarger & Associates, Inc., 78 N.M. 642, 436 P.2d 502 (1968).

The plaintiff requested a finding "That the draining sinus condition was caused by and directly related to the accident of July 8, 1968." Instead of meeting this request squarely, the trial court's Finding No. 9, as quoted in the majority opinion, states in part that "* * * more than likely the draining sinus is completely unrelated to his injury of July 8, 1968." The trial court, when requested, must find one way or the other on a material fact issue, and failure to do so constitutes error. Aguayo v. Village of Chama, 79 N.M. 729, 449 P. 2d 331 (1969). While there is a line of New Hampshire cases holding that a finding of a probability that a certain fact exists is equivalent to a finding that it does exist, e. g., Pulsifer v. Walker, 85 N.H. 434, 159 A. 426, 81 A.L.R. 1052 (1932), the precise question has not been decided in this jurisdiction. Under the majority opinion a "more than likely" finding meets the minimum requirements of Rule 52(B), Rules of Civil Procedure, § 21-1-1(52) (B), N.M.S.A.1953 (Repl.Vol. 4), that "* * * the court shall find the facts * * * pertinent to the case * * *" The same rule goes on to require in two places that each finding and conclusion be separately stated, which definitely was not done in this case. The wisdom of this requirement is well illustrated here; if each fact and conclusion "pertinent to the case" had been stated and numbered separately, we would know much more precisely what was intended, and the true basis of the decision. As it was, the trial court simply adopted verbatim the defendants' requested findings and conclusions, which leave a lot to be desired.

Subsection (B) (a) (5) of the same Rule 52 requires that the trial court mark "Refused" all requested findings of fact and conclusions of law not included in the court's decision. Our Supreme Court has held this rule to be sufficiently complied with where "Refused" was written and initialled on the first page of a party's requested findings and conclusions, Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965), and where the trial court merely included in its decision an order that "All requested Findings of Fact and Conclusions of Law submitted by the parties at variance with this Decision are hereby denied", Edwards v. Peterson, 61 N.M. 104, 295 P.2d 858 (1956); but in each case the exception was approved on the ground that no prejudice to the appellant had been shown. Here the trial court made no attempt to comply with Rule 52(B) (a) (5) and prejudice did result to the plaintiff because the trial court did not adopt clear-cut findings and conclusions contrary to those requested by plaintiff on material issues, and because the basis of the decision is in doubt. For this reason

alone, the case should be remanded. Otherwise, Rule 52(B) (a) (5) will be nullified in effect, at least in this court, and Edwards v. Peterson and Martinez v. Research Park, Inc., supra, will be impliedly overruled.

Since the true basis of the decision is somewhat obscure, I think it is proper to resort to the trial judge's oral comments at the conclusion of the trial, even though these comments are not binding and may be superseded by the written decision. Edwards v. Peterson, supra. They are, in full:

> "THE COURT: I will have to dismiss this case. I think the release was a valid release and releases the claim in question."

This comment is consistent with the decision, which included detailed findings and conclusions about the validity and binding effect of the general release. In fact, four of the conclusions of law are concerned with the release, and only one, the last, is concerned with the injury now complained of. It does say, "The claim of plaintiff does not constitute a latent injury." However, this conclusion is not supported by any findings of fact, even though plaintiff submitted specific requested findings regarding whether the draining sinus had manifested itself or was known by either party to exist at the time of the settlement. A conclusion of law unsupported by specific findings of fact should be disregarded. Consolidated Placers, Inc. v. Grant, 48 N.M. 340, 151 P.2d 48 (1944).

It is apparent that the trial court felt itself bound by the release in view of the fact that the claimed latent injury was in the same general body area (the low back) as the injury which was known to the parties when they settled. As acknowledged by the majority opinion, our law recognizes latent injuries in workmen's compensation cases, and general releases can be set aside where they exist. If the trial court were fully alerted to this, and the case were remanded for further findings and conclusions, the result might well be different. Whether or not the result might be changed, the workman is entitled to that chance. He has put his settlement of $3500 (plus medical bills) on the line by asking that the release be set aside; he might receive less for both injuries on remand.

We are supposed to construe the Workmen's Compensation Act in favor of the workman. Croner v. J. W. Jones Construction Company, 79 N.M. 179, 441 P.2d 219 (Ct.App., 1968). The majority opinion does not do this.

In my opinion, this court should hold the defendants' medical evidence insufficient as a matter of law to overcome the plaintiff's prima facie case on causation, or at least should remand for further findings on causation and latent injury. The majority holding otherwise, I must respectfully dissent.

486 P.2d 606

SOUTHERN UNION GAS COMPANY, a corporation, Plaintiff-Appellee,

v.

William H. TAYLOR and Jutta Taylor, Defendants-Appellants.

No. 9212.

Supreme Court of New Mexico.

June 7, 1971.

Rehearing Denied June 30, 1971.

Motion for Leave to File Second Motion for Rehearing Denied July 12, 1971.

William H. Taylor, pro se.

Botts, Botts & Mauney, Gerald R. Cole, Albuquerque, for appellee.

OPINION

OMAN, Justice.

This suit was brought in the Magistrate Court of Bernalillo County to recover the final four installments due on a "Retail Installment Contract" under which plaintiff sold and installed a used circulating heater in defendants' home. Defendants counterclaimed. The magistrate found the issue in favor of defendants and entered judgment against plaintiff on its claim and for defendants on their counterclaim. Plaintiff appealed to the district court. Appeals from the magistrate court to the district court are determined by trial de novo in the district court. Sections 36–15–3(A)(C), 36–15–4 and 36–21–42(g), N.M.S.A. 1953 (Repl.Vol. 6, 1964, Supp.1969).

The district court entered summary judgment for plaintiff, and defendant, William H. Taylor, has appealed to this court. We affirm.

Appellant asserts three separate points upon which he relies for reversal. By his first point he claims "THE TRIAL

COURT ERRED IN OVERTURNING JUDGMENT OF LOWER COURT WITHOUT REVIEW." There is no merit to this contention. There is nothing to show the trial court failed to consider the matters he was required to consider by District Court Rule 56(c) [§ 21–1–1(56) (c), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. If appellant is trying to urge that findings made by the magistrate court, which were incorporated in the judgment of that court, raised issues of fact which precluded the district court from properly entering a summary judgment, he is in error. No claim is made that the district court was precluded from or in any way limited in proceeding under the Rules of Civil Procedure for the District Courts, and particularly under Rule 56 [§ 21–1–1(56), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. Although appellant has made no reference thereto, § 36–15–3(A), supra, does provide:

> "Appeals from the magistrate court shall be determined by trial de novo in the district court, and all laws, rules and regulations governing the magistrate court shall govern the trial in the district court."

A similar statutory provision concerning appeals from a justice court to the district court was considered in Pointer v. Lewis, 25 N.M. 260, 181 P. 428 (1919), wherein it was held the district court in a trial de novo may render its independent judgment even in cases involving the discretion of the justice court, and, when a case is tried anew on appeal in the district court, judgment may be rendered by the district court as if the case had originated in that court. See also Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943); State v. Coats, 18 N.M. 314, 137 P. 597 (1913).

As above shown, our statutes expressly provide appeals from a magistrate court to the district court shall be determined by trial de novo. We consider this to mean "anew," as did this court in Pointer v. Lewis, supra. See also, Lewis v. Baca, 5 N.M. 289, 21 P. 343 (1889). This view is in accord with Black's Law Dictionary at 1677 (4th Ed. 1951), wherein "trial de novo" is defined as: "A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below."

If the district court were in any way bound by the findings of the magistrate court, it would not be a trial de novo, or a trial anew.

Under his second point, appellant claims "THE TRIAL COURT ERRED IN GRANTING * * * SUMMARY JUDGMENT AS A MATTER OF LAW ON THE GROUND OF LACHES." His argument apparently is that the trial court must have relied upon the doctrine of laches, since the lapse of time here in question was less than the statutory limitation period; laches cannot be predicated solely upon a lapse of time; there was nothing but a lapse of time before the trial court to support laches; and, consequently, the trial court erred in granting the summary judgment.

The pertinent facts, established by the record, and very largely by an affidavit in support of the motion for summary judgment, and which are in no way controverted, are as follows:

Appellant paid 32 of the 36 monthly installments under the contract. The first notice by him to appellee of his claims that the heater was inadequate and improperly installed was given by his answer to appellee's complaint filed in the magistrate court seeking recovery of the remaining four installments, and this was three years and ten days after installation of the heater. If the heater or its installation failed in any respect to comply with the contract, it was appellant's duty to reject the same within a reasonable time after the installation and after reasonable opportunity for inspection. Sections 50A–2–602 and 606, N.M.S.A.1953 (Repl.Vol. 8, pt. 1, 1962); Woods v. Van Wallis Trailer Sales Company, 77 N.M. 121, 419 P.2d 964 (1966).

It appears from the record that appellant claimed a failure of performance by the heater from the date of installation, and at

some time he removed it from his home and stored it in his garage. In his reply brief he states he "never used the heater more than a few days," and that he took it down and stored it in a weatherproof outbuilding. In spite of this, he kept the equipment, continued making payments thereon for some 32 months, and gave appellee no notice of any claimed defect until suit was filed against him three years after the delivery and installation of the heater. In Woods v. Van Wallis Trailer Sales Company, supra, it was stated:

> "After having a reasonable opportunity to inspect and with full knowledge of the trailer's defects, the making of partial payments, performing acts of dominion, as well as acts inconsistent with any intention to rescind, amount to an acceptance or ratification. * * *"

In our opinion the conduct of appellant could properly be construed only as an acceptance, and the trial court was not concerned with the principle of laches.

By his third point, appellant claims prejudice on the part of the district court in presiding over the case. There is nothing in the record to support or even suggest prejudice on the part of the district judge, and appellant bases his arguments very largely upon matters not found in the record. Matters not disclosed by the record fall outside the scope of our appellate review and will not be considered. Supreme Court Rule 17(1) [§ 21-2-1(17) (1), N.M.S.A.1953 (Repl.Vol. 4, 1970)]; Federal National Mortgage Ass'n v. Rose Realty, Inc., 79 N.M. 281, 442 P.2d 593 (1968); General Services Corp. v. Board of Com'rs., 75 N.M. 550, 408 P.2d 51 (1965); Richardson Ford Sales v. Cummins, 74 N.M. 271, 393 P.2d 11 (1964).

Appellee requests that we award it a reasonable attorney's fee, or direct the trial court, in its discretion, to award such a fee. No question of an attorney's fee was presented to the trial court. Appellee urges the allowance of a fee to discourage and prevent frivolous litigation. It was appellee who first initiated the suit, lost in the magistrate court, and then appealed to the district court. It was properly within its rights in so doing, but, because appellant defended himself successfully in the magistrate court, lost in the district court and then appealed to this court, we are not inclined to award appellee an attorney's fee for the purpose of discouraging or preventing frivolous litigation.

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

486 P.2d 608

Ernest T. SANCHEZ and Arthur M. Dula III, Petitioners-Appellees,

v.

BOARD OF REGENTS OF EASTERN NEW MEXICO UNIVERSITY et al., Respondents-Appellants.

No. 9105.

Supreme Court of New Mexico.
May 28, 1971.

Rehearing Denied June 29, 1971.

Motion for Leave to File Second Rehearing Denied July 20, 1971.

James A. Maloney, Atty. Gen., Santa Fe, Fred Boone, Sp. Asst. Atty. Gen., Portales, for respondents-appellants.

Paul A. Phillips, Albuquerque, for petitioners-appellees.

Hal Simmons, Albuquerque, amici curiae on behalf of New Mexico Press Assn. and New Mexico Broadcasters Assn.

OPINION

McMANUS, Justice.

This is an appeal from the granting by the District Court of Roosevelt County of a writ of mandamus.

Both petitioners-appellees (Petitioners) were students at Eastern New Mexico University (ENMU). Mr. Sanchez was editor of and reporter for the ENMU Chase, the student newspaper. Mr. Dula was a photographer for it. Respondents-appellants (Respondents) are the Board of Regents of ENMU and the individual members of the board. Mr. Wheeler, one of the Respondents, is chairman of that board. Dr. Charles W. Meister, not a party, is President of ENMU.

Petitioners sought to inspect a certain list of proposed faculty salaries. The requests were refused by Respondents and this action followed. The writ of mandamus from the granting of which this appeal was taken directed Respondents to produce a "list of faculty contracts and salary provisions." We take note of the amicus curiae brief filed on behalf of the New Mexico Press Association and the New Mexico Broadcasters Association.

On March 13, 1970, Respondents held a meeting in Roswell with Petitioners in attendance. The conduct of the meeting generally did not win the approval of Petitioners, but their specific complaint has to do with certain proceedings had by the board in relation to faculty salaries for the upcoming school term. Section 73–22–7, N.M.S.A.1953 (made applicable to the ENMU Regents by § 73–22–36, N.M.S.A. 1953) charged the board to "* * * determine the compensation to be paid to the superintendent and teachers."

After administrative activity by the staff which is not pertinent, Dr. Meister was prepared to present his recommendations to the board. To facilitate this evolution, a list of proposed faculty salaries for the 1970–71 term was prepared and presented to the board at the March 13 meeting. The list was broken down into various colleges and departments. The faculty members' names were listed at the appropriate place with his or her proposed annual salary set opposite.

The list was not a document required by law to be prepared or preserved. It was prepared and used as a matter of administrative convenience, but preparation and use of some sort of list was a practical necessity, because it classified and named in excess of 160 individuals and set forth a proposed salary for each. The salaries listed aggregated about $1,500,000.

The board, by motion made, seconded and carried, approved the list. The offers were made by inserting the faculty member's name and proposed salary into a form of offer covering the 1970–71 school year,

affixing Dr. Meister's signature thereon, and transmitting the document to the faculty member. This transmittal also occurred on March 13.

These procedures resulted in no contract to which ENMU or the State was a party. A contract could only come into being upon acceptance of the offer by the individual faculty member. The offer might be accepted by the faculty member, or the offer might be refused, or a counter-offer transmitted. Negotiations might be had between the staff and the faculty member which might or might not result in a contract. All of these things normally occur between the time of the making of the offers and the June 30 deadline.

Proceedings at the March 13 meeting of the board would, in the normal course, be embodied in minutes and approved at the next board meeting. The minutes are not before us. The manner in which the material action of the board is treated in the minutes plays no part in our decision.

It is clear that Petitioners requested inspection of the list at the March 13 meeting, which was prior to the making of the offers, and made further requests on March 16 and 17, subsequent to the transmission of the offers but prior to the June 30 deadline when the offers might be in the process of acceptance, rejection or negotiation.

Section 71–6–2(C), N.M.S.A.1953 (Supp. 1969) reads as follows:

> " 'Public records' means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. Library or museum material of the state library, state institutions and state museums, extra copies of documents preserved only for convenience of reference, and stocks of publications and processed documents are not included;"

Petitioners assert that the list was a public record which they were entitled to inspect by the provisions of §§ 71–5–1 and 71–5–2, N.M.S.A.1953. Section 71–5–1, supra, provides:

> "Every citizen of this state has a right to inspect any public records of this state except records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions and except as otherwise provided by law."

Section 71–5–2, supra, provides:

> "All officers having the custody of any state, county, school, city or town records in this state shall furnish proper and reasonable opportunities for the inspection and examination of all the records requested of their respective offices and reasonable facilities for making memoranda abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose."

The writ of mandamus granted by the trial court and ordered to be made permanent by a later "Decision" of the court, read in part as follows:

> "Whereas, it has been made to appear by the verified complaint of Ernest T. Sanchez and Arthur M. Dula III that you, the respondents, have refused to allow the petitioners to inspect public records in your possession, namely, the list of faculty contracts and salary provisions, * * *."

The writ referred to "faculty contracts and salary provisions" and not to proposed contracts and salary provisions which were still in a negotiation stage. Obviously, completed contracts would be public records and available to inspection under the provisions of the New Mexico statutes.

MacEwan v. Holm, 226 Or. 27, 359 P.2d 413 (1961) contains a scholarly review of

the entire field of the public's right of inspection of records. In MacEwan, supra, the defendant sought to inspect data relating to nuclear radiation sources collected by the Oregon State Board of Health. The Oregon Supreme Court held that the data involved were "public records" for purposes of inspection by the public. This case can be readily distinguished from the instant case inasmuch as scientific data obtained is the result of testing of at least one facet of the over-all purpose of the research. In MacEwan v. Holm, supra, this phase of the research had been completed, whereas in our case we only have an offered contract with no finality attached to it. In the MacEwan case, supra, the court said:

> "Whether a record is to be regarded as a public record in a particular instance will depend upon the purposes of the law which will be served by so classifying it. And a record may be a public record for one purpose and not for another."

We believe that no useful purpose would be served by disclosing preliminary contractual negotiations between the board and its professional and other employees.

We do not consider "thought processes," that is, the offer of a contract, such a public record as would require public inspection. See Kottschade v. Lundberg, 280 Minn. 501, 160 N.W.2d 135 (1968), and Sorley v. Clerk, Mayor and Board of Trustees, 30 A.D.2d 822, 292 N.Y.S.2d 575 (1968).

United States District Judge Leon R. Yankwich of the Southern District of California, had this to say in an article published in 48 N.W.L.Rev. 527, 530 (1953–54):

> "Only documents which present ultimate actions should be accessible to the public. Those which are merely part of the preliminary steps by which the conclusion was reached should become public, *only in the discretion of the particular agency* * * *.
>
> "If the record is one that is not kept pursuant to law or as a part of the duty to be discharged by the officer, and is not required to be filed or recorded, it is not subject to public inspection. * * * [*I*]*n the last analysis, only the memorials representing* * * *ultimate action are, in a sense, public.* * * *" (Emphasis added.)

In Linder v. Eckard, 152 N.W.2d 833 (Iowa, 1967), property owners requested certified copies of written appraisal reports from the city clerk and director of urban renewal. The request was refused. The Iowa Supreme Court held that:

> "Under the particular circumstances existing here, we find that the appraisals in question are not public records or writings and that appellants are not entitled to certified copies of them * * *."

See, also, Wiley v. Woods, 393 Pa. 341, 141 A.2d 844 (1958), and Coldwell v. Board of Public Works, 187 Cal. 510, 202 P. 879 (1921).

Giving the full context to the question, we must determine whether we should give legal character to the demands of the curious who cannot patiently await the final result of a salary contract negotiation. We would deny the right to inspect these records of the Board of Regents on the subject of salary contract negotiations before the task was completed. It would not seem fair that the general public should know the contents of an offer of salary to an individual conceivably prior to the receipt of the offer by the contemplated employee. As indicated in the MacEwan case, supra, we would not take away the right of the Petitioners to know about salary matters, but would merely suspend or defer the privilege of inquiry until the Board of Regents reaches its final conclu-

sion, i. e., the culmination of the contract between the board and the individual.

This cause is hereby reversed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

OMAN and STEPHENSON, Justices (dissenting).

We feel obliged to dissent from the majority opinion. In our view, the beneficent purposes of §§ 71–5–1 and 71–5–2, N.M.S.A., 1953 would be fostered and the intention of the legislature better served by adopting a broader interpretation of the statutes, enhancing rather than restricting availability of governmental information and news sources.

Although the cited statutes were passed in 1947 and have been the subject of numerous opinions of the attorney general, no opinion of this court or of the Court of Appeals has had occasion to construe them. In fact, so far as we can discover, § 71–5–1 has only been twice cited, first by the Court of Appeals in State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970) in which the court, for purposes of resolving a legal point, assumed it to be applicable, and in Ortiz v. Jaramillo, our number 9149, opinion filed April 5, 1971 (82 N.M. 445, 483 P.2d 500) in which the parties conceded the records in question were public records.

The majority opinion quotes from the writ to the effect that it referred to "faculty contracts and salary provisions" rather than those which were proposed, and that completed contracts would obviously be available for inspection.

No contention has been advanced here or below that there is any doubt, confusion or controversy about which document or "list" is the subject of the writ and of this appeal. This is seemingly made clear in the splendid statement of facts which graces the forepart of the majority opinion.

The wording of the writ seems to play no role in the disposition of the case, since the majority proceeds to deal with the merits.

Implicit in our form of government is the necessity for a free flow of information to the citizenry. This tenet has achieved status as a basic doctrine of political science. For example:

"The basis of our governments being the opinion of the people, the very first object should be to keep that right. The right to prevent [errors of] the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people." [Thomas Jefferson quoted] Laswell, National Security & Individual Freedom 62 (1950), 27 Ind.L.J. 212, n. 11 (1952).

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both." [James Madison] Laswell, supra, 62, 27 Ind.L.J., supra, 211, n. 9.

"I, for one, have the conviction that government ought to be all outside and no inside. I, for my part, believe that there ought to be no place where anything can be done that everybody does not know about * * *. Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety * * *. Government must, if it is to be pure and correct in its process, be absolutely public in everything that affects it." Woodrow Wilson, The New Freedom, 92–104 (1913), 11 Kan.L. Rev. 157 (1962).

Although there is authority to the effect that no right to inspect public documents or records existed at early English common law, the doctrine was later formulated that persons were entitled to inspection provided they had an interest that would

enable them to maintain or defend an action for which the document or record could furnish evidence or necessary information. 45 Am.Jur. "Records and Recording Laws" § 17. In Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928), Annot., 60 A.L.R. 1351 (1929) the court rejected the early English common law doctrine and said that there was no "* * * question as to the common law right of the people at large to inspect public documents and records." Although the common law right was subject to various limitations, it seems clear that some right existed to inspect public documents. Accordingly, it is our view that the statutes here involved, rather than being in derogation of the common law, enlarge a common law right and should therefore "* * * be liberally construed in favor of inspection." 76 C.J. S. Records § 35 b (1952).

The issues of this lawsuit are whether the list in question was a public record and, if so, whether the circumstances here nevertheless fall within some recognized exception to the general rule of availability for inspection. Deciding these matters involves a decision as to which party carries the burden of proof.

In few if any states has the legislature attempted to define public documents for purposes of their inspection statutes or to spell out the circumstances under which inspection may be required. Rather, such matters have been left to the courts. Study of many cases, texts and law reviews convinces us that the leading case on the subject is MacEwan v. Holm, 226 Or. 27, 359 P.2d 413 (1961), Annot., 85 A.L.R.2d 1086 (1962). The majority opinion in that case adopts a broad approach to the public's right of inspection of records and is a scholarly review of the entire field. The dissent espouses a more restrictive viewpoint.

MacEwan points out divergent results reached in many cases upon the subject of what constitutes a public record, and one explanation for this is the failure to key the definition of "public record" to the purpose of the law which will be served by so classifying it. For example, the majority opinion cites and quotes § 71–6–2(C), N.M.S.A., 1953 (1969 Supp.). That section unquestionably defines the term "public record" but it does so for purposes of the Public Records Act (§§ 71–6–1 to 71–6–17) which deals with the subject of preservation and storage of public documents rather than the right of citizens to their inspection. It seems clear to us that that statute has no bearing upon the issues here.

We are frankly uncertain as to whether the majority opinion reaches its result on the basis that the document in question is not a public record or whether, although considering it to be a public record, it is nevertheless felt that under the facts of this case inspection ought to be denied. We would hold that the list is a public record and that it does not fall within any exception.

Respondents have here asserted that the list in question was not a public record within the meaning of § 71–5–1, supra. We are of the view that the court should adopt a liberal construction of our statute upon the issue of what constitutes a public record. The majority in MacEwan states:

> "Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. [Citations omitted] 'Public business is the public's business. The people have the right to know. Freedom of information [about public records and proceedings] is their just heritage. * * * Citizens * * * must have the *legal* right to * * * investigate the conduct of [their] affairs.' [Citation omitted]"

Measured by these criteria, it is apparent that the construction apparently placed on

§ 71–5–1, supra, by the majority is too narrow. The list was a writing, representing the final recommendations of the ENMU staff, coming into the hands of Respondents as public officers in connection with their official duties. Certainly, any lingering doubt as to the list being a public record is removed by the imprimature of official action placed on the list by Respondents by their approval of it.

Respondents next assert that, without a lawful purpose, no citizen has the right to examine public records. This statement is obviously correct because of the provisions of § 71–5–2, supra. But the answer to Respondents' contention is that they had the burden of proving that the purpose of the Petitioners was unlawful, which they failed to do. As to the burden of proof, we refer again to MacEwan:

> "In balancing the interests referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. [Citation omitted] The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished. Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from nondisclosure against the harm which may result to the public if such records are not made available for inspection."

The Respondents do not allege Petitioners' purpose to have been unlawful, nor was the court requested to so find, although Respondents did request a finding to the effect that Petitioners had failed to prove that their purpose was lawful, indicating an erroneous theory as to the whereabouts of the burden of proof. In any case, the court made no finding on this issue, and the findings which it did make are supported by substantial evidence.

A more difficult and troublesome issue is presented by Respondents' claims, in substance and effect, that disclosure of the list would be detrimental to the best interests of the state and would unreasonably interfere with the business of government. They point out that it was the custom to treat salary offers as confidential; that various faculty members considered it an invasion of privacy to disclose negotiations; that it would be injurious to the morale of the faculty and that the negotiations concerning the employment contracts would be upset and disturbed. These arguments are serious and persuasive.

As stated in MacEwan, there are qualifications to the public's right of inspection, and circumstances may arise in which inspection can be justifiably withheld. For example, inspection may be withheld if the information is sought for an unlawful purpose, as is specifically provided in our statute. Even when the purpose is lawful, if the information has been received in confidence or if it is confidential and privileged, or if the disclosure would be detrimental to the best interests of the state, the right of inspection may properly be refused. The right of inspection cannot be exercised so as to unreasonably interfere with the business of government, such as unduly disrupting an investigatory process.

Referring once more to the majority opinion in MacEwan, it is said on this subject:

> "In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interest of the public in having the business of government carried on efficiently and without undue interference. The initial decision as to whether inspection will be permitted must, of course, rest with the custodian of the records. And since the justification for a refusal to permit inspection will depend upon the

circumstances of the particular case, we can offer no specific guide for that administrative decision."

In the case at bar, it is easy to visualize resulting mischief from disclosure and dissemination of the list to no useful purpose other than to occupy the columns of the school newspaper and to create another tempest in another teapot, an evolution considered a useful purpose in itself in certain quarters. It was not, however, incumbent upon Petitioners to demonstrate that any benefit from their actions would accrue to the school, the public or the state.

It is here, if we understand the majority opinion aright, that we basically take our departure from it. The majority holds that no "useful purpose" would be served by disclosing preliminary negotiations; that only ultimate actions should be accessible or that unreasonable interference with the business of government might result. Although we are firm in our view that it was not the burden of Petitioners to demonstrate a "useful purpose," we would concede the other grounds to be debatable. However, in our opinion, the fundamental and overriding principle to be served is preserving and protecting free access by citizens, including representatives of the media, to information regarding the conduct of governmental affairs, however saddening may be the results which ofttimes occur in individual cases.

Accordingly, when we weigh and "* * * balance the interest of the citizen in knowing what the servants of government are doing * * * against the interest of the public in having the business of government carried on efficiently and without undue interference," we cannot in good conscience say that the latter outweighs the former; that Respondents have proven that such would be the case nor that the trial court's findings of fact in favor of disclosure are not supported by substantial evidence.

The majority's position seems to be grounded to a considerable extent on the oft cited and quoted statement of Judge Yankwich from Northwestern University Law Review to the effect that it is only documents which represent ultimate action which should be available to the public for inspection as a matter of right and that inspection of preliminary steps should be in the discretion of the agency. Admittedly numerous cases so hold. We have taken the position that such a narrow interpretation of our statutes imposes an unconscionable restriction, but apart from questions of policy, we are by no means convinced that the document of which inspection was here sought was preliminary.

The matter presented to Respondents for their consideration was what *offers* should be made to the faculty. The list in question constituted Dr. Meister's recommendations. The action of the Respondents in approving the list represented final action on that subject, and the offers were thereupon made and transmitted.

It seems to us to furnish no answer to say that the final contracts would be available for inspection. Any particular contract actually made may or may not embody the Respondents' first offer, and in fact offers may have been made which did not result in contracts. The first offer is one subject and the final contracts another.

On the stated grounds, we respectfully dissent.

486 P.2d 615

STATE of New Mexico, Plaintiff-Appellee,

v.

Guy Steven GROVE, Defendant-Appellant.

No. 651.

Court of Appeals of New Mexico.

June 11, 1971.

Oliver H. Miles, Las Cruces, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Special Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

The basic issue in this appeal is whether there is substantial evidence to support defendant's conviction of contributing to the delinquency of a minor. Section 40A-6-3, N.M.S.A. 1953 (Repl.Vol. 6).

Nowhere in the record is the State's theory of "contributing" identified. No bill of particulars was sought; no opening statement was made; the closing arguments were not reported; the instructions do not reveal a theory. In the State's brief it is asserted that defendant "* * * allowed and condoned the smoking of marijuana by the juvenile, * * *" and that defendant was a "partner in the contraband" which a police informer sought to buy. Thus, the asserted delinquency to which defendant allegedly contributed was a violation of the law of the State or conduct injurious to the juvenile's morals. See State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct.App.1969).

Defendant, defendant's brother and Simmons were living in a house located at 1205 Ash in Clovis. On Sunday, the police informer went to the house and sought to buy marijuana from a person named Williams and the juvenile involved in this case. No supply was available. Later that day, the informer, the juvenile and Simmons went to Portales in an attempt to obtain marijuana. They were unsuccessful. There is no evidence that defendant was in anyway involved in these Sunday activities.

On Monday, the juvenile, Simmons and Ray Goodman went to Albuquerque and purchased marijuana, returning to Clovis at approximately 11:30 p. m. Prior to the trip to Albuquerque by the juvenile, defendant knew of the trip and its purpose and refused "to take part in it."

None of the foregoing is relied on as evidence to support the "contributing conviction" of defendant.

There is evidence that after the return to Clovis, and at about 1:30 a. m. on Tuesday, the informer went to the house at 1205 Ash and at that time was taken to a bedroom by the juvenile. The informer identified those present at this time, besides himself, as the juvenile, "Simmons and the two colored guys." According to the informer, he pretended to smoke what appeared to be a marijuana cigarette and the other four present did smoke this cigarette. The informer then asked if "* * * they had anything they wanted to sell * * *" and was told "* * * they wanted to wait for Steve, * * *" The informer testified that defendant was

not involved in any of these transactions; that he had never seen the defendant prior to seeing him in the courtroom at defendant's trial.

The juvenile's testimony as to the events in the early morning of Tuesday is to the same effect as the informer's testimony. In addition, the juvenile testified that after the informer left 1205 Ash, the two Negroes also departed; that the defendant and a person named Hon then came to the house, but only shortly before the police arrived. Other evidence is also to the effect that defendant was not at the house during the smoking of the marijuana cigarette and the informer's attempt to buy marijuana.

The evidence which connects defendant with the juvenile's marijuana smoking and the attempted purchase by the informer is as follows. When the informer went to the house at 1:30 a. m. he was under police surveillance. One officer went to the side of the house and from a distance of approximately 8 feet looked into a bedroom window for five minutes and saw the juvenile and defendant "laying on the bed." The officer couldn't see anyone else. This observation occurred at a time when the informer testified he was present in the house, and about the time of the marijuana smoking and the attempted purchase. The State asserts that combining this portion of the informer's testimony with the officer's testimony permits the inference that defendant "* * * allowed and condoned the smoking of marijuana by the juvenile, * * * and was present when the juvenile was negotiating a sale of this contraband. * * *" It does not.

We accept the officer's testimony as true since, on a review of the sufficiency of the evidence to support a guilty verdict, we view the evidence in the light most favorable to the State. State v. Malouff, 81 N. M. 619, 471 P.2d 189 (Ct.App.1970). The officer's testimony is only that he saw the defendant present in the house. The officer saw only two persons present—the juvenile and the defendant. The officer did not testify about seeing any smoking or about seeing any sign that smoking had occurred. Nor did he testify as to any activity of the juvenile in the presence of defendant other than that he was on the bed. To repeat, the officer's testimony goes no further than the presence of defendant.

If, from the evidence, it may be inferred that defendant was present when the juvenile engaged in his admitted activities with marijuana, there is no evidence that defendant had anything to do with these activities; no evidence that defendant approved of such activities. In the absence of such evidence, an inference that defendant was present when the juvenile engaged in his marijuana activities is insufficient to sustain defendant's conviction for contributing to the delinquency of the juvenile. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970).

Another theory, advanced by the State in support of the verdict, is based on the testimony that before selling marijuana to the informer the juvenile and Simmons "* * * wanted to wait for Steve [defendant], * * *" It is contended that this sustains an inference that defendant "* * * was a partner in the contraband and that his presence was essential before the sale could be consumated [sic]." It does not. The evidence relied on is taken out of context. Compare Payne v. Tuozzoli, 80 N.M. 214, 453 P.2d 384 (Ct.App. 1969). The juvenile went on to testify that his remark about waiting for defendant was "just an excuse;" that there was no partnership in the marijuana. The only inference from the testimony, in context, is that defendant had nothing to do with the marijuana.

Defendant's acts or omissions must have caused or tended to cause or encourage the delinquency of the juvenile. Section 40A–6–3, supra; State v. Leyba, supra. Here, there is no such evidence. The conviction of contributing to the delinquency of a minor is reversed.

At the same trial, defendant was convicted of unlawfully possessing less

than one ounce of marijuana. The prosecution was under § 54–7–13, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1969). This was under the general statute. The State concedes that under State v. Riley, 82 N.M. 235, 478 P.2d 563 (N.M.App.1970), the conviction was under an inapplicable statute. Its contention is that State v. Riley, supra, is wrong and should be overruled. This contention was rejected in State v. Garcia, 82 N.M. 536, 484 P.2d 756 (N.M. App.), decided April 23, 1971. Accordingly, the conviction, under the general statute, of unlawfully possessing less than one ounce of marijuana is reversed.

The cause is remanded with instructions to set aside the judgment and sentences.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

486 P.2d 618

STATE of New Mexico, Plaintiff-Appellee,

v.

Steven MARES, Defendant-Appellant.

No. 561.

Court of Appeals of New Mexico.

May 28, 1971.

Writ of Certiorari Issued June 25, 1971.

Stanley F. Frost, Tucumcari, David W. Bonem, Clovis, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, C. Emery Cuddy, Jr., Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of the unauthorized entry of a dwelling with intent to commit a felony while armed with a deadly weapon contrary to § 40A-16-4(A), N.M.S.A.1953 (Repl.1964) defendant appeals.

We affirm.

Mrs. C. returned home on the evening of October 14, 1969, after a ten day trip. Before retiring that evening she checked and locked all doors and windows. During the early morning hours of October 15, 1969 a forced entry was made into her house. Mrs. C. was awakened and saw a man, wearing no clothes, but with a white towel around his neck, standing near her bed. The man held a long knife. Due to poor lighting Mrs. C. could not see the man's facial characteristics. Mrs. C. persuaded the man to leave and then called the police.

The police arrived and discovered the top window in the utility room broken and the bottom window opened. Shortly, thereafter, the police dusted the area around the window and the formica top and sink which was directly under the broken window. Palm prints were lifted from around the formica sink top and sink molding.

Subsequently on December 29, 1969 palm prints of defendant were made and forwarded to the F.B.I. laboratory along with the lifted prints found October 15, 1969. The testimony of the F.B.I. finger print examiner was to the effect that no two palm prints are the same and that a comparison of the lifted prints showed that they were identical with the right palm print of the defendant.

Mrs. C. testified that defendant and his employer had installed a hot water heater in her home on August 11, 1968 but to her knowledge defendant had not been in her house since that time. Mrs. C. further testified she used the utility room sink "* * from a few times a week to several times a week", that she used it the day before her trip, that she kept "* * * a sponge by the sink at all times and I always use the sponge to, of course, wipe away any water," and that she wiped the sink "* * with a sponge, cleaned it, all particles of water." Also, "* * * it's scrubbed from time to time with scouring powder."

At the close of the State's case and after defendant rested, defendant moved for a directed verdict on the grounds that:

> "* * * the State has not introduced evidence to the extent necessary to support a conviction based on the circumstantial nature of the evidence. * * *"

Defendant contends the trial court erred in overruling the motions.

Defendant frames the issue as "* * * whether proof that palm prints found in the place where a crime was committed which prints correspond to those of the accused and which prints are found under circumstances that indicate they might have been impressed at a time other than when the crime was committed is sufficient proof of identity standing alone to sustain a conviction. * * *"

It is defendant's contention that when circumstantial evidence is relied upon it must exclude every reasonable hypothesis other than the guilt of the defendant. State v. Easterwood, 68 N.M. 464, 362 P.2d 997 (1961). With this proposition we agree.

Defendant has referred us to several fingerprint cases [Townsley v. United States, 236 A.2d 63 (D.C.App.1967); Gray v. State, 4 Md.App. 155, 241 A.2d 725 (1968); Anthony v. State, 85 Ga.App. 119, 68 S.E. 2d 150 (1951); McClain v. State, 198 Miss. 831, 24 So.2d 15 (1945)]. Those cases are distinguishable on their facts. They deal with areas where the public had access or where there was no showing that the public did not have access or in which the mere presence of defendant would not establish the offense charged.

Here we have undisputed proof of a lapse of 14 months since defendant was legally on the premises—repeated wiping

and "time to time" scrubbing of the area from which the prints were lifted.

"Evidence of fingerprint identification, that is proof of fingerprints corresponding to those of the accused, found in a place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed, may be sufficient to support a conviction in a criminal prosecution. * * *" State v. Helms, 218 N.C. 592, 12 S.E.2d 243 (1940). See also Hack v. Commonwealth, 433 S.W.2d 877 (Ky.Ct. App.1968) wherein the court stated:

> "In this case, Hack had been in and around the cocktail lounge prior to the date of the crime and could possibly have left his fingerprints on the door at that time. But the owner testified the door had been washed the day before and following the last time Hack had been present. The jury had every right to believe that testimony. It would necessarily follow then that Hack's fingerprints were not impressed innocently, and the evidence was sufficient to sustain the verdict."

In view of the foregoing, we conclude that there was substantial evidence to sustain the conviction of defendant and that such evidence excluded every other reasonable hypothesis inconsistent with defendant's guilt.

Defendant next contends that the presence of a juror in Mrs. C.'s home during the time when the police were investigating the crime and taking fingerprints denied defendant "a trial by an impartial jury and the right to confrontation and cross-examination."

After trial, defendant learned of Juror Sefcik's presence in Mrs. C.'s home during a part of the police investigation. Defendant filed a motion for a new trial on the ground that Juror Sefcik's involvement precluded a fair trial. A hearing was held and testimony taken.

No record of the voir dire jury examination was made but at the motion for a new trial it was stipulated that defendant's voir dire examination disclosed the fact that Juror Sefcik was a good friend of Mrs. C. for about 22 years, that he had visited and had eaten in her home, that Juror Sefcik did not think this relationship would affect his opinion. It was also stipulated that when the jurors were asked if they had talked to any witnesses or knew of any reason they could not serve on the jury or knew of any reason why they could not render a fair and impartial verdict, Juror Sefcik did not indicate any answer. The record at the motion for a new trial hearing further showed defendant was not limited in his voir dire of the prospective jurors nor did he exercise all of his peremptory challenges.

We fail to see, as a matter of law, how the trial court erred in refusing to grant a new trial. The granting of a new trial, or denial of request therefor, is within the sound discretion of the trial court and the reviewing court will not disturb the decision unless there has been a manifest abuse of discretion. State v. Pope, 78 N.M. 282, 430 P.2d 779 (Ct.App.1967).

The trial court conducted a lengthy hearing on the motion. Both the defendant and the State called witnesses. No evidence was adduced beyond the fact of a 22 year long friendship and visits in the house of Mrs. C., that the juror did not discuss the case with Mrs. C. or the police officers, nor was any evidence discovered at the time in question used at trial. Further, Mrs. C. testified, at trial and at the hearing, that she never could identify the intruder.

We fail to see an abuse of discretion by the trial court. Further, the evidence was not such as to show Juror Sefcik had any special knowledge of the case beyond that brought out on voir dire. There is no factual basis for defendant's contention.

State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

A dissenting or concurring opinion should be carefully scrutinized by judges, lawyers and the public, because it represents the opinion of the dissenter. In writing his dissent or concurrence, despite his ability and integrity, the dissenter has the freedom of the wind to express his beliefs. It is not subject to review by other associate judges.

I dissent in this case because Mares was found guilty by a palm print without a fair trial by an impartial jury. Guilt beyond a reasonable doubt was a shadow. Nevertheless, Mares was entitled to a fair trial with a fair and impartial jury. This is implicit in the concept of ordered liberty. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967). Mares had no prior criminal record and was employed steadily to the date of trial. He was convicted and sentenced to a term of not less than 10 years nor more than 50 years, and all the penitentiary sentence suspended except the first 8 years on condition.

The basis of this dissent is the silence of a juror on voir dire examination to disclose his visitation with the prosecution witness, the alleged victim, less than 14 hours after the alleged crime was committed. Juror Sefcik was present in the home of Mrs. C. while the police officers were making an investigation of the crime, seeking fingerprints. Thereafter, Sefcik became a juror.

The state and the defendant stipulated to the following facts in reference to the voir dire examination:

1. When juror Sefcik was asked if he knew Mrs. C., he responded that he was a good friend, that he had known her and her husband approximately 22 years and had eaten in their home on many occasions.

2. When juror Sefcik was asked if he thought that relationship would affect his opinion, he said no.

3. When the jurors were asked if they had talked to any of the witnesses or if they knew of any reason why they should not serve on the jury, juror Sefcik did not respond.

4. When all the jurors were asked if there was any reason why, if selected as jurors, they could not render a fair and impartial verdict in the case based on the evidence and law, there was no indication by Sefcik one way or the other.

The burglary occurred on October 15, 1969, at 2:00 a. m. About 4:00 p. m., the same day, police officers came to the home of Mrs. C. in hopes of finding additional, latent impressions. Juror Sefcik was present in the kitchen having coffee with Mrs. C. Mares had no knowledge of this until after the verdict. Just prior to the verdict, Police Chief Moore stated to defense counsel, "Well, maybe one of the jurors knew too much." Defense counsel had no indication of Sefcik's exposure to the case prior to the trial until Police Chief Moore came forward with this statement. The day following the verdict, defense counsel conducted a full investigation and uncovered the facts about Sefcik's presence in the home of Mrs. C. on the afternoon of October 15. That same day, defense counsel filed a motion for a new trial which was subsequently denied after a hearing. At the hearing, the trial court heard the testimony of Mrs. C., but not the testimony of Sefcik, or any other juror. Jurors are not permitted to impeach their verdict after discharge. Skeet v. Wilson, 76 N.M. 697, 700, 417 P.2d 889 (1966). However, an unauthorized communication between a juror and a witness during trial is presumptively prejudicial. State v. McFerran, 80 N.M. 622, 630, 459 P.2d 148 (Ct.App.1969). This same rule should apply to communication between a juror and

a prosecuting witness before trial. The burden shifts to the state to show absence of prejudice. State v. Gutierrez, supra. The state did not overcome this presumption. It is grossly unfair to listen to the victim and not the jurors.

At one time during the jury's deliberation, it requested information of the court. The trial court said he thought the jury stood six to six.

On the record in this case, was Mares accorded a fair trial by an impartial jury?

"Under ancient common law, jurors were selected because of their personal knowledge of the facts. Under the modern doctrine, however, jurors who have such personal knowledge of material facts as will tend to form an opinion based upon bias are regarded as incompetent to sit as jurors even though they may feel they can render an impartial verdict." Kunk v. Howell, 40 Tenn.App. 183, 289 S.W.2d 874, 73 A.L.R.2d 1304 (1956). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

In New Mexico, the standard guaranteed for an impartial jury is strong and vibrant. In State v. McFall, 67 N.M. 260, 263, 354 P.2d 547, 548 (1960), Justice Moise said:

> "By impartial jury is meant a jury where each and every one of the twelve members constituting the jury is totally free from any partiality whatsoever. * * * Accordingly, the jury which one charged with crime is guaranteed, is one that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If any juror does not have these qualities, the jury upon which he serves is thereby deprived of its quality of impartiality."

First, was Mares' defense counsel guilty of a lack of diligence on voir dire examination about Sefcik's pre-trial exposure to the case? The trial judge gave the answer. "I do not think it was necessary for defendant's counsel to ask if he [Sefcik] had been in the C. home the morning of October 15, 1969." The reason is obvious. The trial judge on voir dire asked the jurors if they had talked to any of the *witnesses* or if they knew of any reason they could not render a fair and impartial verdict; whether there was any reason why they could not render a fair and impartial verdict. Other voir dire examination occurred and some prospective jurors responded. For example:

> "THE COURT: Mrs. Aitken, have you heard what purport to be the facts in the case?
>
> "JUROR AITKEN: I have.
>
> "THE COURT: Did what you hear cause you to form an opinion as to the guilt or innocence of the defendant?
>
> "JUROR AITKEN: It has.
>
> "THE COURT: Ma'am?
>
> "JUROR AITKEN: I think it has.
>
> "THE COURT: Is that an impression or opinion?
>
> "JUROR AITKEN: Well, I talked directly with the party concerned.
>
> "THE COURT: And I mentioned this party as a witness here?
>
> "JUROR AITKEN: Yes, sir.
>
> "THE COURT: I see. Then you feel that you do have a fixed opinion one way or the other?
>
> "JUROR AITKEN: It could, it could affect my decision.
>
> "THE COURT: You couldn't lay aside what you heard and try the case from the evidence and the law that the Court gives you?
>
> "JUROR AITKEN: I could try.
>
> "THE COURT: It is, of course, required that the juror's mind be open,

free from any preconceived ideas, and that you don't have to quarrel with setting aside what you heard. You must set it aside, if you can. Sometimes it is humanly impossible and we cannot prejudge a thing. That's what it's called, prejudice, judging a thing before we hear the facts, but sometimes we do form an opinion from what we hear and we cannot lay it aside. If it's going to require evidence to remove what you have in your mind then you probably wouldn't be qualified, because the defendant is presumed to be innocent under our law and the State has to prove him guilty to the jury. You think it will require evidence?

"JUROR AITKEN: It would be very difficult for me not to say that I haven't already formed an opinion.

"THE COURT: Any objection to excusing Mrs. Aitken for cause?

"MR. BREEN: Yes, sir.

"MR. FROST: I have no objection.

"THE COURT: What number is that? Eighteen. You will be excused, Mrs. Aitken. * * *"

Sefcik talked directly with Mrs. C. He remained silent. He had an inviolable duty to disclose his visitation with Mrs. C. regardless of his good faith and honesty. His silence compares with concealment and false answer. See, Juries-New Trial-Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial, 7 Natural Resources Journal 415 (1967). This is a criticism of State v. Ortega, 77 N.M. 312, 422 P.2d 353 (1966).

In United States v. Freedland, 111 F. Supp. 852, 853 (D.N.D.1953), the district judge said:

"The answers to questions put by the Court necessarily form the basis for the Court's excusing a juror on its own motion or challenges for cause by the parties and the exercise of peremptory challenges by each side. Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a *general question*, any matters which might tend to disqualify them from sitting on the case for any reason. It therefore becomes imperative that the answers be *truthful and complete*. False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge." [Emphasis added].

Under the rules of the court in this case, the judge examined all the jurors on voir dire. However, there is the same requirement of truthfulness and completeness of the jurors when the attorneys themselves perform this examination.

State v. Ortega, supra, held that actual injury to the defendant must be shown where a juror was disqualified by virtue of having been convicted of an infamous crime. Section 19–1–1, N.M.S.A.1953, stated therein, was repealed in 1969. Now, under §§ 19–1–1 and 19–1–2, any person disqualified or exempt from service does not vitiate any verdict rendered by the jury unless actual injury to the defendant shall be shown. Sefcik was not disqualified or exempt from service. A showing of actual injury is not necessary.

It is the duty of the trial court to see that there is a fair and impartial jury. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct.App.1968).

"The function of voir dire is to implement the constitutional guarantee of an impartial jury, a fundamental right of our system of criminal justice." [Daniels v. United States, 123 U.S.App.D.C. 127, 357 F.2d 587, 591 (1966)] [Dissenting Opinion].

To this end, the New Mexico legislature has charged trial courts to excuse any juror for good cause. Section 19–1–14, N.M.S.A.1953 (Repl.Vol. 4). In addition the legislature has provided for peremptory challenges to further insure the impartiality of a jury. Section 41–10–3, N.M.S.A.

1953 (Repl.Vol. 6). The right of peremptory challenge is "an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011 (1892).

"Thus, under statutory law, the court is the judge of actual bias, but counsel is the sole and exclusive judge of whom he shall challenge for suspected bias or prejudice against his client's cause. No one will gainsay that the denial or substantial impairment of the statutory right of peremptory challenge is prejudicial to the constitutional right to a fair and impartial jury." [See 338 F.2d at 786].

There is a well settled rule "which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so 'insignifcant or trifling' as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected." Photostat Corporation v. Ball, 338 F.2d 783, 786 (10th Cir. 1964).

Sefcik was not excused for cause or peremptory challenge because he remained silent under a duty to speak.

Second, if Sefcik had disclosed during the voir dire his presence in Mrs. C.'s home on October 15, the most probable consequence is that Sefcik would have been excused for cause or by peremptory challenge.

"Whether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading has the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right." [Consolidated Gas & Equipment Co. of America v. Carver, 257 F.2d 111, 115 (10th Cir. 1958)].

In Photostat Corporation v. Ball, 338 F. 2d 783, 787 (10th Cir. 1964), the court said:

"In this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge."

It would be blinking reality not to recognize Sefcik's suppression of information being of sufficient cogency and significance to constitute a substantial impairment of Mares' right of peremptory challenge and, therefore, prejudicial to his right to a fair trial by an impartial jury.

In his order overruling the motion for a new trial, the trial judge stated:

"Fully realizing that a close question of law is presented by the facts stipulated by counsel and the testimony given during the hearing on the motion for new trial filed by the defendant, *and that a higher court may properly disagree with my conclusion*, yet I fail to find any factual or legal basis that would lead me to conclude that the Juror Sefcik, * * * was not of a mind to render a verdict other than according to the evidence and the instructions given by the Court, * * *"

The trial court abused his discretion in failing to award Mares a new trial. This case should be accordingly reversed.

I respectfully dissent.

486 P.2d 625

Reynalda BACA, Individually; Reynalda Baca, Administrator of the Estate of Arturo Baca, Deceased et al., Plaintiffs-Appellants,

v.

The NEW MEXICO STATE HIGHWAY DEPARTMENT et al., Defendants-Appellees.

Camilo BACA, Administrator of the Estate of Isabel de la fe Baca, Deceased, Plaintiff-Appellant,

v.

The NEW MEXICO STATE HIGHWAY DEPARTMENT et al., Defendants-Appellees.

No. 597.

Court of Appeals of New Mexico.

June 11, 1971.

W. R. Kegel, Santa Fe, Arturo G. Ortega, Albuquerque, for plaintiffs-appellants.

Allen C. Dewey, Jr., Leland S. Sedberry, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for Mountain States Mutual Casualty Co.

David L. Norvell, Atty. Gen., Richard T. Whitley, James V. Noble, Richard L. Russell, Sp. Asst. Attys. Gen., Santa Fe, for defendants-appellees.

OPINION

SPIESS, Chief Judge.

Actions involving deaths and personal injuries resulting from the collision of motor vehicles were brought against a number of defendants, including New Mexico Highway Department (Department). The claims against the Department related to an alleged dangerous condition of a particular highway which was permitted to exist following construction, either partial or complete. The Department is immune from suit in the absence of liability insurance coverage (§ 5-6-19 and § 5-6-20, N. M.S.A.1953 (Repl. Vol. 2).

Department's insurer, Mountain States Mutual Casualty Company (Company), and plaintiffs were in disagreement as to whether coverage with respect to the particular accident was afforded by the liability policy issued to the Department by the Company. This issue was presented to the trial court through joinder with the complaint against the Department and other defendants of a count for declaratory judgment against the insurance company. Upon motions of the insurance company and the department, the trial court entered summary judgment holding:

> "* * * that the liability insurance policy issued by the Defendant, Mountain States Mutual Casualty Company, to the Defendant, New Mexico State Highway Department, is unambiguous and does not afford coverage to the New Mexico Highway Department for the claims of the Plaintiffs, * * *"

Upon so holding, the trial court dismissed the count for declaratory judgment as against the Company, and dismissed the complaint against the Department. This appeal followed. We reverse the summary judgment.

Facts before the trial court upon its consideration of the motion for summary judgment are the following: During the month of March, 1967, the Department entered into a contract for the construction of a portion of a north-south highway in the county of Mora. The highway being constructed consisted of 8.268 miles and formed a portion of a four-lane highway known as Interstate 25. The portion of the highway involved is herein designated as I-25. The new construction runs a short distance west of and parallel to old U. S. Highway 85 (85). During the course of construction of I-25 it became necessary to divert traffic from a portion of the new construction to 85.

The east lane of I-25 was intended, after completion of the entire project, to accommodate only northbound traffic. During the course of construction, this east lane, as it was completed, had been put to use for both north and southbound traffic. At a point where the completed east lane of

I–25 reached an area of the lane which had not been completed, traffic was diverted to 85 by means of a temporarily constructed bypass from I–25 to 85.

For a distance along the east lane of I–25 and along 85, the highways, including the bypass linking I–25 with 85, were marked with a white center line. Yellow lines were painted on each side of the white center line. These markings directed traffic going south on I–25 to the west portion of the by-pass, and thence to the west portion of 85.

Traffic going north on 85 was directed by these markings to follow a course to and upon the easterly half of the bypass, thence to the easterly half of I–25. When the northbound lane of I–25 was completed, traffic going both north and south was turned onto it. On November 29, 1967, the contractor, at the direction of an employee of the Department, undertook to eradicate the white and yellow lines which had been painted upon I–25, the bypass and 85. In so doing, the contractor painted over the lines with a black paint, and likewise painted a white line along the center of I–25, which, as stated, was then used for both northbound and southbound traffic. The obliterating, or erasing of the particular lines upon abandonment of the bypass, while a function of the contractor, was under the direction and supervison of employees of the Department. On January 18, 1968, the lines directing traffic over the bypass to 85 had reappeared and employees of the Department at this time painted over the lines with a black paint.

It is disclosed by the record that when the accident occurred February 4, 1968, the black paint affixed by employees of the Department had started to wear off and the lines again became visible.

On the date mentioned, February 4, 1968, the plaintiffs' intestates and plaintiffs were proceeding south, and, because of the confusing and perplexing situation caused by the marks or lines turning left onto the bypass, plaintiff's, Reynalda Baca's intestate (her husband and driver) drove the station wagon in which they were riding to the left along the white and yellow lines and, apparently noticing that the bypass was closed, attempted to turn back into the west lane of the northbound lanes of I–25 and collided with an oncoming vehicle. The collision occurred upon the bypass. Three deaths and serious injuries to the survivors resulted.

With respect to the granting of summary judgment, the sole issue was whether the liability policy issued by the Company to the Department afforded coverage for the accident involved.

In considering the question of policy coverage, we are mindful of the rule that the measure of the rights of the parties is to be found in their intention as expressed by them in the contract. Further, if unambiguous, the interpretation of the contract is one of law to be made by the court. Vargas v. Pacific National Life Assurance Co., 79 N.M. 152, 441 P.2d 50 (1968).

In ascribing error on the part of the trial court in interpreting the policy so as to exclude coverage of the particular accident, plaintiffs have referred to certain general language indicative of a broad coverage, but, reliance is specifically placed upon the following typed indorsement.

"I. Comprehensive General Liability Insuranc Coverage Part

A. * * *

B. EXCLUSION OF HIGHWAYS

It is agreed that the policy does not and shall not be construed to cover any liability arising solely from the existence of or condition of highways, streets, roads or other dedicated ways, including bridges, culverts and similar structures appurtenant thereto.

This exclusion does not apply to accidents arising out of construction, maintenance or repair operations undertaken by or on behalf of the named insured."

C. * * *

The parties are in agreement that the policy with respect to the particular coverage which is the subject of this appeal is unambiguous. With this conclusion we are in agreement. There is little doubt, in our opinion, as to the meaning of the language contained in the quoted endorsement.

Excluded from coverage under the first paragraph of B is "* * * liability arising solely from the existence of or condition of highways, * * *" The accident involved, at least for the purpose of summary judgment, arose from the condition of the highway, namely, the lines which confused and misdirected the driver of the car in which plaintiffs were riding. This exclusion, however, is inapplicable under the second paragraph of B, "* * * to accidents arising out of construction, maintenance or repair operations * * *." The words "arising out of" are very broad, general and comprehensive terms, ordinarily understood to mean "originating from," "having its origin in," "growing out of" or "flowing from." See Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W. 2d 181, 154 A.L.R. 1088 (1944); Carter v. Bergeron, 102 N.H. 464, 160 A.2d 348, 89 A.L.R.2d 142 (1960). Also cases cited in the Anno. 89 A.L.R.2d 150 (1963). Compare Berry v. J. C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964); Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956); Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 P. 72 (1922).

In this case, building the bypass from I–25 to 85 and painting the lines upon I–25, the bypass and 85 for the purpose of directing traffic from the uncompleted portion of I–25 was clearly a part of construction. Eradicating or erasing the lines after traffic was to flow only upon I–25 was likewise a part of the construction process.

The accident was caused by the presence of the painted lines upon I–25, the bypass and 85. In our opinion, it arose out of a construction operation which resulted in coverage under the language of the second paragraph of the endorsement B, which we interpret as extending coverage to the accident involved here.

The Company contends that the language "arising out of construction, maintenance, or repair operations" should be interpreted as providing coverage for a condition of the highways only while actual construction, maintenance, or repair operations are in progress. It argues that to decline to so interpret the second paragraph of the endorsement would nullify or destroy the effect of the first paragraph. It reasons that anything which is a "condition of highways" must necessarily arise from one of the three activities, namely, construction, maintenance or repair. We disagree. "Condition of highways," as used in the first paragraph of the endorsement, could arise in a number of ways other than from construction, maintenance or repair operations. A few of such ways would include normal deterioration of the highways, condition of the highway due to floods, or other weather conditions, and unauthorized or improper use of the highways.

In our opinion, the interpretation we have placed on the second paragraph of endorsement B does not have the effect of nullifying the first paragraph of B.

Additionally, the Company, to sustain its position, calls our attention to the following policy exclusion:

"D. EXCLUSION — COMPLETED OPERATIONS AND PRODUCTS HAZARD

'It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to bodily injury or property damage included within the "Completed Operations Hazard" or the "Products Hazard".'

* * *"

* * * * * *

"'completed operations hazard' includes bodily injury and property damage arising out of operations or reliance upon a representation

or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. 'Operations' include materials, parts or equipment furnished in connection therewith."

We do not consider this exclusion to be applicable under the facts in this case because, as has been shown, the accident occurred upon premises owned by the insured (Department).

The Company finally contends that plaintiffs have no cause of action against it at this time. It says that if the other contentions urged are not sustained, summary judgment is nevertheless sustainable on the ground that no actual controversy exists as between it and plaintiffs. Consequently, there is no basis for declaratory relief. (§ 22–6–1, N.M.S.A.1953.) As has been pointed out, no action is maintainable against the Department in the absence of liability insurance coverage extending to the particular accident. The Company's position, as stated, is that the policy does not extend coverage to the accident involved.

In our view, an actual controversy does exist as between plaintiffs and the Company with respect to coverage, absent which the suit against the Department is not maintainable. The Company, in citing Rhodes v. Lucero, 79 N.M. 403, 444 P.2d 588 (1968), argues that because plaintiffs have no judgment against the Department and the rights against the Department are contingent, no justiciable controversy is shown. *Rhodes* did not, as here, involve a situation where insurance coverage was a condition precedent to the maintenance of an action as against one of the alleged tort-feasors. We hold the action for declaratory judgment is maintainable in this situation although no judgment has been obtained against the Department. Compare Baca v. Board of County Commissioners, 76 N.M. 88, 412 P.2d 389 (1966).

It is further contended by the Company that the policy provisions prevent suit against it in the absence of a determination of liability on the part of the assured. In our opinion, these provisions are inapplicable to an action of the kind involved here, which, as stated, seeks only an interpretation of the contract between the parties. Compare Satterwhite v. Stolz, 79 N.M. 320, 442 P.2d 810 (Ct.App.1968).

The Company appears further to argue, as a basis for sustaining the summary judgment, that joining it as a party defendant, and likewise joining the declaratory judgment action against it with the claim against the Department was improper.

Summary judgment under the provisions of Rule 56(c) (§ 21–1–1(56) (c), N.M.S.A. 1953 Repl.Vol. 4), is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Hewitt-Robins, Inc., etc. v. Lea County Sand & Gravel, Inc., 70 N.M. 144, 371 P.2d 795 (1962); Dempsey v. Alamo Hotels, Inc., 76 N.M. 712, 418 P.2d 58 (1966).

From the above authorities, and those therein referred to, it is clear that the impropriety, if such be the case, of the joinder of the Company as a party defendant, and likewise joinder of the cause of action for declaratory judgment with the complaint against the Department cannot be utilized as a basis for supporting the summary judgment.

Plaintiffs, by their reply brief, have undertaken to challenge the doctrine of sovereign immunity. The Department has likewise responded to this issue. In view of the conclusions we have reached we do not consider, nor do we rule upon this challenge.

The order granting summary judgment should be set aside with directions to proceed in a manner not inconsistent herewith.

It is so ordered.

WOOD and SUTIN, JJ., concur.

487 P.2d 122

STATE of New Mexico ex rel. STATE HIGHWAY COMMISSION of New Mexico, Petitioner-Appellee,

v.

Lucia L. TRUJILLO and Ernest Trujillo, Defendants-Appellants.

No. 9132.

Supreme Court of New Mexico.

June 28, 1971.

Wright & Kastler, Raton, for appellants.

James A. Maloney, Atty. Gen., Margaret W. Lamb, Special Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

STEPHENSON, Justice.

This is an appeal by defendants-appellants Trujillo (the landowners) from a judgment entered in a condemnation case which determined that road building material from the landowners' property had been reserved to the government in the patents and that petitioner-appellee (Highway Commission) was therefore not required to pay the landowners for the material taken.

The petition sought condemnation of a material pit, ownership of which was

claimed by landowners. The Highway Commission tendered a contract to pay seven cents per ton for the material. It was never fully executed, although counsel have since stipulated that such is the market value of the material.

The patents by which a predecessor of the landowners acquired title contained the following reservation:

> "Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862)."

The cited Act is known as the Stock-Raising Homestead Act, 43 U.S.C. §§ 291–302.

The Highway Commission, after suit was filed, procured from the Bureau of Land Management, Department of the Interior, a "free use permit" authorizing the removal of the materials for use in a federal aid project under construction. It amended its petition to take the materials, and further said that "* * * the Petitioner not knowing whether the Defendants have any ownership in and to said surfacing material, their ownership * * * is hereby denied."

The evidence consisted of certain facts stipulated at a pretrial conference, the patents and the free use permit. It was agreed that the sole issue was of law and was as to the ownership of the material, as to which it was stipulated that:

> "* * * the material is taken from the land in its exposed state, without refining, and is used (as gravel) as an aggregate for coarse and surfacing materials for highway construction."

The trial court concluded that the Stock-Raising Homestead Act segregated the surface estate from the mineral or subsurface estate, granting the former to the entryman for stock raising and agricultural purposes and reserving the latter to the United States. It held that the patents conveyed "only the right to use the surface of the land described in such patents, and reserved to the United States all subsurface rights." It further concluded that monzonite was a mineral which was reserved in the patents and was owned by the United States.

Consistent with its decision, the trial court concluded that the landowners were not entitled to be compensated for the material and, following the entry of judgment, landowners appealed.

The statute provides in pertinent part, concerning patents granted thereunder, that "* * * any patent therefor shall contain a reservation to the United States of all minerals in said lands and the right to prospect for, mine, and remove the same." 43 U.S.C.A. § 291. Section 299 of that title provides that "all entries made and patents issued * * * shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

■ The excellent and interesting briefs of the parties range across a broad spectrum of controversies, the resolution of several of which is unnecessary for our decision. The landowners first attack findings of fact of the trial court determining that the material was monzonite, that it was being taken from a knoll and that monzonite is a porphyritic rock having a certain chemical composition. They assert that the court ventured outside the stipulated facts and correctly point out that where evidence consists of documents and stipulated facts, this court is in as good a position as was the trial court to determine the facts and we are not bound by the trial court's findings. Atlantic Refining Company v. Beach, 78 N.M. 634, 436 P.2d 107 (1968).

■ The landowners are probably correct in their assertion that the findings which they attack are unsupported by the record, but the error, if any, is harmless.

Obviously the material is made of something and has some chemical makeup. Its composition is necessarily "mineral' in nature, at least in the sense that it is not animal or vegetable. It seems to have been simply country rock adaptable for use, and used in, the construction of a highway. The Highway Commission conceded on oral argument that the chemical makeup of the rock taken was immaterial.

As we view the case, the sole issue which confronts us is the proper construction to be placed on the word "mineral" in the context of the statute and the patent. Such a construction, in varying frames of reference, is attended with some difficulty.

In Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963) the court said:

> " 'Mineral' is a word of general language, and not per se a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute. Regard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies." (Footnotes omitted.)

On the same subject, in State Land Board v. State Department of Fish and Game, 17 Utah 2d 237, 408 P.2d 707 (1965), the court said:

> "It is to be conceded that in its broadest sense the term 'minerals' would include sand and gravel. In fact, under the common cliche that everything is either 'animal, vegetable or mineral' the term would include almost all material substances of the earth, its waters and even the air we breathe. But a reflection upon the semantics of words reveals how unsure and varied are the possibilities of their meanings when considered in the abstract; and that in order to divine the true meaning in any given usage, it is necessary to look to the context."

See also Board of County Com'rs of Roosevelt County v. Good, 44 N.M. 495, 105 P.2d 470 (1940), in which the court, in holding that caliche was not a precious metal within the provisions of a condemnation statute, digressed to a discussion of "minerals" and said that caliche was a mineral, as were stone and rock. It is clear the court there spoke of "mineral" in its comprehensive sense as meaning substances or materials which are neither animal nor vegetable.

The material which we are considering had no rare or exceptional character and possessed no peculiar property giving it special value. It seems useful only for road building purposes, and moreover it was stipulated to have been taken in its exposed state. Although courts have reached differing results in arriving at the judicially ascertained intent of reservation clauses such as the one before us, we are of the opinion that under the circumstances of this case the reservation of coal and other minerals was not intended to include rock.

An annotation entitled "Clay, sand or gravel as 'minerals' within deed, lease, or license" appears at 95 A.L.R.2d 843 (1964) and is of some interest. The annotation states that it is a fair common-sense inference that in most instances, clay, sand or gravel was not specifically in the minds of the parties, but that the paramount rule is to consider the entire instrument and be controlled by the intention so determined. It is said that most cases have held clay, sand and gravel to be included in the word "minerals," but:

> "There are, however, important considerations which cause exceptions to this general rule. Among them are that materials which possess no exceptional characteristics or value which distinguish them from the surrounding soil are not likely to be recognized as 'minerals' in the sense of such conveyances; that materials which form part of the surface are also not legally recognizable as minerals, nor are those which cannot be ob-

tained without a destruction of the surface, in the absence of extremely clear indication that they are to be so recognized and that the usual considerations of avoiding damage to the surface estate are to be deliberately disregarded; * *"

Each of these exceptions seem applicable here.

See also Whittle v. Wolff, 249 Or. 217, 437 P.2d 114 (1968); Bumpus v. United States, supra; Bambauer v. Menjoulet, 214 Cal.App.2d 871, 29 Cal.Rptr. 874, 95 A.L.R.2d 839 (5th Dist.1963); Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949) and Steinman Development Company v. W. M. Ritter Lumber Company, 290 F. 832 (W.D.Va.1922), aff'd 290 F. 841 (4th Cir. 1923).

The Commission places great reliance upon Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931) construing the same federal statute. In that case, the patentee of lands in Lea County, New Mexico, sought a judicial determination that water, oil and gas were not reserved by language in the patent identical to that with which we are here concerned. This portion of the case was dismissed because the United States was an absent indispensable party.

A second count sought a determination that the patentee was by law the owner of and possessed of a preference right above all others to prospect for and produce oil and gas on the property. The second count was on the assumption that oil and gas were reserved to the United States. The court accepted the assumed fact as irrefutable. In its discussion, apparently by way of emphasis, because the statements do not seem essential to the limb of the case under consideration, the court said:

"The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stockraising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States."

Presumably the trial court was guided by Skeen, and the court in Skeen apparently gave weight to the legislative history of the Stock-Raising Homestead Act, a feature which the Commission urges us to consider. A committee report states that the "purpose * * * is to limit the operation of the bill strictly to the surface of the lands * * *."

We find nothing in the statute as enacted which indicates an intention to create two estates or to grant the entryman use of the surface only. Had such been the intention of the Congress, it would have been a simple matter for it to have said so. Rather than reserving *all* the subsurface estate only minerals *in* the land were reserved. Refusal to give credence to the "two estates" or "surface only" concept leads to no absurd result. 50 Am.Jur. Statutes § 334. In fact, the reverse is more nearly true. It is clear that the intention of the act was to permit entry upon relatively large tracts suitable only for grazing. For this objective, grass is essential, and grass grows in dirt. A considerable portion of the earth's surface seems to be comprised of dirt. Can it be seriously thought that the patentee under the act in question would not own the dirt in which the grass is situated and finds its sustenance? If he constructs a stock tank, is it reasonable to suppose that the patentee was moving and using material which he did not own? And what of subsurface water brought to the surface by pumps or windmills and used for stockraising purposes? Certainly, dirt and water as well are minerals in the broadest sense, at least to the extent of not being animal or vegetable.

Although we have no quarrel with the result of Skeen that oil and gas are minerals, we cannot subscribe to the theory of Skeen and the trial court that the Congress intended the entryman to have use of the surface only.

From what we have said, it follows that the judgment is reversed, with directions to the trial court to proceed to determine the amount of material removed and to enter judgment for the landowners.

It is so ordered.

McMANUS and OMAN, JJ., concur.

487 P.2d 126

Petition of Dominico QUINTANA and Alice Quintana to adopt Deborah Jean Quintana and Marvin James Quintana.

Anastacia Garcia QUINTANA, Appellant,

v.

Dominico QUINTANA and Alice Quintana, Appellees.

No. 9211.

Supreme Court of New Mexico.

June 28, 1971.

Vaughan, Marek & Paone, Albuquerque, for appellant.

Roberto L. Armijo, Las Vegas, for appellees.

OPINION

McMANUS, Justice.

The defendant appeals from an order of the District Court of San Miguel County, New Mexico, dispensing with the defendant's consent to the adoption of her two children by the paternal grandparents.

Consent was dispensed with pursuant to § 22-2-6(A) (3), N.M.S.A. (1967 Supp.).

Supreme Court Rule 5(2) states:

> "Appeals shall also be allowed by the district court, and entertained by the Supreme Court, in all civil actions, from such interlocutory judgments, orders or decisions of the district courts, as practically dispose of the merits of the action, so that any further proceeding therein would be only to carry into effect such interlocutory judgment, order or decision. Appeals shall also be allowed by the district court, and entertained by the Supreme Court, from all final orders affecting a substantial right made after entry of final judgment. * * *"

Defendant's appeal is not timely since the merits of the action were not disposed of with this order waiving the defendant's consent to the adoption. The trial court must conclude the matter with a hearing on the final adoption. This as yet has not been done.

This Court further holds as it has in the past on its own motion that it is without

jurisdiction in the matter where the order lacks finality due to the absence of the necessary determination and order of the trial court. Pacheco v. Pacheco, 82 N.M. 486, 484 P.2d 328 (1971); Aetna Casualty and Surety Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969).

The appeal is dismissed. It is so ordered.

COMPTON, C. J., and STEPHENSON J., concur.

487 P.2d 127

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., Plaintiff-Appellee,

v.

Donald G. KEITH and William C. Thompson, Individually and d/b/a Keith & Thompson, Defendants-Appellants.

No. 9003.

Supreme Court of New Mexico.

June 30, 1971.

Modrall, Sperling, Roehl, Harris & Sisk, John R. Cooney, Albuquerque, for appellants.

Sutin, Thayer & Browne, Jonathan B. Sutin, Albuquerque, for appellee.

OPINION

STEPHENSON, Justice.

This action for anticipatory breach of a written installment contract was tried to the court and judgment was entered for the plaintiff-appellee (AIMS). Defendants-appellants (Broker) appealed.

The parties entered into a written contract which by its terms required AIMS to furnish certain services and materials designed to facilitate sales of real estate for which Broker agreed to pay $2,610.00 in thirty-six monthly payments of $72.50 each less a down payment of $145.00. It also obligated Broker to purchase nine "marketing presentations" and pay therefor $2,632.50. Broker, after making the down payment, disavowed the contract, refused to make further payments and this suit followed.

Broker asserts error in the exclusion of certain evidence and the court's award of damages.

During trial the court reserved ruling on objections to a good deal of testimony offered by Broker concerning conversations between Broker and AIMS' agent at and prior to the execution of the contract. The objections were grounded upon the parol evidence rule and an assertion that fraud was not an issue. Ultimately the court ruled that such evidence violated the parol evidence rule, would be excluded, and that he therefore would "necessarily" find the issues in favor of AIMS. The excluded evidence tended to show that AIMS' agent, prior to execution of the contract, orally represented that AIMS had developed and would make available to Broker a residential financing technique whereby employees of major corporations transferred to Albuquerque or its environs could have the equities in their homes purchased from them by a corporation affiliated with AIMS, known as Relocation Finance Corporation, so that Broker could immediately close a sale of a home in Albuquerque; that such representations were the principal motivating factor in Broker's entry into the contract and that Broker understood these arrangements to be embodied in paragraph 2(f) of the contract by which AIMS agreed "to make available to broker new residential financing techniques as and when developed by AIMS."

Various findings were made by the court favorable to AIMS. AIMS devotes much of its brief to demonstrating that these findings are supported by substantial evidence. This contention misses the point. The question is whether the court erred in excluding the mentioned evidence. What the court's findings might have been had the excluded evidence been considered is speculation.

The fourth and fifth defenses in Broker's answer are:

"That the consideration for the promises of defendants failed, and defendants have been released from their obliga-

tions, if any, under the contract described in plaintiff's complaint because of the failure of such consideration.

"That a material inducement to defendants to enter into the contract described in plaintiff's complaint was the promise on the part of plaintiff to establish and maintain a residential real estate referral program for defendants and to make available to defendants new residential financing techniques, and that plaintiff breached the said contract by failing or refusing to perform such promises."

Broker asserts that the parol evidence rule does not require exclusion of evidence of fraud, particularly in the inducement. However this may be, the difficulty with Broker's position is that there is no plea of fraud, which is an affirmative defense (Rule 8(c), Rules of Civil Procedure [§ 21–1–1(8) (c), N.M.S.A., 1953]), the circumstances of which must be stated with particularity. Rule 9(b), Rules of Civil Procedure [§ 21–1–1(9) (b), N.M.S.A., 1953]. The fourth defense is a plea of failure of consideration and the fifth is of breach of contract. Broker asserts the gist of the defense is that misrepresentations were made concerning facts which did not exist or promises which AIMS did not intend to perform, but there is no plea of either the misrepresentations or the intention.

Broker says that even if there were technical deficiencies in pleading fraud, "in the interests of justice the pleadings are to be regarded as amended in accordance with the evidence" presumably relying upon Rule 15(b), Rules of Civil Procedure [§ 21–1–1(15) (b), N.M.S.A., 1953]. AIMS correctly points out that this rule cannot apply because the issue of fraud was not tried by express or implied consent nor did Broker seek an amendment.

Broker further asserts that the phrases in paragraph 2(f), "residential financing techniques" and "as and when developed by AIMS" are ambiguous, and that parol evidence should be admitted to explain that paragraph. Although the former phrase is mildly puzzling, it may be doubted that either are sufficiently ambiguous to fall within the exception to the parol evidence rule. Assuming, arguendo, that evidence was admissible to explain either or both, and that the phrases were then explained in minute detail, we fail to see how Broker would benefit, absent a plea of fraud or some other effective defense predicated upon the explanation.

Broker next claims that the excluded evidence was properly admissible to show that the consideration was different from that expressed in the contract, asserting that Broker's motivating force in executing the contract was the supposed residential refinancing technique. Broker is thus attempting to equate its reason for signing the contract with the consideration which supports it.

As to consideration, the contract provides:

"In consideration of One Hundred Forty-Five Dollars ($145.00) the receipt of which is hereby acknowledged and other good and valuable consideration, and the mutual promises herein contained, Broker and AIMS agree * * *."

Broker cites and relies upon Morstad v. Atchison, T. & S. F. Ry. Co., 23 N. M. 663, 170 P. 886 (1918). The principle of law contended for is of no aid to Broker. It is true that parol evidence is admissible to show that consideration for a contract is greater, lesser or different from that expressed, but this cannot be extended to vary or alter other provisions of the contract. It is said in Morstad, supra:

"* * * it is always competent to show by parol that the consideration for the contract was greater or less than or different from the one expressed."

In Pople v. Orekar, 22 N.M. 307, 161 P. 1110 (1916), after quoting Jones on Evidence, § 468, it was said:

"The same author also states the rule to be that the real consideration may be proved, although different from that expressed in the writing, *unless the parol*

testimony tends to change the contract itself, in which event parol evidence is not admissible." (Emphasis ours.)

That case was cited with approval, with the same quotation and the same emphasis in Alford v. Rowell, 44 N.M. 392, 103 P.2d 119 (1940). In Alford, as here, it was claimed that the excluded evidence was the inducing cause of execution of the contract. The court said:

"If a parol contemporaneous agreement be the inducing cause of the written contract, or forms a part of the consideration therefor, and it appears the writing was executed on the faith of the parol agreement or representation, extrinsic evidence is admissible. In such cases, the real basis for its admission is to show fraud. The principle which admits such evidence under the conditions stated has no application, however, where the parol agreement relates directly to the subject of the written contract, even though it be alleged, as in the case at bar, that the written contract was signed upon the faith of the oral promises. [Citations omitted.]"

In this case, the evidence excluded relates directly to the subject of the contract and moreover there is no plea of fraud.

See also 4 Williston On Contracts, § 642 (3rd ed. 1961) and Annot. 100 A.L.R. 17 (1936).

We accordingly hold that the court below did not err in its exclusion of the evidence of which Broker complains in this appeal, and now turn to an examination of the subject of damages.

The trial court awarded AIMS judgment for all of the installment payments provided in the contract to be made by Broker, less the down payment, and for all of the marketing presentations. The court further allowed interest on the total amount of the judgment from June 15, 1966, that being the date of the first default in payment of an installment.

Broker, on the subject of damages, contends that:

A. The court erred in awarding the entire unpaid amount of the contract. Since AIMS was not required to perform its obligations, savings accrued to it and the award should have been reduced by the amount thereof. AIMS bore the burden of proving the amount of such savings and having failed to prove them, the award is defective and should be struck down.

B. The court erred in awarding damages for payments which, by the terms of the contract, fell due after February, 1967, when AIMS entered into a similar contract with another Albuquerque realtor. One of AIMS' witnesses testified the latter contract would not have been executed had Broker performed.

We find it unnecessary to resolve these issues. The contract provides in part:

"* * * Broker further agrees to pay for all goods and services contracted for the full term of this Agreement. * * *"

and in a subsequent section:

"Broker agrees to pay for all Marketing Presentations as agreed to herein and as contracted for by the terms of this Agreement, * * *."

Subject to certain limitations not applicable here, parties to a contract may fix the sums to be paid as damages in the event of a breach. Gruschus v. C. R. Davis Contracting Co., 75 N.M. 649, 409 P.2d 500 (1965); Van Sickle v. Keck, 42 N.M. 450, 81 P.2d 707 (1938); Kuchan v. Strong, 39 N.M. 281, 46 P.2d 55 (1935).

Finally, Broker complains of the court's having allowed interest on the full sum of the damages awarded from June 15, 1966, the time when the first installment which was not paid fell due. The contract does not include any acceleration clause, one of the few features which it

lacks. We consider the Broker's contention regarding interest as meritorious.

The trial court is directed to set aside its judgment for the purpose of recomputation of interest including therein an award of interest on each installment and payment only from the time such installment or payment ought to have been made according to the terms of the contract. Except for this recomputation, the holding of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and TACKETT, J., concur.

487 P.2d 131

Herman LEVINE, Administrator of The Estate of David Allen Levine, Deceased, Plaintiff-Appellant, (Respondent),

v.

GALLUP SAND AND GRAVEL COMPANY, Inc., a corporation et al., Defendants-Appellees, (Petitioners).

No. 9265.

Supreme Court of New Mexico.

June 28, 1971.

Rehearing Denied July 12, 1971.

Denny, Glascock & McKim, Gallup, Modrall, Sperling, Roehl, Harris & Sisk, Joseph E. Roehl, Allen C. Dewey, Farrell L. Lines, Albuquerque, for petitioners.

Lorenzo A. Chavez, Melvin L. Robins, George Jones, III, Albuquerque, for respondent.

OPINION

OMAN, Justice.

The New Mexico Court of Appeals reversed the judgment of the trial court with directions to grant plaintiff a new trial. Levine v. Gallup Sand and Gravel Company, Inc., et al, 484 P.2d 1405 (1971). The case is now before us on a writ of certiorari. We reverse the decision of the Court of Appeals.

Our disagreement with the Court of Appeals lies in the fact that we believe the principal and ultimate issue presented is whether the refusal of the trial court to poll the jury upon request constituted reversible error. We agree with the Court of Appeals that in a civil case the parties are entitled as a matter of right to have the jury polled upon making a proper request therefor; that plaintiff made a proper request; and that the error committed by the refusal of the request was not cured by the subsequent polling of the jury.

However, all error is not reversible. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971); Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970); Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); Supreme Court Rule 17(10) [§ 21-2-1(17)(10), N.M.S.A.1953 (Repl. Vol. 4, 1970)]. See also Rule 61, Rules of Civil Procedure [§ 21-1-1(61), N.M.S.A.1953 (Repl. Vol. 4, 1970)]. In our opinion the mere failure of the trial court to poll the jury upon request does not evidence, or even suggest, prejudice to a substantial right of the requesting party.

We do not wish to be misunderstood as suggesting the right to have the jury polled is discretionary with the trial court, or that the trial court may properly consider whether prejudice will or will not result if the jury is not polled. As already stated, it is the duty of the trial court to poll the jury upon proper request. Our opinion is, however, that the mere failure to poll the jury upon proper request does not in itself constitute reversible error. Upon appeal from a refusal by the trial court of a proper request to poll a jury, we would apply the following standard adopted in Jewell v. Seidenberg, supra, in determining whether reversible error has been committed: "* * * [W]e will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice. * * *"

In the present case there is not the slightest evidence of prejudice to plaintiff by reason of the refusal of his request to have the jury polled. In fact he makes no claim that such evidence exists. He seeks reversal solely upon the error of the trial court in denying his request. We have already ruled this is not reversible error.

The only matters in the record before us, which bear upon the validity of the jury verdict, and particularly upon the fact that the required number of jurors concurred therein, are the consistency between the verdict and the answers to the special interrogatories, the subsequent polling of the jury by the trial court referred to in the opinion of the Court of Appeals, and affidavits secured from six of the jurors and filed by defendants pursuant to authority granted by the trial court. These matters clearly show the verdict to be proper and to represent a concurrence of the required number of the jurors. We are not suggesting the subsequent polling of the jury or the filing of the affidavits cured the error of the trial court, but they

do demonstrate that no prejudice resulted to plaintiff by the error.

In order to avoid any possible misinterpretation of our reference to the affidavits which relate to the verdict, we have not departed from the rule that jurors should not be permitted to impeach their verdict by affidavits made after their discharge. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966). The affidavits here in question were offered as support for rather than impeachment of the verdict.

We need not rule on the propriety of permitting jurors to affirm or substantiate their verdict by their affidavits, since there is a complete absence in the record in this case of anything to show irregularity in the verdict or prejudice to plaintiff. Thus, there is no need for evidence affirming or substantiating the verdict. The validity and regularity of a verdict are presumed. See Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967); Ellis v. Parmer, 76 N.M. 626, 417 P.2d 436 (1966). We note, however, that a number of jurisdictions permit jurors to affirm or substantiate their verdict by their affidavits or testimony, if an attack is made thereon, although they may not impeach their verdict. Chrum v. St. Louis Public Service Co., 242 S.W.2d 54 (Mo.1951); Ford Motor Credit Co. v. Amodt, 29 Wis.2d 441, 139 N.W.2d 6 (1966); Schiff v. Oak Park Cleaners and Dyers, 9 Ill.App.2d 1, 132 N.E.2d 416 (1955); Gregorich v. Jones, 386 S.W.2d 955 (Ky.Ct.App.1965). We also note that in at least one jurisdiction jurors are properly subject to interrogation by the court under certain circumstances to determine if an irregularity has occurred. See Ford Motor Credit Co. v. Amodt, supra.

The decision of the Court of Appeals must be reversed and this cause remanded to that court with instructions to affirm the judgment of the trial court.

It is so ordered.

COMPTON, C. J., and TACKETT, McMANUS, and STEPHENSON, JJ., concur.

487 P.2d 133

Elirio RAEL and Rosa C. Rael, his wife, Plaintiffs-Appellees,

v.

Frank CISNEROS et al., Defendants-Appellants.

No. 9144.

Supreme Court of New Mexico.

July 2, 1971.

Barry Rudolf, Santa Fe, for appellants.

Eliu E. Romero, Taos, Bachicha & Corlett, Santa Fe, for appellees.

OPINION

STEPHENSON, Justice.

From a judgment quieting the title of plaintiffs-appellees, three of the numerous defendants have appealed. We affirm.

The land in question (the land) was patented to the heirs of Eugenio Gonzales in 1920. Eugenio Gonzales was survived by his wife, Rosita Gonzales, now deceased, by whom he had eight children, including:

A. Irene Gonzales Rael, a daughter, wife of Salomon Rael. Salomon and Irene Rael were both deceased at material times. They were the parents of appellee Elirio Rael.

B. Flavio Gonzales, a son, deceased father of appellant Corina Cisneros.

C. Cristino Gonzales, a son, deceased husband of appellant Agapita Gonzales.

Prior to suit, appellee Elirio Rael obtained various deeds from heirs of Eugenio Gonzales and members of their families, and a deed from his parents. The trial court held such deeds to be valid and effective to vest in appellee a good title to the land in question. It also held appellee had title by adverse possession.

The appellants assert that both limbs of the court's decision are unsupported by substantial evidence and attack the court's determination of the validity of a certain tax deed which we will discuss presently. In addition, appellant Agapita Gonzales contends that a certain deed was procured by appellee from her by fraud.

Appellant Agapita Gonzales did in fact execute a deed to appellee in 1950. She testified to circumstances surrounding the execution and delivery of the deed from which the trial court might have found fraud. However, appellee's testimony differed in material respects from that of Mrs. Gonzales, and described the acquisition of the deed in a manner free from fraud. The trial court found that the deed was not fraudulently obtained. Its finding is supported by substantial evidence and will not be disturbed.

Appellants assert that appellee failed to prove that the lands described in the complaint were the same as those described in the patent and the various deeds to appellee and the tax deed to appellee's father, i. e., that the trial court's contra finding is unsupported by substantial evidence. We invite attention to Supreme Court Rule 15(6) [§ 21-2-1(15) (6), N.M. S.A., 1953] which requires the party contending that findings of fact are not supported by substantial evidence to state the substance of *all* evidence bearing upon the proposition.

We have examined those portions of the record cited by the parties in support of their respective positions and are of the opinion that the court's finding regarding adequacy of the descriptions in the complaint, patent and deeds is supported by substantial evidence.

The trial court found that Salomon Rael, father of appellee, had been in exclusive possession of the land from about 1930. It is to be recalled that he was not an heir of Eugenio Gonzales, although his wife Irene was one of the latter's daughters. It follows that the interest of Irene Rael was her separate property. In March, 1941, the land was sold by the Taos County Treasurer to the State for non-payment of 1937 taxes, plus penalty, interest and costs. The tax deed recited that the lands had theretofore been assessed to Salomon Rael. In July of that year, Salomon Rael made application to the State Tax Commission to repurchase the land and a few days later

entered into a contract with the Commission to repurchase. In September, 1942, the Commission conveyed the land to Salomon Rael. In February, 1960, Salomon Rael and Irene G. Rael, his wife, conveyed the land to appellee Rael.

Appellants point out that Salomon Rael's application to repurchase falsely stated that title to the land was vested in him at the time of issuance of the tax deed from the Taos County Treasurer to the State, and that in the repurchase contract he falsely covenanted and warranted that he was the owner of the land whose title had been extinguished by the Treasurer's deed to the State.

Appellants claim that these misrepresentations invalidated the deed from the Tax Commission to Salomon Rael, and since he could not convey a title which he did not own, his deed to Elirio Rael conveyed nothing.

Fraud must be proven by clear and convincing evidence. Hockett v. Winks, our No. 9094, decided May 10, 1971, 82 N. M. 597, 485 P.2d 353. The means of determining whether the requisite quantum of proof has been shown was stated in Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955). Appellants requested a conclusion of law to the effect that the tax deed was procured by fraud. The trial court found as a fact and made a conclusion of law that the tax deed was valid, thereby determining an absence of fraud.

The tax deed was prima facie evidence of its validity. Section 72–8–43, N. M.S.A., 1953. It may be doubted that, with the record in the state we have described, the proof is sufficient to require us to determine the existence of fraud in the procurement of the tax deed by Salomon Rael as a matter of law. We will, however, for purposes of our discussion, assume that fraud was shown.

Appellants rely upon Trujillo v. Montano, 64 N.M. 259, 327 P.2d 326 (1958). That case does stand for the proposition that "any person who procures a tax deed from the State under the provisions of Section 72–8–31, supra, when he has no right, title or interest in the property, acquires no title to the land sold," and that a subsequent deed from the fraudulent purchaser to a third person is a "nullity" and has no "force or effect."

This reasoning, however, has been restricted to the precise facts of that case. This was most strongly exemplified in the case of State ex rel. State Tax Commission v. Garcia, 77 N.M. 703, 427 P.2d 230 (1967), in which the court stated that Trujillo v. Montano, supra, and similar cases "must be restricted to the fact situations there being considered." After quoting from the case of Eager v. Belmore, 53 N.M. 299, 207 P.2d 519 (1949), the court in Garcia stated:

> "In this language we perceive a recognition that 'void' does not always mean 'absolutely void' but, to the contrary, when it is clear that such a meaning was not intended, it may mean 'voidable.'"

Appellants also rely upon Velasquez v. Mascarenas, 71 N.M. 133, 376 P.2d 311 (1962) as authority for the proposition that repurchase and payment of taxes restores the title to its status prior to the tax sale. The facts in Velasquez are distinguishable. That case held that repurchase by a cotenant inured to the benefit of all cotenants. Appellants here have been at pains to point out that so far as the record shows, Salomon Rael was not a cotenant and owned no interest in the land. This, in truth, is the principal thrust of their argument.

It seems to us the case most nearly applicable is State ex rel. State Tax Commission v. Garcia, supra. In that case, Mr. Garcia had fraudulently obtained deeds from the State Tax Commission. He then sold the lands to others. In a suit to cancel the fraudulently procured deeds, the State made the identical argument that Appellants make here, viz., that inasmuch as the deeds were fraudulently procured, they were void, and the person so procuring them had no title to convey. The court, after careful consideration, held that under the circumstanc-

es there present, the fraudulently procured deeds were not void, but only voidable, and passed good title to bona fide purchaser:

> "[A] purchaser for value without notice of shortcomings in the proceedings which could be raised by a previous owner under the statutes, or which would become apparent from a reasonable examination of the record, took free from such defect."

In their attack upon the tax deed, appellants have failed to meet the requirements of § 72-8-20, N.M.S.A., 1953.

There remains the question of whether appellee Rael is to be regarded as a bona fide purchaser for value without notice in respect to the deed from his parents. This is a phase of the case which seems to have received little attention below. The court made no findings directly on this subject, but appellee Rael's status as a bona fide purchaser is easily inferred in support of the judgment from the court's finding that the deed was valid. Appellants do not concede that appellee Rael was a bona fide purchaser for value without notice, but failed to allege, prove or attempt to prove anything to the contrary, or even argue that he was not.

The deed from Salomon Rael et ux. to Elirio Rael is a Spanish warranty deed, regular on its face. A deed, being merely a specialized form of contract, consideration is imported in the same manner and as fully as sealed instruments. Section 20-2-8, N.M.S.A., 1953. Moreover, the deed recites a consideration of $300.00, considerably more than Salomon Rael paid the Tax Commission.

The record, furthermore, is barren of any evidence which would tend to color appellee Rael's acquisition of the property from his father with the mark of bad faith.

We are of the opinion that Elirio Rael was a bona fide purchaser for value without notice of any defect in the tax deed to Salomon Rael, and the court's conclusion of the validity of the various deeds to Elirio Rael is sustained.

Having held that the trial court's decision that Elirio Rael proved a good record title to the land, we find it unnecessary to consider whether he proved title by adverse possession.

The judgment will be affirmed.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

487 P.2d 136

CITY OF ROSWELL, New Mexico, Plaintiff-Appellee,

v.

Ronald R. MARTINEZ, Defendant-Appellant.

No. 636.

Court of Appeals of New Mexico.
May 21, 1971.
Rehearing Denied June 17, 1971.

J. Lee Cathey, Carlsbad, for defendant-appellant.

James B. Stapp, City Atty., Roswell, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted in the municipal court of the City of Roswell of violating an ordinance prohibiting driving of a vehicle while under the influence of intoxicating liquor. He appealed to the District Court and following trial de novo was again convicted of the same offense. The appeal here is from the judgment and sentence of the District Court.

Facts which appear relevant are as follows: one of the city police officers received a radio call from the radio dispatcher informing him that there was a drunk subject in a Plymouth automobile at a particular address within the City of Roswell. The officer proceeded toward the address and observed a Plymouth automobile traveling along the street. The officer stopped the automobile, and, as he did so, the driver (defendant) disembarked from the car. Defendant was then asked to produce his driver's license. As he undertook to comply, the officer concluded from his actions that defendant was intoxicated and placed him under arrest. It appears to be undisputed that, before the car was stopped, the officer had seen no violation of law on defendant's part, and that he had no warrant for defendant's arrest.

Defendant asserts that the trial court was without jurisdiction to try him because the arrest was illegal. It is his position that the arrest occurred at the time his automobile was stopped by the officer. Assuming that the arrest did occur at the time the car was stopped, which we do not decide, the contention that the trial court lacked jurisdiction because the arrest was illegal we believe was answered contrary to defendant's position in State v. Halsell, 81 N.M. 239, 465 P.2d 518 (Ct.App. 1970), wherein the following statement appears from substantial authority.

> "The courts of this and many other jurisdictions have—in direct appeals, habeas corpus proceedings, and post-conviction proceedings—repeatedly held that the jurisdiction of a court to try a person accused of crime, or to accept his plea of guilty, is not divested, nor his conviction vitiated, because his arrest was irregular or unlawful."

Defendant further contends that the sentence imposed by the District Court was improper. We agree. Following the trial in the municipal court defendant was sentenced to pay a fine of $175.00. The District Court, upon finding defendant guilty, imposed a fine of $250.00, which latter fine, in our opinion, exceeds the limit authorized by § 38-1-11, N.M.S.A. 1953, (Rpl.Vol. 6, 1969 Supp.). The material portion of this statute follows:

> "If the judgment of the municipal court in the action is affirmed or rendered against the defendant on appeal, the district court shall enter judgment imposing the same or a lesser penalty as that imposed in the municipal court in the action."

We affirm the conviction but remand with directions to set aside the sentence imposed by the District Court and re-sentence defendant in conformity with the provisions of the statute to which we have referred.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

487 P.2d 138

STATE of New Mexico, Plaintiff-Appellee,

v.

Don H. HODNETT, Defendant-Appellant.

No. 656.

Court of Appeals of New Mexico.

June 25, 1971.

N. Randolph Reese, Hobbs, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Thomas Patrick Whelan, Jr., Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Within one year of his judgment and sentence defendant moved for a new trial under §§ 21-1-1(60) (b) and 21-1-1(93), N.M.S.A.1953 (Repl. Vol. 4). Since defendant is a prisoner in custody under a sentence we treat the motion as one under § 21-1-1(93), supra. Compare State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966); State v. Romero, 76 N.M. 449, 415 P.2d 837 (1966); Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct.App.1969), cert. denied, 395 U.S. 967, 23 L.Ed.2d 754, 89 S.Ct. 2115 (1969).

The motion was denied after an evidentiary hearing and findings of fact by the trial court. Defendant's appeal raises three issues. The issues, and our answers, follow:

A. Defendant contends that prosecution misconduct deprived the trial court of jurisdiction. The asserted misconduct is alleged to have occurred at the trial. Assuming, but not deciding that a jurisdictional issue is involved, we do not dispose of it on the basis that it could have been, but was not, raised on a direct appeal. See State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969). Instead, we assume the claim of misconduct is properly before us.

The claim of misconduct has two parts. First, defendant asserts the prosecutors were guilty of misconduct in arguing to the jury that defendant fired only two well-placed shots although the prosecutors had knowledge that five or six shots were fired. The trial court found that the arguments of the prosecutors were consistent with the testimony of witnesses for the State and that the prosecutors were not guilty of misconduct in their arguments. Substantial evidence at the evidentiary hearing supports this finding. Compare State v. Anaya, 79 N.M. 43, 439 P.2d 561 (Ct.App.1968).

Second, defendant asserts the prosecutors were guilty of misconduct in arguing to the jury that at the time of his arrest there was no evidence as to defendant's appearance which supported defendant's testimony that defendant and deceased engaged in a scuffle prior to the shooting and that deceased struck defendant before the shooting. The argument is that the prosecutors failed to present testimony from witnesses under subpoena and in court which would have supported defendant's testimony. Defendant does not complain of the State's failure to call certain witnesses. See State v. Lujan, 79 N. M. 200, 441 P.2d 497 (1968). His contention is that in not calling certain witnesses who would have supported defendant's testimony and then in arguing to the jury that the evidence introduced failed to support defendant's testimony, the prosecutor's arguments were misconduct.

We disagree. The witnesses, not called at the trial, testified at the post-conviction hearing. Their testimony is to the effect that defendant told them about his alleged fight with decedent but they observed defendant and saw nothing in defendant's appearance which tended to support defendant's statement. With this evidence, the trial court could properly refuse to rule that the prosecutors' arguments to the jury, about the absence of supporting evidence, was misconduct.

In the light of the evidence at the post-conviction hearing, we cannot say, as a matter of law, that the prosecutors' arguments were in bad faith or an extreme disregard for the truth. Compare State v. McDonald, 21 N.M. 110, 152 P. 1139 (1915); State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970).

B. Defendant contends he was convicted on the basis of perjured testimony and the district attorney's argument based on such testimony deprived him of a fair trial. The trial court refused to find that the witness, whose testimony is attacked, testified falsely at the trial. This refusal was proper under the evidence presented at the post-conviction hearing. Further, even if there had been perjured testimony, there is nothing to show the district attorney knew the witness' testimony was perjured and nothing indicating the district attorney intentionally used perjured testimony. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct.App.1968). See also State v. Minns, 81 N.M. 428, 467 P.2d 1000 (Ct. App.1970).

C. Defendant asserts that his conviction resulted from fundamental error but fails to point out in what way the fundamental error occurred. The record before us shows no fundamental error as that doctrine has been defined. See State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969). Nor, contrary to defendant's contention, is there a basis for applying the concept of cumulative error. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967).

Denial of the motion is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 139

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald A. DEATS, Defendant-Appellant.

No. 587.

Court of Appeals of New Mexico.

June 18, 1971.

[redacted]

[redacted]

[redacted]

William H. Carpenter, Mercer & Carpenter, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Ray Shollenbarger, Sp. Asst. Atty. Gen., for appellee.

OPINION

HENDLEY, Judge.

Defendant was charged with, and on insistence of his defense counsel tried simultaneously on nine counts involving conspiracy, burglary, and larceny. He was acquitted by a directed verdict on one count of larceny but was convicted on each of the other counts. He was sentenced to serve a term of one to five years on each count, which terms are to run consecutively.

Defendant appeals asserting nine points for reversal. We affirm.

1. THE RIGHT TO ASSISTANCE OF COUNSEL.

Under this point defendant claims error by the court in allowing his counsel to withdraw without notice which is contrary to the statute and rule of the court; in denial of his motion for a two-week continuance; and that prejudice is presumed when a defendant obtains counsel one day prior to trial.

The record indicates that at arraignment on May 1, 1968 defendant was represented by Fred Calkins, an attorney retained by him. Defendant was then out on bond. On February 28, 1969, his attorney filed a motion to withdraw as counsel and the court allowed this withdrawal. Defendant claims that his approval was needed for this withdrawal.

District Court Rule 89 (1) (2) [Section 21-1-1(89) 1 (2), N.M.S.A.1953 (Repl. Vol. 1970)] provides that an attorney may be changed as follows:

> "(2) Upon order of the court and upon such terms as may be just upon application of the attorney or of the client. The court may require such notice as it may consider appropriate under the circumstances of the particular case. * *"

Supreme Court Rule 19(4) (2) [§ 21-2-1 (19) (4) (2) is identical with District Court Rule 89(1) (2). Section 18-1-13, N.M. S.A.1953 (Repl.Vol.1970) although worded somewhat differently is conceded by counsel to be similar to Rule 89.

This section does not require notice to or consent of the client. The plain meaning of the rule is that notice and consent are discretionary with the court.

Defendant's claim is that retained counsel should not be allowed to withdraw without some provision being made for substitute counsel. Even if this be the case we fail to see how defendant was prejudiced because he proceeded on the assumption that attorney Woolston was representing him and in fact Woolston did prepare an affidavit of disqualification for defendant. The procedure in allowing attorney, Calkins to withdraw, even if erroneous, which is not decided, was harmless. Compare State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969).

For over one month, during which time he was free on bond, defendant did nothing to obtain counsel. The day before trial defendant went in person to the trial judge to ask for a continuance to arrange for counsel. The judge called the Assistant D. A. and in his presence informed the defendant that he would appoint counsel for him but that he would be held in jail while

his appointed counsel prepared for trial. This was not suitable to the defendant. He went out and made arrangements with attorney Les Houston who defended him at trial the following day. At trial defendant moved for a continuance. The court ruled that out-of-state witnesses were brought in and that a continuance would be granted only if defendant paid for the cost to the State for such witnesses. The court also ruled that in the event of a continuance the bond on defendant would be revoked. These terms of the continuance were not agreeable to the defendant and the court denied the motion.

Defendant claims a right to "prepared" counsel. He asserts the trial court denied him this right by the terms the trial court attached to the continuance. We disagree since the record shows any lack of preparedness on the part of Mr. Houston was due to defendant's dilatoriness. Compare State v. Gutierrez, 82 N.M. 578, 484 P.2d 1288 (Ct.App.) decided April 16, 1971.

The granting of a motion for continuance lies in the sound discretion of the trial court and the denial of such a motion will not be deemed error unless there is a clear abuse of discretion. State v. Cochran, 79 N.M. 640, 447 P.2d 520 (1968). In the circumstances of this case we cannot say that the trial judge abused its discretion.

Defendant has failed to indicate in what way he was prejudiced at trial and we are not persuaded by his claim that prejudice is to be presumed under these circumstances. A review of the record shows that the circumstances upon which he bases his claim can only indicate that the defendant alone was responsible for whatever transpired.

Finally, we refuse to adopt the basic premise on which this first point is predicated. At oral argument counsel for defendant contended that the defendant had no obligation to make any effort to obtain counsel; that under the Sixth Amendment of the U. S. Constitution he had an absolute right and the burden was on the court to see that he be provided with counsel. Defendant does have a right to be represented by counsel, but the trial court had no obligation to provide defendant with counsel prior to any claim of indigency, and here no such claim was made. Rather the counsel who represented defendant, whether Calkins, Woolston or Houston, were retained counsel. The right to counsel does not mean the trial court has an obligation to seek out retained counsel for a defendant. Compare State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

2. INSTRUCTION CAUTIONING THE JURY ON THE STATEMENT OF AN ACCOMPLICE.

Defendant contends that the trial court erred in declining to give his requested instruction No. 9 relating to the weight to be accorded the testimony of an accomplice.

Defendant, in fact, tendered two instructions, both having the effect of limiting the weight to be given testimony of an accomplice. Instruction No. 9 stated, in effect, that the testimony of an accomplice should be weighed with great care and accepted with caution. The other requested instruction imposed the requirement that the testimony of the accomplice be corroborated.

The trial court gave the instruction relating to corroboration but declined to give defendant's requested instruction No. 9. The instruction given, although erroneous (State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960)) was tendered by defendant, is not challenged here, nor a subject of review. We note that the effect of the instruction which was given placed a greater burden upon the prosecution. State v. Gutierrez, 75 N.M. 580, 408 P.2d 503 (1965).

In our view, reversible error cannot be predicated upon the refusal of the trial court to give instruction No. 9 because the giving of it, together with the instruction relating to corroboration, would have unduly emphasized the weight to be accorded the testimony of an accomplice.

See Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

In our view, the instructions, when considered as a whole, fully and fairly placed the case before the jury.

3. CHALLENGE TO THE JURY ARRAY.

On the morning of trial defendant made a motion to quash the jury array. The court ruled that the motion was not timely. On appeal the State conceded that the motion was timely under § 19-1-16, N.M.S.A. 1953 (Repl.Vol.1970); but adds that the motion was otherwise defective. We agree.

Defendant made no claims that the jury array was defective or was in any way not selected and qualified according to law. At best defendant's motion appears to be a fishing expedition. He appears to be asking the court to find out whether or not the selection of jury array was proper. No allegation of impropriety was made, no grounds were stated except that the statute permits a challenge; no witnesses were subpoenaed; and no offer of proof was made when the motion was denied. In effect when the court was asked to determine whether the array was selected according to law the trial judge ruled:

> "* * * I very carefully went up there and read the statute and had a representative of the Sheriff's department, called Manuel Armijo from the bank, had the jury commissioners; we followed the new Chapter 222, Laws of 1969. * * *"

Although the court might have been incorrect in ruling as to timeliness, nevertheless the court was correct in denying the motion. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969); compare Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct.App. 1969). In light of the court's explanation and in the absence of any testimony or tender to the contrary, we see no need for a hearing and cannot predicate error on a silent record.

4. MOTION FOR MISTRIAL BECAUSE OF A SICK JUROR.

One of the jurors was reported sick. Defendant moved for a mistrial on the grounds that the sick juror could not be attentive while sick. The court, on the other hand, had reasons to believe otherwise as is demonstrated by its ruling:

> "[I]n view of the assurance from Mr. Smith [the sick juror] that he is going to keep the Court informed and if any problems arise we will be alerted."

Defendant does not challenge the validity of that determination; neither does he claim that it was not followed. Unless defendant specifies wherein he was prejudiced we must presume that the proceedings below are proper. In re Hay's Guardianship, 37 N.M. 55, 17 P.2d 943 (1932). The absence of any allegation, much less proof, of prejudice is dispositive of this issue. See State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967).

5. THE CHARGES AGAINST THE DEFENDANT AND THE CONVICTION AND SENTENCING ON EACH CHARGE CONSECUTIVELY CONSTITUTE DOUBLE JEOPARDY AND DOUBLE PUNISHMENT.

Defendant's contention concerns larceny and burglary; he does not complain about the conspiracy charge. All consecutive sentences for different offenses arising out of the same event do not necessarily violate the double jeopardy prohibition of the U. S. and New Mexico Constitutions. Defendant cites State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961) for the proposition that burglary and larceny arising out of the same event constitutes double jeopardy. We disagree. That decision states that larceny and robbery merge when they arise out of the same event. Burglary is not like robbery. Burglary is not necessarily involved with other crimes committed while the burglar is in the burglarized building. Whether a defendant may be sentenced for each crime

arising out of the same transaction depends on whether the crimes have merged; and the test of merger is whether one crime necessarily involves the other. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App. 1969); State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969). There is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967); State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970).

6. CONSECUTIVE RATHER THAN CONCURRENT SENTENCES.

As was shown above, consecutive sentences for crimes arising out of the same event are permitted unless there has been a merger. This point questions the validity of consecutive sentences for crimes which arose out of different events but which were tried simultaneously at one trial. Defendant urges that the jury verdict on each count carries sentence that should commence on the date of the verdict; that providing that sentence is to commence years after the verdict is to tamper with the verdict to the prejudice of defendant.

We see no merit to this contention. The bringing in of a guilty verdict is an altogether different matter from the imposition of sentence, which is governed by specific provisions. See Sections beginning with § 40A-29-1, N.M.S.A. 1953 (Repl.Vol.1964). A sentencing judge has discretion in determining whether sentences are to run consecutively or concurrently. State v. Crouch, 75 N.M. 533, 407 P.2d 671 (1965); Swope v. Cooksie, 59 N.M. 429, 285 P.2d 793 (1955). His discretion in this area will not be interfered with unless he has violated one of the sentencing statutes. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

7. BIAS AND PREJUDICE OF TRIAL COURT.

Under this point defendant points to a $20,000.00 appeal bond which he claims is excessive. Relief on this ground is not appropriately sought in arguments on the merits on appeal. Compare State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct.App.1970). However, if defendant is contending that the amount of bail indicates the bias of the judge at trial, his contention does not show that he is entitled to reversal. He has not pointed to any particulars where because of bias or prejudice he did not have a fair trial or was harmed in any way at trial. There is a presumption of rectitude and regularity in proceedings below. First State Bank of Alamogordo v. McNew, 32 N.M. 225, 252 P. 997 (1927); In re Hay's Guardianship, supra.

Defendant contends, in addition, that comments by the trial judge at sentencing bolster his contention that the trial judge was biased against him. We have previously discussed the legality of the sentences and concluded that the trial judge did not abuse his discretion.

8. JURORS AND WITNESSES AFFIRMING THEIR FAITH IN GOD.

Defendant's contention is that by requiring an oath by witnesses and jurors, the State "openly fostered religion." As was discussed above a claimed error without any showing that the defendant was affected thereby is at best a specie of harmless error. But in addition to the failure to show prejudice, defendant made no objections in the lower court. This issue was therefore not preserved for review. State v. Ortega, 81 N.M. 337, 466 P.2d 903 (Ct.App.1970).

Defendant's ninth point regarding the failure of his attorney to introduce articles and material on adverse pre-trial publicity was abandoned on oral argument as being contrary to the record.

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

487 P.2d 145

William R. WILSON, Plaintiff-Appellant,

v.

ALBUQUERQUE BOARD OF REALTORS, Defendant-Appellee.

No. 666.

Court of Appeals of New Mexico.
June 18, 1971.

William R. Wilson, Albuquerque, pro se.

Dennis J. Falk, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellee.

OPINION

WOOD, Judge.

1. Matters not disclosed by the record are not considered because they are outside the scope of appellate review. Southern Union Gas Company v. Taylor, 82 N.M. 670, 486 P.2d 606, decided June 7, 1971. 2. Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970) sets forth the method for pleading and proving libel. 3. Points on appeal not argued and not supported with citation to authority are deemed abandoned and

will not be reviewed. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct.App.1970). 4. Assertions of fact must be accompanied by references to the transcript. Section 21–2–1(15) (6), N.M.S.A.1953 (Repl.Vol. 4). These four items are applicable and dispose of this appeal.

Defendant, Albuquerque Board of Realtors, is a non-profit corporation. It has by-laws and rules applicable to its members and requirements for membership. It runs a multiple listing service under which property, primarily residential, listed by a participant in this service, is made available for sale by other participants in the service. A requirement for participation by a real estate broker is active membership in defendant corporation.

Plaintiff desired to participate in the multiple listing service as a real estate broker. He attempted to participate through a business association with a broker who was a member of defendant. He also sought membership in defendant. His business association with a member broker came to naught under defendant's rules and his membership applications were denied, also under the rules.

In processing plaintiff's membership applications, defendant caused a letter to be sent to voting members in which the recipient of the letter was asked to indicate if they had derogatory information concerning plaintiff. Various members so indicated. The apparent result was that defendant's membership committee submitted plaintiff's first two applications for membership to a vote "without recommendation." The third and fourth applications were affirmatively recommended by the membership committee.

Plaintiff sued defendant alleging libel, various non-statutory damage claims and a statutory damage claim under §§ 49–1–1 through 49–1–3, N.M.S.A.1953 (Repl.Vol. 7). In addition, plaintiff sought to enjoin defendant from denying plaintiff participation in the multiple listing service. The trial court granted defendant's motion for summary judgment. Wilson I [Wilson v. Albuquerque Board of Realtors, 81 N.M. 657, 472 P.2d 371 (1970)], reversed that summary judgment because the trial court failed to state its reasons for the summary judgment. However, defendant was given leave to renew its motion.

Upon remand, the motion for summary judgment was renewed and summary judgment was again granted with reasons stated in the judgment. Plaintiff's appeal from this summary judgment was filed with our Supreme Court but, by that court's order, was transferred to this court. Section 16–7–10, N.M.S.A.1953 (Repl.Vol. 4). In this court, plaintiff abandoned his claim for an injunction.

Matters not disclosed by record.

Plaintiff contends that after the Supreme Court remand, the trial court refused to hear the case. He does not claim that no proceeding occurred before the trial court. His claim of no hearing is directed at the length of time involved in the trial court proceeding, at what was allegedly discussed during that proceeding, the point in time in which defendant renewed its motion, and the asserted refusal of the trial court to hear additional arguments. These contentions are not supported by the record. Further, the summary judgment recites there was a hearing. In the absence of a record supporting plaintiff's arguments and the record recital that a hearing was held, we do not consider plaintiff's contentions. General Services Corp. v. Board of Com'rs, 75 N.M. 550, 408 P.2d 51 (1965); compare Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct.App. 1969).

Pleading and proving libel.

The trial court ruled that the record failed to show any defamatory material. We agree. One response to defendant's letter was that plaintiff was "no good." Another response commented on plaintiff's background which was stated in the letter. The response asked why defendant didn't present all of plaintiff's history. Other than these two responses the

so-called derogatory information is not identified. In addition to the fact of "derogatories," plaintiff relies on the fact that the membership committee submitted his first two membership applications "without recommendation."

None of the above is a patent libel. There is neither pleading nor transcript reference indicating defendant knew or should have known of extrinsic facts which made any of the above a libel by innuendo. There is no claim of special damages. Under Reed v. Melnick, supra, the ruling on the libel claim is correct.

Points not argued and not supported by authority.

The trial court ruled that the non-statutory damage claims, apart from the libel, had been waived by plaintiff. In claiming this ruling was error plaintiff argues there can be no waiver of a right established by public policy. The public policy on which he relies, however, is that disclosed by §§ 49–1–1 through 49–1–3, supra. These statutes are the basis of his statutory damage claim and this statutory claim is separate and in addition to his non-statutory claims. Plaintiff advances no argument and cites no authority concerning waiver of the non-statutory claims. Since his only argument concerns a lack of waiver of the statutory claim, plaintiff is deemed to have abandoned his attack on the trial court's ruling concerning the non-statutory claims. Novak v. Dow, supra.

Assertions of fact without transcript references.

The statutory damage claim concerns an alleged combination in restraint of trade, an alleged combination tending to monopolize trade and the asserted civil liability of defendant to plaintiff on the basis that he was injured by the alleged combination. Sections 49–1–1 through 49–1–3, supra.

Assuming a claim has been stated, the New Mexico decisions are to the effect that there is no statutory violation unless the restraint of trade is unreasonable. Elephant Butte Alfalfa Ass'n v. Rouault, 33 N.M. 136, 262 P. 185 (1926); State v. Gurley, 25 N.M. 233, 180 P. 288 (1919).

In determining the question of unreasonableness, the courts have looked to the harm caused by the practice involved and the business excuse or justification for the practice involved. See Grillo v. Bd. of Realtors of Plainfield Area, 91 N.J.Super. 202, 219 A.2d 635 (1966).

Plaintiff does not claim the multiple listing service is harmful; he seeks to participate in its benefits. The harm on which plaintiff relies is economic harm to himself. Whether such a harm is sufficient we do not decide. The other aspect of "unreasonableness" is the justification for the practice.

Plaintiff argues that the practice was not justified but he gives us no transcript references supporting a lack of justification. On this issue, the only transcript references in his briefs either go to the practice involved or tend to justify defendant's practice. There is no reference to items which tend to show or raise a factual issue as to lack of justification.

Wilson I, supra, states: "* * * if the claimed error is the court's failure to properly consider evidence of record at the time of the motion appellant must state in his brief the substance of all evidence bearing upon the proposition with proper reference to the transcript." Plaintiff has not done this; his claim of no justification will not be considered. Section 21–2–1(15)(6), supra.

The result is that the summary judgment is to be affirmed on procedural grounds, without a consideration of the merits of the case. This procedural result is properly applied to plaintiff even though his appeal is pro se. "* * * Those who choose to plead or appear pro se are bound by all of the applicable procedural rules and enjoy no greater rights than those who employ counsel. * * *" State ex rel.

State Highway Commission v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971).

The summary judgment is affirmed.

It is so ordered.

SPIESS, C. J., and OMAN, J., concur.

487 P.2d 148

Thurman F. CLARK, Plaintiff-Appellant,

v.

DUVAL CORPORATION and Continental Casualty Company, Insurer, Defendants-Appellees.

No. 625.

Court of Appeals of New Mexico.

June 18, 1971.

Richard E. Ransom, Smith, Ransom & Deaton, Albuquerque, for plaintiff appellant.

Robert E. Sabin, Bob F. Turner, Atwood, Malone, Mann & Cooter, Roswell, for defendants-appellees.

OPINION

WOOD, Judge.

The appeal in this workman's compensation case involves notice under § 59-10-13.-4, N.M.S.A.1953 (Repl.Vol. 9, pt. 1). Plaintiff suffered an injury in an accident arising out of and in the course of his employment. There is no question as to the employer's knowledge of the accident and of a "no lost time" injury where medical attention was provided by the employer. Our concern is with the employer's knowledge of a "compensable" injury. See Smith v. State, 79 N.M. 25, 439 P.2d 242 (Ct.App.1968). Compare Rohrer v. Eidal International, 79 N.M. 711, 449 P.2d 81 (Ct.App.1968). The issues are: (1) whether the trial court found as a fact that there was no notice of a compensable injury and (2) whether there was notice of a compensable injury as a matter of law.

Did the trial court find as a fact that there was no notice of a compensable injury?

While the trial court's findings of fact refer to evidence bearing on the notice question, there is no specific finding under the "Findings of Fact" concerning notice of a compensable injury. However, one of the conclusions of law reads:

> "Plaintiff is not entitled to recover any compensation benefits from Defendants under the Workmen's Compensation Act of New Mexico, and Plaintiff's Complaint should be dismissed with prejudice for the reason that *plaintiff did not give the defendant Notice of a compensable injury within the time and manner provided by law.*" (Emphasis added)

Plaintiff asserts this "conclusion of law" is erroneous because the trial court found there was no notice of compensable injury as a matter of law. Plaintiff also claims the "conclusion" is erroneous because not supported by findings going to the ultimate facts. See Walter E. Heller & Company of Cal. v. Stephens, 79 N.M. 74, 439 P.2d 723 (1968). He further contends there is substantial evidence in the record for the trial court to consider upon the issue of notice; that the trial court did not consider this evidence, and the cause should be remanded with instructions to the trial court to consider this evidence and enter a finding on the question of notice. See Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

We agree with the plaintiff to this extent—there is evidence on the issue of whether the employer had notice of a compensable injury and this evidence is conflicting. We do not agree that the trial court failed to consider this evidence, failed to find on the issue, or ruled on the notice question as a matter of law.

The emphasized portion of the conclusion is a finding of fact although "intermingled with the conclusion of law." Pankey v. Hot Springs Nat. Bank, 46 N.M. 10, 119 P.2d 636 (1941); Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070, 130 A.L.R. 963 (1940). Further, the emphasized words are a finding of ultimate fact. Geeslin v. Goodno, Inc., supra. Substantial evidence supports this finding. Contrary to plaintiff's contentions, we cannot say that the record, considered as a whole, shows the trial court failed to exercise its discretion in making this finding, nor can we say that the trial court's conclusion as to notice was based on an erroneous view as to the law of notice. See Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956).

Admittedly the finding is not "separately stated and numbered" as a finding of fact as required by § 21-1-1(52) (B) (a) (2), N.M.S.A.1953 (Repl.Vol. 4). Since the finding is clear, and the only fault with the finding is that it is mislabeled, plaintiff is not prejudiced. We decline to remand the case to require the trial court to remove the finding from its conclusions and include it under the findings of fact. White v. Morrison, 62 N.M. 47, 304 P.2d 572 (1956); compare Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); Moore v. Moore, 68 N.M. 207, 360 P.2d 394 (1961).

Was there notice of a compensable injury as a matter of law?

Plaintiff states: "For the same reasons that no additional notice was required in Geeslin v. Goodno, Inc., 77 N.M. 408, 423 P.2d 603 (1967) * * * no additional notice was required in the instant case, as a matter of law, * * *" This second Geeslin decision (for Geeslin I, see Geeslin v. Goodno, Inc., 75 N.M. 174, supra), does not support plaintiff's claim that there was notice of a compensable injury as a matter of law. In Geeslin, II, supra, notice was found as a fact by the trial court and the New Mexico Supreme Court's "holding" that "* * * appellants had actual knowledge of the accident and injury. * * *" is based on the facts found by the trial court.

Plaintiff seems to contend that under Geeslin II, supra, notice of a compensable injury is not required; that notice of an accident and an injury is sufficient. Gees-

lin II, supra, does not so hold. The opinion expressly states: "The employer had notice of a compensable injury * * *." Geeslin II, supra, did not change the requirement that there must be notice of a compensable injury. Smith v. State, supra. The question of notice of a compensable injury is one of fact. Geeslin I, supra.

Plaintiff asserts: "The purpose of the notice provision of the statute [§ 59-10-13.4, supra] is to allow the employer, or its insurance company, to investigate the accident. * * *" citing Collins v. Big Four Paving, Inc., 77 N.M. 380, 423 P.2d 418 (1967). His contention is that since the employer had notice of an accident and injury, the notice requirement was satisfied even though under the evidence the trial court could properly find there was no notice of a compensable injury. Plaintiff's contention is incorrect.

The purpose of the notice requirement "* * * is to enable the employer to investigate the facts while they are accessible and, if necessary, to employ doctors so as to speed recovery * * *." Waymire v. Signal Oil Field Service, Inc., 77 N.M. 297, 422 P.2d 34 (1966). Another purpose of the notice requirement is to allow the employer to protect himself against simulated or aggravated claims. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962).

In Collins v. Big Four Paving, Inc., supra, the defendants had knowledge "of all known facts." We cannot hold, as a matter of law, that defendants had such knowledge in this case because there is evidence that defendants had no knowledge of plaintiff's physical condition for months. Plaintiff did not ask defendants to provide medical attention and did not claim he was entitled to compensation until his suit was filed. The notice requirement cannot be considered satisfied as a matter of law because of the evidence that defendants had no knowledge of facts indicating additional medical attention was necessary and that defendants had no knowledge of the fact that plaintiff considered his claim to be compensable.

Since the purpose of the notice requirement was not satisfied as a matter of law, and since the evidence on the question of notice of a compensable injury was conflicting, the trial court did not err in failing to resolve the notice issue in plaintiff's favor as a matter of law.

The judgment of dismissal is affirmed. It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

487 P.2d 150

STATE of New Mexico, Plaintiff-Appellee,

v.

Jack HIBBS, Defendant-Appellant.

No. 644.

Court of Appeals of New Mexico.

June 25, 1971.

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Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Jay F. Rosenthal, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant was convicted of aggravated battery. For a prior appeal in a post-conviction proceeding see State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct.App.1968). For a denial of relief by habeas corpus in Federal Court see Hibbs v. Baker, No. 7885 Civil, D.C.N.M., May 27, 1969. The trial court denied the current motion for post-conviction relief, without a hearing, on the basis that no grounds for relief had been stated. Section 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4).

Although represented by counsel, defendant chose to file his own briefs. These briefs present numerous claims and it is doubtful that all of such claims can be considered to have been raised before the trial court. Nevertheless we have attempted to state, and answer, the various claims. In several instances the statement of the claim is followed by a citation of authority which disposes of the claim without need for any discussion. We hold that none of the claims are meritorious and most of them fail to state a basis for post-conviction relief. The claims, the dispositive authority, and the discussion we deem necessary, follow.

A. The claim of an illegal arrest, of no probable cause for arrest, and of no arrest warrant having been issued at the time of arrest—State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967); State v. Halsell, 81 N.M. 239, 465 P.2d 518 (Ct.App.1970).

B. The claim that upon arrest he was not "properly" taken before a magistrate and informed of the charges against him—State v. Helm, 79 N.M. 305, 442 P.2d 795 (1968); Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct.App.1970).

C. The claim that upon arrest he was interrogated by the police without being advised of various constitutional rights, the record showing that no statement of defendant (if, in fact, any was made) was used against him—Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct.App.1970); State v. Bryant, 79 N.M. 620, 447 P.2d 281 (Ct.App.1968).

D. The claim that a certain witness was not called to testify at the preliminary hearing. To the extent this is a claim that the State failed to call the witness—State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967); Barela v. State, supra. To the extent this is a claim that defense counsel failed to call the witness—State v. Selgado, supra.

E. The claim that the criminal information charged him with an offense which was not charged in the criminal complaint before the magistrate is based on proceedings before the magistrate which are not included in the record before us. The claim is that the criminal complaint charged defendant with an attempt to commit aggravated battery, § 40A-28-1, N.M.

S.A.1953 (Repl.Vol. 6), while the criminal information in district court charged defendant with an aggravated battery, § 40A-3-5, N.M.S.A.1953 (Repl.Vol. 6). The record shows that the criminal information charged defendant both with an aggravated battery and an attempt to commit that offense. On the basis that the criminal complaint did not charge the aggravated battery, it is contended that the magistrate's bind over to the district court must name the offense found at the preliminary examination and it is inferred that the commitment to district court for trial did not name the offense of aggravated battery. See State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct.App.1969). Because of the absence of the record of the magistrate proceedings, we assume the claim to be true. The result then is that defendant was charged in the criminal information with an offense concerning which there had been no preliminary examination. The record does not show any objection to the lack of a preliminary examination on the aggravated battery charge; the record does show defendant pled not guilty when arraigned and proceeded to trial without raising a question as to the propriety of the magistrate's bind over. By so proceeding the claim was waived—State v. Robinson, 78 N.M. 420, 432 P.2d 264 (1967); State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct.App.1969).

F. The claim that defendant did not have legal assistance at his trial is based on the fact that the attempt charge was dismissed by the trial court and defendant's assertion that upon the dismissal of the attempt charge, his attorney was also relieved from representing defendant. The record does not support the claim; it does show that court-appointed counsel represented defendant at his trial.

G. The claim of double jeopardy is made on two grounds; that both the aggravated battery and the attempt were committed at the same time and when the lesser charge of attempt was dismissed prior to trial it was "double jeopardy" to proceed to try defendant on the charge of aggravated battery. There is no issue as to double punishment or merged offenses, see State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969), because defendant was not tried on the attempt charge and the attempt charge was dismissed before any evidence was presented—State v. Rhodes, 76 N.M. 177, 413 P.2d 214 (1966); State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct.App.1969).

H. The claim of not being confronted with the witnesses against defendant is based on the introduction at trial of prior testimony of a witness at the preliminary hearing. This witness was not present at trial, the record shows diligent efforts to locate the witness and shows defense counsel had opportunity to cross-examine the witness at the preliminary examination. There was no denial of the constitutional right to confront witnesses—Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Compare State v. James, 76 N.M. 376, 415 P.2d 350 (1966); State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1956).

I. The claim that defendant was convicted on perjured testimony is based on defendant's assertions that various witnesses lied when they testified. Such a claim is insufficient—State v. Minns, 81 N.M. 428, 467 P.2d 1000 (Ct.App.1970); State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct.App.1968). The claim that the trial judge was prejudiced, in that he condoned and allowed perjury, is a conclusion and too vague, and therefore insufficient—Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct. App.1970). (See Claim M).

J. The claims attacking the credibility of the witnesses are insufficient—Pena v. State, supra.

K. The claim of an illegal search and the claim that pictures of the room where the crime occurred were illegally obtained are insufficient because the circumstance of the alleged illegal search and seizure was known to defendant at trial—Salazar v. State (Ct.App.), 82 N.M. 630, 485 P.2d 741, decided May 14, 1971.

L. The claim that the defense attorney allowed the District Attorney "first choice" at trial in questioning the woman who had been living with defendant as his wife is not supported by the record. The witness was called as a witness for the defense, and defendant's attorney presented her testimony on direct examination. The District Attorney's questioning was cross-examination.

M. The claim of incompetency of counsel is that the defense attorney failed to have subpoenas issued for witnesses, and did not check on the circumstances of the allegedly illegal arrest. These contentions are insufficient to raise an issue as to incompetency of counsel—State v. Selgado, supra; State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970). Defendant also asserts his counsel was incompetent because he failed to bring "perjury" to the attention of the trial judge. (See Claim I). Apart from the vagueness of this claim, Pena v. State, supra, the claim is insufficient in that it is not contended that counsel knew of the alleged "perjury." Compare State v. Hodnett, supra.

N. The claim is that defendant's request for a change of attorney was denied. This, in itself, is insufficient—State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App.1970).

O. The claim that the jury was incompetent and predetermined on a guilty verdict is insufficient because it is a conclusion and too vague—Pena v. State, supra.

P. The claim that defendant did not commit aggravated battery because his victim was not permanently disfigured goes to the sufficiency of the evidence for conviction and is not cognizable in a proceeding under § 21–1–1(93), supra. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct.App. 1969).

Q. The claim that the trial record is not truthful is based on defendant's view of his trial and his view as to what witnesses knew and testified about. The claim was not raised before the trial court. It will not be considered here for the first time. State v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct.App.1970). (See Claim S).

R. The claim that defendant's conviction was a fundamental denial of due process is incorrect. We have reviewed the record presented. There was no fundamental error as that doctrine has been defined in New Mexico. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969).

S. Defendant's request to produce evidence in this court is denied. The Court of Appeals is a court of review. Section 16–7–8, N.M.S.A.1953 (Repl.Vol. 4). Our review is limited to matters disclosed by the record. Morgan v. State Board of Education, 80 N.M. 754, 461 P.2d 236 (Ct.App.1969). We do not originally determine questions of fact. State v. Lucero, 78 N.M. 659, 436 P.2d 519 (Ct.App. 1968).

T. Defendant's request to appear and act as his own counsel in this court is denied. Under § 21–1–1(93) (c), supra, a court may hear and determine a post-conviction motion without the presence of the prisoner. To do so is not a denial of the constitutional right "to appear and defend" in criminal proceedings because post-conviction proceedings are civil, not criminal. State v. Brinkley, 78 N.M. 39, 428 P.2d 13 (1967). Compare State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

The order denying relief is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 155

STATE of New Mexico et al., Plaintiffs-Appellees,

v.

Alex C. DeBACA et al., Defendant-Appellant.

No. 664.

Court of Appeals of New Mexico.
June 18, 1971.

Joseph A. Roberts, David Chavez, Jr., Chavez & Roberts, Santa Fe, for defendant-appellant.

Duane C. Gilkey, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for plaintiffs-appellees.

OPINION

SPIESS, Chief Judge.

This appeal primarily challenges the sufficiency of the evidence to support findings of an agency relationship. The action involved the sale of a number of used cars to appellees (buyers) by one Donald Mussetter, the alleged agent of appellant, Alex C. DeBaca (Baca). In effecting the sales, Mussetter represented to the buyers that they would forthwith receive valid title certificates to the vehicles they had purchased, and warranted that the titles were free and clear of liens.

After sales had been effected to the buyers and they had financed unpaid balances of the purchase price with the plaintiff, First National Bank in Albuquerque (Bank) upon security of the vehicles, it developed that the certificates of title to the vehicles could not be obtained for buyers and the vehicles were repossessed from buyers. The buyers, joined by the bank, instituted this suit against Baca alleging that Mussetter was his agent in effecting the sales and in making the incidental false representations as to title. Damages were sought against Baca as the principal in the transactions.

The trial court specifically found upon conflicting evidence that "* * * Donald Mussetter, and other salesmen and representatives of the Heights Auto Mart, were agents of the defendant, Alex C. DeBaca, who was the principal in the operation of said Heights Auto Mart, a used automobile sales lot, * * *"

The question of whether an agency exists is ordinarily one of fact which may be established by direct or circumstantial evidence. State v. Kelly, 27 N.M. 412, 202 P. 524 (1921). See Kennedy v. Justus, 64 N.M. 131, 325 P.2d 716 (1958); Brown v. Cooley, 56 N.M. 630, 247 P.2d 868 (1952).

As we have stated, it is defendant's position that the evidence is insufficient to support the findings of an agency relation between Baca and Mussetter. In considering the merits of this contention, the evidence must be viewed in its most favorable light in support of the finding of agency, which we have quoted. Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970).

Considered in this light, the record discloses that prior to the occurrences involved in the suit, Baca had acquired the use of the particular location for the sale of automobiles; had painted, or repainted a sign indicating a business name for the location as "Heights Body Shop—Auto

Mart." Baca was a licensed automobile dealer under § 64–8–1, N.M.S.A.1953 (Repl.Vol. 9, 1969 Supp.). He likewise had procured the bond required by § 64–8–6, N. M.S.A.1953 (Repl.Vol. 9, 1969 Supp.). The bond was issued to Alex C. DeBaca, d/b/a "Heights Body Shop."

It does not appear that Mussetter, at any material time, was a licensed automobile dealer, nor that he had procured a bond as required by the statute. Dealer plates No. D–319, which had been issued to Baca, were used by Mussetter in the operation of the business. Temporary licenses bearing Baca's number D–319 were issued to buyers of vehicles by Mussetter and those participating in operating the sales lot during the time to which this action relates. The contract forms used in effecting sales bore the name Heights Body Shop. It is apparent from the record that Mussetter's sales activities were carried on under Baca's license.

The record further shows that on one occasion Baca stated that Mussetter was in his employment. While the record does contain other facts which lend support to the finding of agency, we think the foregoing in themselves substantially support the challenged finding.

Baca questions the sufficiency of the evidence to support a finding of express agency. The finding, which we have quoted, was not limited to express agency but included the existence of an implied agency, proof of which is generally found in the acts and conduct of the parties as distinguished from the introduction of a contract, written or oral, establishing the relationship. Cleveland v. Gabriel, 149 Conn. 388, 180 A.2d 749 (1962).

Baca next contends that the court erred in admitting testimony of declarations of the purported agent as to an agency relationship until a prima facie case of agency was established. A police officer was permitted to testify as to a conversation with Mussetter during which Mussetter stated that Baca was the owner and he, Mussetter, was the manager, and he was working for Baca.

This contention is not, in our view, supported by the record in that each of the matters which we have held furnish substantial support for the finding of agency had been presented to the court before the police officer testified as to the declaration. Consequently, prima facie evidence of agency had been presented before the declaration was received, which rendered it admissible in evidence. Jameson v. First Savings Bank & Trust Co. of Albuquerque, 40 N.M. 133, 55 P.2d 743 (1936).

Baca further argues that the trial court erred in failing to apply the rule that

> "* * * where a transaction is explainable upon either of two different theories, one of which is consistent with good faith and fair dealing, and the other involves fraud and deception, the explanation consistent with honesty and legality will be accepted unless the evidence clearly preponderates in favor of the illegal aspect of the transaction, * * *"

The question here is not whether fraud or deception was practiced on the part of Mussetter. Fraud and deception on his part was admitted. The issue is whether Mussetter was Baca's agent in effecting the several transactions to which reference has been made. It is clear that the trial court in finding an agency relationship as between Baca and Mussetter charged Baca with the responsibility for the acts of Mussetter. Nevertheless, the rule contended for by Baca is inapplicable here because, as we have stated, the issue was purely one of agency, and the responsibility of Baca for the wrongful acts of Mussetter was an incident of the relationship.

Baca next argues that

> "THE COURT ERRED IN NOT FINDING THAT NO REPRESENTATIONS WERE MADE BEWEEN DEFENDANT [Baca] AND PLAINTIFFS." [Buyers]

The argument advanced under this point, as we understand it, should properly be directed against a finding of agency by estoppel. The trial court found, upon evidence which we have held to be substantial, that an agency relationship existed between Baca and Mussetter. We interpret this finding as meaning an agency in fact, as distinguished from one by estoppel.

Baca's third point is:

"THE COURT ERRED IN NOT FINDING THAT A SCHEME OR PLAN EXISTED IN THE MIND OF DONALD MUSSETTER TO DEFRAUD THE APPELLANT [Baca] AS WELL AS PLAINTIFFS." [Buyers]

Under this point Baca argues that the evidence supports a finding that a scheme or plan existed in the mind of Mussetter to create an illusion of a principal-agent relationship between Baca and Mussetter. A finding expressing this view was tendered to, and refused by, the trial court.

This contention, in our view, is without merit because the trial court found, as has been shown, the existence of an agency relationship between Mussetter and Baca. The trial court obviously did not believe that Mussetter simply created an illusion of a principal-agency relationship, but that one, in fact, did exist.

Baca's final point is that

"THE COURT ERRED IN NOT FINDING THAT TITLE TO THE MOTOR VEHICLES PASSED TO THE PLAINTIFFS AS A MATTER OF LAW."

Under this point it is argued that title to the vehicles was actually in the buyers in accordance with the language of the Commercial Code, § 50A–2–403(2) (3), N.M.S.A.1953 (Repl.Vol. 8, pt. 1).

"(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business

"(3) 'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law."

The sales to buyers were based upon representations that the Heights Auto Mart was the owner of the automobiles; that good and merchantable title would be delivered to buyers by Heights Auto Mart; that the State of New Mexico Motor Vehicle Department would forthwith issue to buyers valid certificates of title to the automobiles. Further, it was warranted that the automobiles were free and clear of liens. It was established that these representations were false and the title to the vehicles was actually in the entrustors and was subject to liens of others.

The buyers might, through incurring the expense of litigation with the entrustors, have acquired their rights in the vehicles. The rights or title so acquired, would nevertheless have been subject of liens of others, § 50A–9–307(1), N.M.S.A.1953 (Repl. Vol. 9, pt. 2). The statute relied upon by Baca, in our opinion, was not intended as a cure for false misrepresentation or breach of warranty, nor does the statute preclude buyers from repudiating the transaction on the ground of material misrepresentation and breach of warranty. We hold the section of the Commercial Code relied upon by Baca in no manner precludes this action, nor the judgment rendered by the trial court.

We have carefully considered authorities cited by Baca; in our opinion, they do not compel a conclusion different from that herein expressed. Buyers have requested this court to fix attorneys fees in their behalf covering representation of buyers in this court. No objection to such allowance or the right of this court to fix an amount is asserted by Baca.

The court does, therefore, award attorneys' fees to buyers in the sum of $1,000.-00. The judgment of the trial court is affirmed and attorneys' fees in the amount stated is awarded to buyers.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 159

Elvin W. McALISTER, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Appellee.

No. 621.

Court of Appeals of New Mexico.

June 11, 1971.

James E. Snead, Jones, Gallegos, Snead & Wertheim, Santa Fe, for appellant.

Mack Easley, Easley & Reynolds, Hobbs, for Hobbs Municipal School Dist.

E. P. Ripley, Santa Fe, for New Mexico State Bd. of Education.

OPINION

WOOD, Judge.

McAlister, a school principal, was discharged during the term of his existing contract. He appealed the decision of the Local Board (Hobbs Municipal School Board) to the State Board (New Mexico State Board of Education). The State Board affirmed the Local Board and McAlister appeals directly to this court. Section 77-8-17, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). The issues concern: (1) evidence of insubordination; (2) whether the insubordination was prior to the current contract; (3) written hearsay evidence; (4) pre-hearing consideration of written statements; and (5) State Board regulations.

Evidence of insubordination.

Several causes were listed in the notice of discharge served on McAlister. The Local Board's decision, affirming the discharge after the Local Board hearing, contains multiple grounds for affirming the discharge. The discharge, and the cause for discharge, stems from a reading program. Neither the details of the reading program, the philosophy behind it, nor the results of that program is involved in this appeal.

McAlister states he "* * * was charged with deviating from school rules and policy in instituting a reading program at the school, but the evidence is clear that the program was not a deviation from the school rules and regulations. * * *" While the notice of discharge and the Local Board's findings and conclusions did include a claim of violation of school rules and regulations, the attack on the evidence supporting this issue is misdirected in this appeal.

The notice of discharge also stated that McAlister had been insubordinate to his superiors. The Local Board found insubordination as a fact and concluded that McAlister had been insubordinate to his superiors. The State Board's affirmance of the Local Board's decision was on the basis there was "* * * evidence substantiating the finding of the Hobbs Municipal School Board that appellant was insubordinate." Our review is a review of the State Board's decision. See § 77-8-17(F), supra. The issue here is not whether McAlister violated school rules and regulations. The issue here involves the evidence pertaining to insubordination.

Black's Law Dictionary (4th ed. 1951) indicates that insubordination is disobedience to constituted authority. Webster's Third New International Dictionary (1966) states: "* * * Insubordinate applies to disobedience of orders, infraction of rules, or a generally disaffected attitude toward authority, * * *"

There is substantial evidence of the following: the elementary grades in the school system had, for many years, been operated on a self-contained classroom basis. This practice, or organization, was well known by teaching and administrative personnel within the system. During the 1969-70 school year, and within the term of McAlister's current contract, a reading program at McAlister's school departed from the self-contained classroom basis. This departure was with McAlister's knowledge and approval. In permitting this departure, McAlister did not seek nor obtain approval from anyone.

The evidence is undisputed that the Superintendent of Schools is a superior off-

cer of McAlister and that the Superintendent's duties include the "* * * supervision of the instructional program of all schools in the system. * * *" There is substantial evidence that the Superintendent had told McAlister not to effect a departure from the standard practice without prior approval.

McAlister's position, consistently maintained, is that the departure was one he had authority to effect as a school principal; that he did not need permission from anyone.

On the basis of the foregoing evidence the State Board could reach the conclusion that evidence before the Local Board substantiated the finding of insubordination. In reaching this result, we have not overlooked McAlister's apparent contention that he could not be insubordinate to the Superintendent unless it is shown that the Superintendent's position concerning self-contained classrooms was expressly authorized in writing by the Local Board. This contention is without merit because insubordination is disobedience to constituted authority. The evidence as to the Superintendent's authority to supervise the instructional program is undisputed.

The State Board's affirmance of the discharge on the basis of insubordination is not unreasonable. See Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970).

Whether the insubordination was prior to the current contract.

McAlister contends the insubordination related to a period of time prior to his current contract and, therefore, could not be the basis for discharge during the current contract term. He relies on Roberson v. Board of Education of City of Santa Fe, 80 N.M. 672, 459 P.2d 834 (1969) which states:

> "* * * matters which occurred under a previous contract would not support cancellation of a subsequent contract. * * *
>
> "* * * Since the evidence relied upon as a basis or support for cancellation of a contract for future services related solely to known conduct during prior periods of employment, * * * it could not furnish a basis for cancellation of a contract for the future and accordingly was improperly admitted * * *."

The evidence is substantial that a departure from the recognized self-contained classroom organization occurred during the term of McAlister's current contract. The fact that McAlister may have departed from the recognized organization during prior contracts does not alter the fact that insubordination occurred during the existing contract. The rule of *Roberson,* supra, is simply inapplicable to the classroom organization during the existing contract.

The question of matters occurring under a prior contract arises because evidence as to prior departures from the organizational structure was introduced at the Local Board hearing. Those prior departures and matters pertaining to those departures were evidence tending to establish McAlister's knowledge of the practice of classroom organization, knowledge of his departure from that organization and knowledge that such a departure required administrative approval in advance. Two witnesses, testifying in connection with the prior departures, testified that McAlister admitted he wasn't supposed to be grouping students in the way he was doing it but that he was going to keep on doing it.

The evidence as to matters occurring prior to the current contract does not violate *Roberson,* supra, where as here, the evidence is used to establish McAlister's knowledge that he was carrying on a practice contrary to the Superintendent's position on classroom organization. *Roberson* prohibits discharge for prior misconduct, but it does not prohibit proof of prior knowledge that what was done during the contract term was in fact misconduct.

Apart from the question of departures from the standard classroom organization prior to the current contract, there is evi-

dence of insubordination during the current contract which in no way relies on prior matters. During meetings between McAlister and the Superintendent resulting from the classroom organization during the existing contract, McAlister indicated he could not effectively administer the program as presently organized; "* * * my conscience wouldn't allow me to do it, * * *" Further, he indicated that he could not conform to the self-contained classroom structure and do an enthusiastic job, nor could he inspire his teachers to do an enthusiastic and competent job. Such a disaffected attitude toward authority supports the finding of insubordination.

Written hearsay evidence.

McAlister complains of the admission of four written exhibits at the Local Board hearing on the basis that the documents were hearsay and prejudicial to his interest.

Section 77-8-16(C), N.M.S.A.1953 (Repl. Vol. 11, pt. 1) is concerned with the admission of evidence. It provides that technical rules of evidence shall not apply. It states in part:

> "* * * A hearing shall be conducted so that the contentions or the defenses of each party to the hearing are amply and fairly presented without substantial prejudice. In ruling on the admissibility of evidence, a local school board may require reasonable substantiation of statements or records tendered when the accuracy or truth of the statements or records are in reasonable doubt. When a hearing will be expedited and interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form;"

Under this statute the written hearsay was admissible if the hearing would be expedited and the interests of the parties would not be substantially prejudiced. The question of expediting the hearing is not a material issue. The issue is whether the four exhibits substantially prejudiced the rights of McAlister.

All four of the exhibits have some bearing on McAlister's knowledge that he should obtain administrative approval before undertaking classroom organization of his own choice. S-21 is a report to McAlister from the Director of Instruction concerning grouping of students in 1958 contrary to the standard practice. It concludes with a recommendation for a conference with the Superintendent to attempt to resolve the problem. S-23, S-33 and S-35 all pertain to a "Title I" program in 1968 and departures from the approved program at the school where McAlister was principal. S-35 is the minutes of a meeting of teachers and administrative personnel in connection with the guidelines to be followed. S-23 is a report from the Director of Instruction to the Superintendent concerning that meeting. S-33 is a report from the "Title I" director to the Director of Instruction to the effect that even after the meeting certain guidelines were not being followed. None of the four exhibits contain evidence of insubordination during the term of the current contract, but each tends to establish that McAlister's insubordination during the current contract was willful.

[redacted] S-35, the minutes, is identified as a true and accurate report of what occurred at the meeting; the identification is by the person who conducted the meeting. The other three exhibits are identified by their authors as an accurate report of the matters referred to in the report. The three reports were documents prepared in the course of carrying out the respective duties of their authors within the school system. There was testimony substantiating the contents of the reports from the witness stand. See § 77-8-16(C), supra. With this record we cannot say that McAlister's right to a fair hearing, or his interests, was substantially prejudiced by the admission of the four exhibits.

Pre-hearing consideration of written statements.

Section 77-4-2(D), N.M.S.A.1953 (Repl. Vol. 11, pt. 1), which pertains to the pow-

ers and duties of a local school board, states:

"D. subject to the provisions of law, approve or disapprove the employment or discharge of all employees and certified school personnel of the school district upon a recommendation of employment or discharge by the superintendent of schools;"

The Superintendent recommended to the Local Board that McAlister be discharged. In support of this recommendation the Superintendent submitted various written documents for the Local Board's consideration. Some of these documents were introduced in evidence at the subsequent discharge hearing; some, however, were not.

McAlister claims that submission of these documents to the Local Board was prejudicial to him and "* * * amounts at the very least to unfairness. * * *" This position, if adopted, would have the effect of requiring a Local Board to approve or disapprove a Superintendent's recommendation without consideration of records of the school system pertinent to that recommendation. We decline to adopt such a position.

Section 77-4-2(D), supra, provides for the Superintendent's recommendation, and the Local Board's approval of that recommendation. This being a discharge during the term of the contract, the notice and hearing requirements of § 77-8-14, N.M.S.A.1953 (Repl.Vol. 11, pt. 1), were applicable. These procedures were followed. At the hearing, pursuant to § 77-8-14, supra, the Local Board must find cause for the discharge and upon review, the State Board must find evidence substantiating the discharge for cause. Section 77-8-17(D), supra.

The fact that documents in support of the Superintendent's recommendation were presented to the Local Board, when the question before the Local Board was the approval or disapproval of the recommendation, did not prejudice McAlister. There is no prejudice because the discharge will not be approved under the statutory scheme unless there is evidence substantiating the discharge for cause. The fact that the Local Board considered these documents in connection with the Superintendent's recommendation and, having approved that recommendation, then conducted a hearing to establish the cause, did not result in unfairness to McAlister under the statutory scheme because again, good cause must be shown by the record. Compare Wickersham v. New Mexico State Board of Education, supra.

State Board regulations.

Section 77-8-18, N.M.S.A.1953 (Repl. Vol. 11, pt. 1), provides in part:

"The state board shall, by regulations, prescribe procedures to be followed by a local school board in supervising and correcting unsatisfactory work performance of certified school instructors with tenure rights before notice of termination is served upon them and of certified school personnel before notice of discharge is served upon them. * * *"

Pursuant to this authority, the State Board adopted certain regulations "* * governing supervision and correction procedures related to refusal to reemploy or discharging for unsatisfactory work performance." During the State Board hearing, members of that Board raised the question whether insubordination was encompassed in the term "unsatisfactory work performance." Assuming, for the purposes of this appeal, that it is included, we do not consider this question.

There are four regulations. Each has a heading. The heading of each pertains to "teachers" and unsatisfactory work performance. If these headings can be considered to limit the applicability of the contents of the rules, then none are applicable. McAlister is not a teacher, he is "* * * a certified school administrator who spends more than one-half of his employment times in administrative functions." Being in this category, "tenure" is not involved. See § 77-8-13, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). We will assume, for this appeal, that the word "teacher" in the headings to

the rules does not limit the contents of the rules.

The rules involved in this appeal appear at pages 5 and 7 of the State Board booklet setting forth the regulations. The introductory paragraph to the page 5 regulation states the State Board "* * * adopts the following procedures to be followed by local boards prior to service of a notice of termination upon certified nontenure personnel at the end of a school year for unsatisfactory work performance:" McAlister asserts the applicability of this rule and relies on paragraph 4 of the rule which reads:

> "Written notice of discharge or termination for unsatisfactory work performance shall be served upon such personnel at least two (2) weeks prior to the end of the school year."

A similar regulation was upheld and applied to a tenure teacher in Brininstool v. New Mexico State Board of Education, 81 N.M. 319, 466 P.2d 885 (Ct.App.1970). See also Tate v. New Mexico State Board of Education, 81 N.M. 323, 466 P.2d 889 (Ct.App.1970). Neither case is applicable here, however, because both cases involved the non-reemployment or termination of the teacher. This situation is to be distinguished from a discharge during the term of a contract. Compare §§ 77-8-9 and 77-8-12 with § 77-8-14, N.M.S.A.1953 (Repl.Vol. 11, pt. 1).

Even though "termination" and "discharge" are distinguished in the statutes, McAlister claims the above quoted paragraph 4 of the rule on page 5 should apply because it refers to both discharge and termination. It is undisputed that notice of discharge was not served upon McAlister two weeks or more prior to the end of the school year. His notice of discharge was served in July, sometime after the end of the school year.

We disagree with this contention. The introductory paragraph of the rule appearing on page 7 of the State Board booklet states the State Board "* * * adopts the following procedures to be followed by local boards prior to service of a notice of discharge upon certified non-tenure personnel during the term of an existing contract for unsatisfactory work performance:" Comparing the "adopted" portions of the regulations, it is clear that the State Board intended the page 5 rule to apply to "termination" situations and the page 7 rule to apply to "discharge" situations. The page 7 rule contains no two week notice requirement, in light of the "adopting" provisions of the rules, the reference to "discharge" in paragraph 4 of the page 5 rule can only be considered an unintended drafting error. We note that our view is consistent with the State Board decision. It held: "* * * the State Board regulations requiring service of notice of hearing at least two weeks prior to the last day of school are not applicable to this case;"

On the basis of the contents of the regulations, we hold that McAlister was not entitled to notice of discharge at least two weeks prior to the end of the school year and that the page 5 regulation pertaining to "termination" is not applicable to McAlister's notice of discharge.

The page 7 regulation, pertaining to discharge, is assumed to apply even though its heading is limited to teachers, thus, apparently, excluding one in McAlister's position. This regulation requires three conferences, and requires a written record "* * * specifying the areas of unsatisfactory work performance, all action taken to improve such performance and all improvements made. * * *"

McAlister asserts his meetings with the Superintendent do not amount to conferences because the areas of unsatisfactory work performance were not specified and there is nothing indicating action taken to improve McAlister's performance. We have assumed that insubordination is an aspect of unsatisfactory work performance. While the records of the meetings between McAlister and the Superintendent do not show a formal specification of insubordination, these records do show that issues involved included McAlister's departure

from the self-contained classroom organization and McAlister's willingness to comply with that type of classroom organization. These records support the State Board's finding of no "* * * substantial departure from * * * regulations prescribed by the State Board which is prejudicial to appellant, * * *" See § 77-8-17(D), supra. We cannot say that this ruling of the State Board is arbitrary, unreasonable, unlawful or capricious. Wickersham v. New Mexico State Board of Education, supra.

The decision of the State Board is affirmed.

It is so ordered.

SPIESS, C. J., concurs.

SUTIN, Judge (specially concurring).

I concur in the result of the majority opinion, but not for the reasons stated. I specially concurred in Fort Sumner Municipal School Board v. Parsons, et al., 82 N. M. 610, 485 P.2d 366 (Ct.App.1971), because the State Board of Education did *not* comply with the authority and powers granted in § 77-8-17(D), N.M.S.A.1953 (Repl.Vol. 11, pt. 1). I specially concur in this opinion because the State Board of Education *did* comply with its authority and powers.

The State Board found, (1) "That the transcripts do not disclose a substantial departure from the procedures and regulations prescribed by the State Board which is prejudicial to 'McAlister' * * *;" (2) "that the transcripts contain evidence substantiating the finding of the Hobbs Municipal School Board that 'McAlister' was insubordinate;" and concluded "That good cause exists for the discharge of Elvin McAlister."

The decision of the State Board was final. Section 77-2-2(T), N.M.S.A.1953 (Repl.Vol. 11, pt. 1). McAlister appealed. The State Board decision complied with its statutory authority and powers in a review proceeding provided by law. This is the reason I concur.

I desire to supplement the concurring opinion in *Parsons*. There, I stated "The State Board of Education is not an administrative agency of the state because it is created by the constitution, not by the legislature." No authority was cited.

State ex rel. Sholes v. University of Minnesota, 236 Minn. 452, 54 N.W.2d 122, 126 (1952), said:

> "An administrative agency * * * is given *life* by the legislature. Its powers and duties are prescribed by the legislature. *As it is created, so may it be destroyed.* Its powers may be curtailed or enlarged by legislative action. The legislature has no such power over the board of regents of our university. Its charter may be amended only by action of the people." [Emphasis added].

However, see Utton, Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies, 7 Natural Resources Journal 599 (1967). Professor Utton recognizes administrative agencies as being "Constitutional Agencies" and "Legislatively Created Administrative Agencies." The article does not discuss the relationship between constitutional agencies and "administrative agencies of the state" in Article VI, Section 29 of the Constitution.

The State Board may not be an administrative agency of the state, and we should be concerned with the jurisdiction of the Court of Appeals to review its decisions.

Article VI, Section 29 of the Constitution provides:

> "The court of appeals shall have no original jurisdiction. It may be authorized by law to review directly *decisions of administrative agencies of the state*, and it may be authorized by rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. *In all other cases*, it shall exercise appellate jurisdiction as may be *provided by law*." [Emphasis added].

In my opinion, "administrative agencies of the state" is limited to legislative creat-

ed agencies. Otherwise, the constitutional provision would have included "all" administrative agencies, or constitutional and legislative agencies. Generally, administrative agencies are creatures of the statute. This is a common belief in the legal mind.

The legislature, by § 16-7-8, N.M.S.A. 1953 (Repl.Vol. 4), granted the Court of Appeals jurisdiction to review on appeal civil and criminal actions, workmen's compensation actions, post conviction remedies, actions for violation of ordinances, decisions of administrative agencies, and finally:

> "G. *decisions* in *any other action* as may be *provided by law.*" [Emphasis added].

The legislature may have intended the words "decisions in any other action" to mean "in all other cases." But, to me, it sounds like a limitation because the words "all other cases" are broader than "decisions in any other action."

The word "cases" in the constitutional provision, supra, does not embrace "decisions of administrative agencies," but the word "case" does include a "decision." Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo C.A.C.B., 80 N.M. 633, 639, 459 P.2d 159 (Ct.App.1969).

Is a decision of a judicial hearing before the State Board "any other action" which gives the Court of Appeals jurisdiction?

The words "any other action" are very broad and without limitation and in the statute, it follows actions, proceedings and decisions. This could include a judicial hearing before a constitutional body. The legislature did provide procedure for a decision of the State Board. Section 77-8-1 to § 77-8-19, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). The legislature provided another "action," so this is a "decision" in another action provided by law.

This jurisdictional analysis was not heretofore discussed by New Mexico courts of review. But this court has in the past accepted jurisdiction on appeal from decisions of the State Board. I concur at this point, because the jurisdictional problem has not been a matter of interest in the struggle between the teacher and the legislature.

In *Parsons* special concurring opinion, I used the term "quasi-judicial" adopted from a Montana decision. Utton, supra, has convinced me the word should be removed and "judicial" substituted therefor as the term "judicial power" was used in McCormick v. Board of Education, 58 N. M. 648, 660, 274 P.2d 299 (1954). I disagree with *McCormick*. It states that under the constitution, the decisions of the State Board are final and conclusive and not subject to review, and, in the next sentence, it states that the State Board decisions are subject to review. I interpret Article XII, Section 6(A) of the Constitution, as amended November 4, 1958, to declare that the State Board shall act "pursuant to authority and powers provided by law." Under the previous constitutional provision in existence during *McCormick*, the State Board had control of public schools "under such regulations as may be provided by law." There is a substantial difference in both constitutional provisions. This difference has not heretofore been discussed or decided by a court of review. It should be done.

It is my opinion, as stated in *Parsons*, that our only power of review is to determine whether the State Board complied with authority and powers granted it in § 77-8-17 (D), supra. This puts the teacher within the authority and power of the State Board granted by the legislature. Otherwise, what purpose could the people have in creating a State Board of Education as a constitutional body?

I, accordingly, specially concur.

487 P.2d 167

Michael SVEJCARA, Jr., and Matilda Svejcara, his wife, Plaintiffs-Appellees, Cross-Appellants,

v.

Lyman Jimmie WHITMAN, Defendant-Appellant, Cross-Appellee.

No. 558.

Court of Appeals of New Mexico.

June 18, 1971.

Richard L. Gerding, Tansey, Rosebrough, Roberts & Gerding, Farmington, for appellant.

James L. Brown, Farmington, for appellees.

OPINION

HENDLEY, Judge.

Defendant appeals an adverse decision whereby plaintiffs recovered for property damage, personal injuries and punitive damages. Defendant's appeal concerns (1)

punitive damages, (2) punitive damages after a statutory violation fine was paid as being double jeopardy and (3) admission of defendant's liability policy for purpose of assessing punitive damages. Plaintiffs' cross-appeal concerns the measure of the punitive damage award in that it did not (1) make plaintiff whole or relate to the enormity of defendant's conduct, and (2) the award was grossly inadequate in view of the extreme anti-social implication of driving while intoxicated.

PUNITIVE DAMAGES.

Defendant contends that in the "* * * case at bar, the evidence produced was that of an ordinary intersectional accident." We review the facts as established by the record.

Plaintiffs were traveling east on Broadway in Farmington at a speed of less than 10 miles per hour. They were approximately in the center of the intersection of Broadway and Orchard when they were struck by defendant's car. The impact of the collision spun plaintiffs' car almost 90 degrees and caused it to strike a light pole on the median. The force of the impact blew out the left rear tire, bent the left rear wheel, ruptured the gas tank, and bent the left rear door and fender for a total damage exceeding $1,000.00. Both plaintiffs received considerable personal injury some of which are permanent and disabling.

Defendant, prior to this trial, pleaded guilty to driving under the influence of intoxicating liquor and reckless driving. Defendant testified that at the time of the accident he was traveling at a speed of three miles per hour and also explained the reasons for pleading guilty.

The trial court found that "The proximate cause of the accident was defendant's negligence, which under the circumstances amounted to wilful and wanton misconduct."

Defendant's position is that his admission of guilt to driving while intoxicated and reckless driving without other evidence is insufficient to allow imposition of punitive damages. We decide adversely to defendant.

"* * * Section 70.26 of the Ordinances of the City of Farmington provides:

"'Reckless Driving.

Any person who drives a vehicle carelessly and heedlessly in wilful or wanton disregard the rights of safety of others, and without due caution and circumspection, and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving * * *'"

This Ordinance is substantially the same as § 64–22–3, N.M.S.A.1953 (1969 Supp.).

Proof of a plea of guilty and conviction based thereon is admissible under circumstances where the same act is involved in both criminal and civil proceedings. Vargas v. Clauser, 62 N.M. 405, 311 P.2d 381 (1957). Such admission is substantial evidence of the truth of the matter and will support a finding. Ward v. Ares, 29 N.M. 418, 223 P. 766 (1924). The guilty plea supports a finding of wilful and wanton misconduct which is a prerequisite to an award of punitive damage.

Defendant states that he adequately explained away his admission. This is not for us to decide. We do not weigh the evidence or decide on the credibility of the witness. That is the function of the trial court. We only review the evidence in the light most favorable to the successful party to see whether there is substantial evidence to support the findings. Martinez v. Sears, Roebuck and Co., 81 N.M. 371, 467 P.2d 37 (Ct.App.1970).

Having found support in the record for wilful and wanton misconduct we need not consider defendant's cases and discussion on intoxication as a basis for awarding punitive damages. A finding of wilful and wanton misconduct will support an award of punitive damages. As stated in Bank of

New Mexico v. Rice, 78 N.M. 170, 429 P. 2d 368 (1967):

"* * * The rule is stated in the disjunctive in Stewart v. Potter, 44 N.M. 460, 104 P.2d 736 (1940), and Loucks v. Albuquerque National Bank, 76 N.M. 735, 418 P.2d 191 (1966). Loucks says:

'* * * Punitive or exemplary damages may be awarded only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs' rights.'"

PUNITIVE DAMAGE AWARD AND STATUTORY VIOLATION FINE AS BEING DOUBLE JEOPARDY.

Defendant contends that the recent United States Supreme Court cases of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970) changes the rule in Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914).

Colbert stated:

"As stated by the Supreme Court of Wyoming: 'Where the act is punishable criminally, the judgment for the act as an offense against the criminal laws is for the wrong done the public, while the damages awarded in a civil action, although punitive and inflicted by way of example and punishment, are for the offense committed wantonly or maliciously against an individual sufferer.' Cosgriff v. Miller, 10 Wyo. 190, at 236, 68 P. 206 at 217."

Defendant contends that *Ashe* and *Waller* changed that rule when the doctrine of collateral estoppel was used in those criminal cases as a part of the Fifth Amendment's guarantee against double jeopardy.

Ashe defined collateral estoppel as it applied there as:

"'Collateral Estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161."

We fail to see how, what we consider to be the very limited holding of *Ashe* and *Waller*, apply to or change *Colbert*. *Ashe* and *Waller* apply only to a double jeopardy situation criminal action. The word "jeopardy" as used in the Fifth Amendment of the United States Constitution and Article II, § 15 of the New Mexico Constitution is used in its technical sense and is only applicable to criminal proceedings. We cannot agree with defendant that "both punitive damages and criminal sanctions serve the same end. * * *" Punitive damage serves a civil end to an individual, while criminal sanctions serve a criminal end to the public.

DEFENDANT'S LIABILITY INSURANCE AS EVIDENCE IN ASSESSING PUNITIVE DAMAGES.

The day before trial defendant was served with a subpoena duces tecum for the production of defendant's liability insurance policy. Defendant's motion to quash the production was denied. The policy could not be found and upon completion of trial and before the court's decision defendant was reminded to produce the policy. A copy of the policy was produced.

It is defendant's position that "there was no legitimate reason to receive defendant's policy of insurance, that the receipt of such policy influenced and prejudiced the decision of the trial court, and that reversible error was committed by allowing its introduction."

Plaintiffs assert that since defendant admitted ordinary negligence in open court

prior to the admission of the $100,000.00 insurance policy and that since the admission of the policy was only after all the testimony was in, the "insurance policy then becomes like any asset and a pertinent factor in the setting of exemplary damages (unless by its terms such damages are clearly excluded.)"

Defendant contends the asset argument for use in assessing punitive damages is ridiculous. Defendant bases this contention on the grounds that punitive damages are for the "limited purpose of punishment of the offender" and "defendant would suffer no hardship by reason of payment by the [insurance] company of his damages."

In our opinion it is not necessary to discuss the various contentions of the parties and we make no ruling as to the propriety of admitting an insurance policy under these circumstances. We will assume for purpose of this opinion that the admission of the policy was improper. The issue is then was the improper admission prejudicial to defendant in view of the award of $6,600.00 to Michael, $7,800.00 to Matilda and punitive damages of $7,580.00. We think not.

As stated in Sweitzer v. Sanchéz, 80 N. M. 408, 456 P.2d 882 (Ct.App.1969):

> "Here, the amount of the exemplary damages is left to the 'sound discretion' of the trial court as the fact finder. This amount is to be based on the circumstances of the case, that is, the enormity of the offense, * * * the nature of the wrong committed and such aggravating circumstances as may be shown. * * *"

What were the circumstances here? Defendant was driving in a reckless manner while intoxicated. He turned into slow moving on-coming traffic. He stated he was traveling three miles per hour and yet the force of his car's impact spun plaintiffs' car almost 90 degrees, blew out the left rear tire, bent the left rear wheel, ruptured the gas tank, and bent the left rear door and fender for a total damage exceeding $1,000.00. The collision caused both plaintiffs to receive personal injuries some of which are permanent and disabling.

Under the foregoing circumstances we cannot say as a matter of law that the award indicates in any way prejudice to the defendant since the award was not so disproportionate to the circumstances.

By reason of the foregoing we necessarily hold against plaintiffs on their cross-appeal which claims inadequacy of punitive damages.

Affirmed.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

487 P.2d 170

Manuel D. DURAN, Plaintiff-Appellee,

v.

The NEW JERSEY ZINC COMPANY, Defendant-Appellant.

No. 549.

Court of Appeals of New Mexico.
May 7, 1971.
Rehearing Denied June 1, 1971.
Writ of Certiorari Issued June 25, 1971.

Neil E. Weinbrenner, R. E. Riordan, Las Cruces, for appellant.

J. W. Reynolds, Robertson & Reynolds, Silver City, for appellee.

OPINION

DEE C. BLYTHE, District Judge.

Although defendant-appellant raises 16 points, mostly concerned with substantial evidence to support the trial court's findings of fact, the principal issue is whether the statute of limitations for filing a workmen's compensation claim is tolled while the workman remains employed in the same job by the same employer with no reduction in pay, but could not perform many of the duties of the job. From a judgment for the workman, the employer (a self-insurer) appeals. We reverse.

With certain differences which we deem immaterial, this case is on all fours with Cordova v. Union Baking Company, 80 N. M. 241, 453 P.2d 761 (Ct.App.1969). The applicable statute of limitations depends on when the cause of action accrued, and this in turn depends on when the workman became partially disabled under § 59–10–12.19 which reads:

> "As used in the Workmen's Compensation Act * * * 'partial disability' means a condition whereby a workman, by reason of injury arising out of and in the course of his employment, is unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury and is unable to some percentage-extent to perform any work for which he is fitted by age, education, training, general physical

and mental capacity and previous work experience."

The injury in this case occurred November 13, 1963. At that time the statute of limitations for filing a workmen's compensation claim was contained in Laws of 1963, ch. 269, § 6, which read in part:

"A. If an employer or his insurer fails or refuses to pay a workman any installment of compensation to which the workman is entitled under the Workmen's Compensation Act, after notice has been given as required by Section 59–10–13.4, New Mexico Statutes Annotated, 1953 Compilation, it is the duty of the workman, insisting on the payment of compensation, to file a claim therefor as provided in the Workmen's Compensation Act, not later than one year after the failure or refusal of the employer or insurer to pay compensation. This one-year period of limitations shall not be tolled during the time a workman is employed by the employed [sic] by whom he was employed at the time of such accidental injury."

The last sentence quoted above was changed by Laws of 1967, ch. 151, § 1, now compiled as § 59–10–13.6(A), N.M.S.A. 1953 (Supp.1969), to read as follows:

"* * * This one [1] year period of limitations shall be tolled during the time a workman remains employed by the employer by whom he was employed at the time of such accidental injury, not to exceed a period of one [1] year. * * *"

Duran, the workman in this case, left his employment with New Jersey Zinc Company on October 23, 1968, and the claim was filed on February 3, 1969. Since plaintiff was required to file his claim under the foregoing limitation statute (within one year of the failure or refusal to pay compensation) we must determine when the failure or refusal to pay occurred. It thus becomes necessary to examine the trial court's findings of fact pertaining to accrual and the evidence supporting such findings.

The crucial finding, which is challenged by the employer, is as follows:

"10. All physicians who treated the plaintiff for the accidental injury described herein released plaintiff to return to his full employment duties. It did not become and should not have become reasonably apparent to plaintiff that he had an injury on account of which he would have been entitled to Workmen's Compensation benefits."

Another, and somewhat inconsistent, finding of the trial court then follows:

"11. Plaintiff's accidental injury on November 13, 1963, *was serious and continued serious through 1968*, but at no time did defendant fail or refuse to make compensation payments or furnish medical benefits." (Emphasis added.)

It is apparent from two memorandum opinions filed by the trial judge that he was most concerned with the last clause of finding no. 11, however. His first memorandum opinion was against the workman, but this opinion was withdrawn by the second on the strength of Noland v. Young Drilling Company, 79 N.M. 444, 444 P.2d 771 (Ct.App.1968), where we said:

"* * * As soon as it becomes reasonably apparent, or should become reasonably apparent * * * to a workman that he has an injury on account of which he is entitled to compensation *and* the employer fails or refuses to make payment he has a right to file a claim and the statute begins to *run from that date*. There is nothing in the act as we read it which indicates that the running of the statute may be delayed until a more serious disability is ascertainable." (Emphasis by trial court.)

In *Noland* no workmen's compensation was paid, and nothing in *Union Baking* indicates that such payment is a sine que non although this factor was there present. After all, payment of workmen's compensation, terminated by the workman's resuming full-time employment for his regular wages, hardly could be construed as "failure or refusal of the employer or in-

surer to pay compensation", within the meaning of § 59–10–13.6(A), supra. Here no demand for payment was made until October 29, 1968. The workman left the job October 23, 1968, after he had been told by the assistant superintendent that he would have to do the work assigned to him "or else." The workman apparently considered this the same as being discharged, since he could not do many of the assigned tasks. A few days later the union chairman told him he would be discharged if he didn't return, and he refused on the ground that he couldn't do the work.

Duran would date the "failure or refusal * * * to pay" from either October 23 or October 29, 1968. Even if, as contended by Duran, he was in effect discharged on October 23, this would be a refusal to pay further wages, rather than workmen's compensation.

Thus we are brought back to the question of when it became reasonably apparent, or should have become reasonably apparent, to Duran that he had a compensable injury. In finding number 10 quoted above, and in the trial court's memorandum opinion, it is apparent that the court thought that the workman was entitled to rely entirely on the fact, as found, that "All physicians who treated the plaintiff for the accidental injury described herein released plaintiff to return to his full employment duties." This finding is challenged, since only one physician testified that he did so and the workman testified repeatedly that all the doctors gave him "light duty slips" when he returned to work. However, this makes no difference in the complete absence of any testimony that the workman relied on the doctors' releasing him to full employment duties, if they did so, in not demanding compensation or filing his claim sooner than he did.

Duran testified repeatedly that from the time he returned to work on January 4, 1964, he could not do many tasks required of him and other employees in the position of Mechanic No. 1; that he had to get his fellow employees to help him with heavy lifting, pulling, and climbing tasks in the mine; that his right shoulder had never ceased to cause him pain since the date of injury; that he frequently had to use his left hand instead of his right hand to pull on big wrenches; and that from 1963 to 1968 he had requested light duty but it had been denied him by his superiors. As the trial court found, his original injury "was serious and continued serious through 1968." His condition steadily worsened until, as found by the court below, he was totally disabled. Obviously, it was reasonably apparent to Duran that he was partially disabled to work for New Jersey Zinc Company as a Mechanic No. 1, on and after January 4, 1964, and he could have filed his claim then.

There remains the question of whether Duran was "unable to some percentage-extent to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience," the second part of the partial disability definition of § 59–10–12.19(B), supra. The trial court found:

> "12. Plaintiff is over 55 years of age, had a grade school education and has earned his livelihood by heavy, manual labor and is not qualified to perform any other type of work * * * and * * * is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience."

He had worked for New Jersey Zinc Company 22 years between 1937 and 1968 and practically continuously since 1955. His other work experience was limited to such jobs as ranch hand, cowboy, and mule skinner—all jobs requiring ability to do heavy work. It is obvious that his injuries disabled him from doing these jobs to the same degree, if not more, than he was disabled from working as a Mechanic No. 1 for New Jersey Zinc Company, since the latter job had some light duties which he could perform.

The court below appears to have placed some reliance on the fact that the employer paid for two operations, one on October 21, 1963, and another on February 14, 1968. As pointed out in Garcia v. New Mexico State Highway Department, 61 N. M. 156, 296 P.2d 759 (1956), payment of medical benefits is not payment of an "installment of compensation" within the meaning of § 59–10–13, now § 59–10–13.-6(A), supra, such as would toll the running of the statute of limitations.

It follows from what has been said that the judgment of the court below must be reversed and remanded with instructions to dismiss the complaint.

It is so ordered.

SPIESS, C. J., and HENDLEY, J., concur.

487 P.2d 174

Theresa SAIZ, a Minor, by Her Mother and Next Friend, Emma Saiz Waite, and Emma Saiz Waite, Individually, Plaintiffs-Appellants,

v.

CITY OF ALBUQUERQUE and Frederick Ford, Defendants-Appellees.

No. 603.

Court of Appeals of New Mexico.

June 25, 1971.

Richard A. Bachand, Smith, Ransom & Deaton, Albuquerque, for plaintiffs-appellants.

William S. Dixon, James C. Ritchie, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Theresa Saiz, a minor, was injured when an automobile, driven by an Albuquerque policeman, collided with the automobile in which she was riding. The Mother, as next friend, brought suit against the city and the policeman. On a motion for summary judgment the trial court dismissed the suit as to the City of Albuquerque on the ground that § 64–25–9, N.M.S.A. 1953 (Repl. Vol. 1960, pt. 2) precludes suits against a municipality for alleged vehicular negligence.

We affirm.

At oral argument the constitutionality of § 64–25–9, supra, was raised for the first time. We are of the opinion that the constitutionality of § 64–25–9, supra, may not be properly considered by us since it was neither raised in the court below nor does it come within one of the three recognized exceptions to the rule for preservation of issues for review. DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966); Candelaria v. Gutierrez, 30 N. M. 195, 230 P. 436 (1924). The existence of a constitutional question does not automatically constitute an exception. Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966); In re Reilly's Estate, 63 N.M. 352, 319 P.2d 1069 (1957); State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969); see Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 83 S.Ct. 1759, 10 L. Ed.2d 983 (1963).

Our opinion considers the relationship of § 64–25–9, supra, with §§ 5–6–18 through 5–6–22, N.M.S.A. 1953 (Repl.1966). Section 64–25–9, supra, states:

> "*Actions for injuries by state vehicles against operator—Provisions of policy—Waiver of governmental immunity—Release of claim in excess of policy limit.* —No action shall be brought or entertained in any court of this state against the state or any of its institutions, agencies or political subdivisions for injury or damage caused by the operation of such vehicles, but the action for any such injury or damage shall be brought against the person operating such vehicle at the time of the injury or damage. Every policy of insurance upon such vehicles shall contain a provision that the defense of immunity from tort liability because the insured is a governmental agency or an employee of a governmental agency, or because the accident arose out of the performance of a governmental function, shall not be raised against any claim covered by such policy. Provided the claimant, or plaintiff in the event suit is instituted, shall file with the insured and the company issuing such policy of insurance a release in writing of any amount of such claim in excess of the limit stated in the policy, and a further statement that any such release shall not be construed as an admission of liability, nor may it be offered in evidence for any purpose, and that no attempt may be made in the trial of any case to suggest the existence of any insurance which covers in whole or in part

any judgment or award in favor of the claimant."

Because the constitutionality of § 64–25–9, supra, is not before us for determination, in our discussion we indulge in the usual presumption that legislative acts are legal and valid, and assume that that provision is constitutional. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964); State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

For purposes of our discussion we also assume the existence of liability insurance coverage for this accident. If there was no coverage there could be no suit against a political subdivision of the State. Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970); Chavez v. Mountainair School Board, 80 N.M. 450, 457 P. 2d 382 (Ct.App.1969). With the assumption that there was liability coverage, the issue of this case is whether the City of Albuquerque may be joined as a party with the policeman.

We think not.

It is plaintiffs' position on appeal that in enacting §§ 5–6–18 through 5–6–22, supra, the Legislature abolished the common law defense of sovereign immunity against the action they brought. Plaintiffs recognize that City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960) construed § 64–25–9, supra, to mean that the existence of insurance coverage does not automatically waive the defense of sovereign immunity. Nevertheless, they rely on the doctrine of revocation by implication. Their position is that the enactment of §§ 5–6–18 through 5–6–22 in 1959 destroyed the special treatment for vehicular negligence and combined all action against the state or political subdivisions in the broad and all-comprehensive language of the new sections.

We do not agree. Repeals by implication are not favored and are not resorted to unless necessary to give effect to an obvious legislative intent. Buresh v. City of Las Cruces, 81 N.M. 89, 463 P.2d 513 (1969); State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966). At issue is the effect of those provisions which deal with general liability of the State and its subdivisions, and the one provision which deals solely with vehicular liability. We are committed to the rule of statutory interpretation that a general act later enacted does not affect an earlier special act. State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936). In these situations the specific provision is considered an exception to the general act. State v. Lujan, supra.

Another approach taken by plaintiffs is that § 64–25–9, supra, was only a restatement of the Common Law at the time § 64–25–8, N.M.S.A. 1953 (Repl.Vol.1960, pt. 2) was enacted to emphasize that by permitting the purchase of insurance coverage the Legislature did not intend to abolish the common law defense of sovereign immunity. And so, according to plaintiffs, when §§ 5–6–18 through 5–6–22, supra, were enacted the common law defense of sovereign immunity, along with its restatement § 64–25–9, supra, was repealed to the extent that there is liability coverage.

Conceding arguendo that in fact § 64–25–9, supra, is a mere restatement of the common law, this statute specifically states that "no action is to be brought against the political subdivision of the State." This includes municipalities. City of Albuquerque v. Campbell, supra. Since § 64–25–9, supra, has specific provisions concerning suing the municipality and since § 5–6–18 through 5–6–22, supra, are general provisions concerning such suits, the specific statute was not repealed, but applies to later enacted acts.

Plaintiffs query "why should the state and its municipalities be immune from suit in only actions involving negligence arising from the operation of motor vehicles." Our answer is that there is nothing unreasonable per se in such classification and the Legislature is vested with wide range discretion in selecting and classifying. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct.App.1967).

Plaintiffs have cited several cases and urged other positions about the interpretations of §§ 5-6-18 through 5-6-22, supra.

We need not consider these, for, as we have discussed above, those sections are general provisions which do not cover the fact situation before us.

Affirmed.

It is so ordered.

WOOD, J., concurs.

SUTIN, Judge (dissenting).

I respectfully dissent.

The City of Albuquerque relied upon §§ 64-25-8 and 9, N.M.S.A. 1953 (Repl. Vol. 9, pt. 2) to dismiss plaintiffs' complaint because the City was immune from suit. On this basis, the trial court dismissed the complaint against the City with prejudice.

Section 64-25-9 is unconstitutional. The title of the Act, Laws 1941, ch. 192, reads as follows:

> *An Act Authorizing the State Board of Finance to Direct the Purchase of Public Liability and Property Damage Insurance Upon All Cars Owned and Operated by the State of New Mexico*

The title only authorized the purchase of insurance upon all cars owned and operated by the state of New Mexico.

Section 64-25-9 leaves the title of the Act by the wayside. It moves into areas of litigation, immunity, release of excess claims, and evidence.

It does not require citation of extensive authority that under Article IV, Section 16 of the New Mexico Constitution, any subject matter not expressed in the title of the Act is void. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

City of Albuquerque v. Campbell, 68 N. M. 75, 358 P.2d 698 (1960), held the statute constitutional, limited to the attack made on it. It held the title of the Act, referring to "All cars owned and operated by the State of New Mexico," was broad enough to include "political subdivisions," which in turn includes municipal corporations. See State ex rel. State Highway Comm. of New Mexico v. Town of Grants, 69 N.M. 145, 364 P.2d 853 (1961), which states that the question of immunity was not raised in *Campbell.*

The only issue is whether the constitutionality of § 64-25-9 can be raised for the first time on appeal. The issue was raised from the bench during oral argument. Thereafter, supplemental briefs were filed by both parties.

The only pertinent pleadings in the record are the complaint, defendants' motion to dismiss, and judgment of dismissal on the basis of § 64-25-9.

Courts of review are dedicated to the protection of the constitution and devoted to the principle that "Justice, Justice shalt thou pursue." This court has the inherent power to prevent fundamental injustice. Gonzales v. Rivera, 37 N.M. 562, 25 P.2d 802 (1933). The Supreme Court has often chosen to decide cases on theories not followed by the trial courts. "The proper function of this court is to correct an erroneous result rather than to approve or disapprove the grounds upon which it is based." State Highway Com'n v. Ruidoso Telephone Co., 73 N.M. 487, 389 P.2d 606 (1963).

There is a consistent rule that "a trial court will not be reversed if the result be correct, even though the result may have been based upon a wrong reason." Rein v. Dvoracek, 79 N.M. 410, 444 P.2d 595 (Ct. App.1968). On the other hand, we may reverse the trial court if the result of a motion to dismiss is incorrect based upon a wrong reason. Pankey v. Hot Springs National Bank, 44 N.M. 59, 97 P.2d 391 (1939).

Since Law is Justice, we have a duty to determine the constitutionality of § 64-25-9.

Furthermore, questions of constitutionality of an act creating a *crime* may be raised for the first time on appeal. The reason is that "* * * If the law is void, no crime has been committed and none can be committed under it, and the court has no jurisdiction over the person of the defendant or the subject-matter of

the cause." State v. Diamond, 27 N.M. 477, 488, 202 P. 988, 993, 20 A.L.R. 1527 (1921).

The same rule should apply to the defense in this civil case. If § 64–25–9 is void, it is no defense to the plaintiffs' complaint. The district court lacked jurisdiction under a void statute to dismiss plaintiffs' complaint.

There are three exceptions to the rule which allow this court to determine questions of law for the first time on appeal: (1) when jurisdictional questions are involved; (2) when questions are presented of a general public nature affecting the interest of the state at large, and (3) when it is necessary to protect the fundamental rights of the party. DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966).

A review of New Mexico decisions cited in *DesGeorges*, and other citations, will establish that each of these questions are involved here. Exceptions (2) and (3) were added by the Supreme Court in the interest of justice. Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949). Although plaintiffs come within the three exceptions, a fourth exception should be added.

During *trial*, there are good reasons for not reviewing matters not passed upon. Fullen v. Fullen, 21 N.M. 212, 153 P. 294 (1915). In the absence of trial, no good or substantial reason has been given for refusing to decide statutory constitutional questions first raised on appeal from a judgment of dismissal based upon a motion.

This situation should constitute a fourth exception to the rule.

Should an aggrieved party suffer the pain of defeat in the motion stage of procedure before trial because a statutory constitutional question was not presented by plaintiffs in some manner in the trial court? This is a manifest sense of injustice.

State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926), says:

> Constitutional questions, *not raised in the regular and orderly procedure in the trial*, are ordinarily rejected * * *, unless the jurisdiction of the court below or that of the appellate court is involved, in which case it may be raised at any time or *on court's own motion*. [Emphasis added].

This rule was followed in some succeeding cases. Miera v. State, 46 N.M. 369, 129 P.2d 334 (1942).

I feel compelled to call this matter to the attention of the public so that lawyers will raise the issue of constitutionality. If the statute is declared unconstitutional, citizens will find relief under §§ 5–6–18 to 5–6–22, N.M.S.A. 1953 (Repl. Vol. 2). These statutes were enacted by the legislature an 1959 to allow suits for negligence against the sovereign and public agencies of the state where liability insurance is carried. The defense of sovereign immunity is not available to the extent of insurance coverage. Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970). The judgment of the trial court should be reversed.

For the above reasons, I dissent.

487 P.2d 178

STATE of New Mexico, Plaintiff-Appellee,

v.

Pablo Victor MORAGA, Defendant-Appellant.

No. 676.

Court of Appeals of New Mexico.

July 2, 1971.

Scott McCarty, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ethan K. Stevens, Thomas L. Dunigan, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Moraga was convicted and sentenced for second degree murder. He seeks a reversal on two points, (1) the circumstances of rape by one Carrillo, a witness, should have been admitted into evidence as bearing on the state of mind of Moraga, and (2) the trial court failed to adequately instruct on the elements of murder in the second degree and the failure was jurisdictional.

The Brief in Chief states:

> "* * * The Defendant was involved in an argument with the witness Carrillo and fired a pistol at Carrillo four times and struck him more than once. Then the defendant started to flee the premises and in the process thereof fired the shot which fatally wounded the deceased, Samuel Garcia."

On cross-examination of Carrillo, the defense brought out there had been a prior fight between defendant and Carrillo. The defense also brought out that Carrillo had been convicted of rape prior to the killing, the date of the rape and of the conviction, and that at the time of trial, Carrillo was an inmate of the penitentiary.

The State objected to further questioning concerning the rape. The objection was sustained. Defendant contends he "* * * was entitled to present evidence of the violent nature of the witness Carrillo, and was entitled to develop the specific violent acts of the witness Carrillo, * * *" This contention is made on the basis it was pertinent to defendant's state of mind at the time of the shootings.

In considering the admissibility of violent acts against third persons (which is the situation here in regard to the rape), State v. Ardoin, 28 N.M. 641, 216 P. 1048 (1923) holds that a specific violent act is admissible if it "* * * would legitimately and reasonably either affect the defendant's apprehensions or throw light on the question of aggression, or upon the conduct or motives of the parties at the time of the affray, * * *" *Ardoin,* supra, recognizes that the holding permits the presentation of collateral issues and that the extent that the evidence goes into collateral issues is to be considered by the court "* * * in exercising the discretion necessary to determine the admissibili-

ty of this class of evidence in any particular case. * * *"

Here, the specific act of violence, the rape, had been admitted without objection. The details of the rape were sufficiently collateral so that we cannot say, as a matter of law, that the trial court erred in refusing to permit them to be developed. Further, the details of the rape could not have been pertinent to defendant's state of mind when there is no showing, and no claim, that defendant knew or had heard of any of the details. Defendant's Point I is without merit.

The contention that the trial court failed to "adequately instruct" on the elements of second degree murder has two parts: (1) murder in the second degree was defined to include all the elements of first degree murder except deliberation and (2) malice and premeditation were not defined for the jury.

The key to this contention is the word "adequately." The elements of second degree murder were stated; defendant's complaint goes to the way they were stated. Malice was defined; the contention is the definition should have been more extensive. Premeditation is referred to in terms of "premeditated design" and "malice aforethought;" the contention is that a specific separate definition should have been given.

Thus, the "inadequacy" of which defendant complains goes to the form of the instructions. This asserted inadequacy is claimed to be jurisdictional because defendant made no objection to the instructions before the trial court.

Since the elements of second degree murder were included, there is no jurisdictional defect under State v. Walsh, 81 N. M. 65, 463 P.2d 41 (Ct.App.1969). Nor do the instructions given introduce any uncertainty into the required elements of second degree murder. See State v. Buhr, 82 N. M. 371, 482 P.2d 74 (Ct.App.1971). Nor can it be said the instructions given were misleading. Compare State v. Soliz, 80 N. M. 297, 454 P.2d 779 (Ct.App.1969).

There being neither a jurisdictional defect nor fundamental error in the instructions, the complaint as to the form of the instructions is answered by the requirement that the asserted inadequacy be called to the attention of the trial court. This was not done. Therefore, the asserted error was not preserved for review. Section 21-1-1(51) (2) (h), N.M.S.A.1953 (Repl. Vol. 4).

No error was committed. The conviction and sentence is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 180

Servando S. SANCHEZ and Pedro Jaquis, Plaintiffs-Appellants,

v.

The PUBLIC SERVICE COMPANY of New Mexico, Defendant-Appellee.

No. 598.

Court of Appeals of New Mexico.
June 18, 1971.
Certiorari Issued July 21, 1971.

John F. Quinn, Standley, Witt & Quinn, Santa Fe, Willard F. Kitts, Albuquerque, for plaintiffs-appellants.

John B. Tittmann, Keleher & McLeod, Albuquerque, for defendant-appellee.

OPINION

WOOD, Judge.

Plaintiffs were laborers engaged in the laying of ten inch cast-iron water pipes in an undeveloped area near the City of Albuquerque. A crane was being used to remove the pipes from semitrucks. The crane came in contact with one of defendant's power transmission cables, energized at that time with forty-six kilovolts of electricity. Plaintiffs were injured in the accident and sued Public Service Company, alleging negligent maintenance of the power lines.

Defendant's motion for summary judgment, based on affidavits and depositions, was granted and plaintiffs appeal. We affirm.

In a motion for summary judgment the movant has the burden of establishing the absence of any material issue of fact and that he is entitled to judgment as a matter of law. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct.App. 1971).

It was stipulated that only if the Public Service Company failed to meet the requirements of the National Bureau of Standards could it be held negligent in the maintenance of its power lines. An undisputed affidavit states that according to the Bureau of Standards Handbook the height of the cable in question should have been twenty-two feet above the ground. The issue of defendant's negligence therefore is whether the cable was less than twenty-two feet at the time of the accident.

It is undisputed that the crane's contact with the cable left burn marks on the cable and that the height of the cable above the ground, when measured at the point of the burn marks, exceeded twenty-eight feet.

This measurement occurred two days after the accident.

An issue is whether defendant made a prima facie showing that the cable's height above the ground, two days after the accident, was the height when the accident occurred. Such a showing was made with the following excerpt from an affidavit submitted by defendant:

> "7. The 46 KV cable contacted by the crane was not displaced or damaged except for the burnt spots. * * * After the crane touched said cable the cable remained in the same position it occupied prior to the accident and it was not necessary to replace the same or in any way alter its location or installation.
>
> "8. Said cable is now in the same location as it was on the date of said accident. * * *"

While there is no express statement that the height at the time of measurement was the height at the time of the accident, this inference follows from the statement that the cable was not displaced, that it remained in the same position after the accident as it occupied prior to the accident and is now, at the time of the measurement, in the same location.

Upon this prima facie showing by defendant, plaintiffs had the burden of showing that a factual issue existed. Sanchez v. Shop Rite Foods, supra. Plaintiffs assert a factual issue exists because of the following statement in an affidavit:

> "* * * For my opinion and observation, the cause of the accident was the wires. In my estimate, the wires were from 13 to 18 feet above the ground. * * *"

It is defendant's position that the affiant's "* * * eyeball estimate, no matter how honest, cannot create a genuine issue as to the height of the cable above the ground in view of the actual physical measurement 28 feet 11 inches. * * *" Relying on Ortega v. Koury, 55 N.M. 142, 227 P.2d 941 (1951), defendant contends that under the "physical facts" rule the estimate is inherently improbable.

We agree. The physical facts rule is applicable because the estimate of thirteen to eighteen feet is inherently improbable in light of the measurement showing the height to exceed twenty-eight feet. Bolen v. Rio Rancho Estates, Inc., 81 N.M. 307, 466 P.2d 873 (Ct.App.1970). Plaintiffs have not shown a factual issue exists; the summary judgment was proper.

Plaintiffs assert the result is contrary to that reached in Wisehart v. Mountain States Telephone & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct.App.1969). We disagree. In Wisehart, supra, there was no showing of the height of the wire above the ground on the day of the alleged accident; here a prima facie showing has been made. In Wisehart, supra, there was a dispute as to the height of the wire; here, the showing of height is undisputed because it is opposed only by an inherently improbable estimate.

The summary judgment is affirmed.

It is so ordered.

SPIESS, C. J., concurs.

HENDLEY, Judge (dissenting).

I cannot agree that the majority's interpretation of the affidavit is the only way it can be viewed. This is a summary judgment case. The rule is stated in Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct.App.1970) as follows:

> "In determining the propriety of granting a motion for summary judgment, all reasonable inferences must be construed in favor of the party against whom the summary judgment is sought and when reasonable minds might differ * * * the matter is issuable before a jury. * * * Where the slightest doubt exists as to the material facts summary judgment should not be granted. * * *"

The majority places great emphasis on "not displaced," "remained in the same po-

sition after the accident as it occupied prior to the accident" and "in the same location."

The inference relied on by the majority could easily have been viewed in the opposite. There is no showing of height prior to the accident. There is no showing of height at the time of the accident except by plaintiffs' co-employee. There is no showing that from the time of the accident until two days later that the height was not changed.

Certainly the language "After the crane touched said cable the cable remained in the same position it occupied prior to the accident" is not conclusive as to height in this context. That statement tells us that the accident did not alter the height of the cable; but it does not tell us that no alteration followed after the accident and prior to the measurement. The affidavit could remain unaltered and be true even if in fact there was some alteration between the accident and the measurement two days later.

I respectfully dissent.

487 P.2d 183

STATE of New Mexico, Plaintiff-Appellee,

v.

Arthur SLUDER, Defendant-Appellant.

No. 640.

Court of Appeals of New Mexico.

June 18, 1971.

Harold H. Parker, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Tom Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SPIESS, Chief Judge.

Defendant was convicted of the unlawful taking of a vehicle. [§ 64-9-4, N.M.S.A. 1953 (Repl.Vol. 9, pt. 2)]. He has appealed. We affirm the conviction. The facts are of little significance in arriving at this decision. Briefly, they are:

One Robert A. Simpson parked his automobile in the parking lot of a bowling alley. He left the car, but did not remove the keys. The defendant took the automobile without the consent or permission of Simpson.

Defendant has presented and argued six points raising various procedural questions, including claimed improper admission of certain evidence. Defendant's first point, as stated by him, is:

> "It was error requiring reversal to deny motion for striking the jury panel when two pro-defense jurors had been dismissed from the jury panel."

It appears that more than a month prior to defendant's trial two jurors were excused. These jurors, defendant claims, were "pro defense." He argues that the dismissal of these jurors denied him a fair and impartial jury, because he had no opportunity to have these two "pro defense" jurors on his jury. We note that in the selection of trial juries for the district in question, new panels are selected each month. All of the members of the panel upon which the "pro defense" jurors had served, with one exception, had been excused from service and a new panel selected for the trial of cases during the month defendant's case was set for trial.

In State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct.App.1971), cert. denied, 482 P.2d 241 (February 22, 1971), we held:

> "* * * All that defendant had a right to was a fair and impartial jury. If defendant had such a trial jury, the fact that a prospective juror had been improperly excused did not amount to reversible error."

Defendant's argument is that he could not obtain a fair and impartial trial jury from a panel which did not include a member or members who might be partial to him. The record is barren of any showing which would indicate that defendant was denied the right to a fair and impartial jury in the trial of his case.

It is next argued that the trial court erred in denying defendant's motion for a mistrial, which was based upon the conten-

tion that the sheriff had displayed defendant to the jury panel in his prison uniform. It is argued that any such display would tend to destroy the presumption of innocence in the minds of the jurors to which defendant is entitled.

Other than counsel's statement, there is no showing that any juror saw defendant in his prison clothes. There is no showing that defendant was in the courtroom at any time dressed in prison clothing. This point is ruled against defendant. See State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct.App. 1971).

Defendant next contends that the trial court erred and abused its discretion in denying a motion for continuance. The continuance was sought upon the ground that defendant was unable to secure the presence of a particular witness, although a diligent and thorough effort had been made to locate him. The record discloses that the testimony expected from the absent witness would not support or aid defendant in his defense. Consequently, abuse of discretion is not shown. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967); State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct.App.1970).

Defendant's fourth point relates to the claimed failure of the prosecution to identify for his benefit a police officer who had undertaken unsuccessfully to find defendant's fingerprints upon the allegedly stolen car. Defendant moved the court for an in camera inspection of the police files. The apparent purpose was to obtain the name of the officer who had examined the car for fingerprints. The court denied the motion but informed counsel for defendant:

> "* * * but I want to afford you time now to simply call over there, find out and, if necessary, you can do it from this phone, call over and see who took—if there was any attempt to get fingerprints, who the officer was, and try to get him over here. * * *"

It appears to us that defendant was accorded, by direct inquiry, the right he sought through an examination of police files.

It is further argued under this point that the trial court erred in denying defendant's motion for mistrial upon the ground that "* * * Defendant did not know until near the end of the State's case that Defendant's fingerprints had been sought and not found on the allegedly stolen car and an order had been granted to give Defendant all exculpatory matter. * * *".

It is not shown that defendant was prejudiced in his defense in not learning that fingerprints had been sought by the police, but not found upon the car, until near the end of the state's case, nor does it appear that defendant was denied the right to secure the presence at the trial of the officer who had unsuccessfully attempted to secure the fingerprints. Absent a showing of prejudice, we see no basis for reversal upon this point.

Defendant's Point V. is stated by him as follows:

> "The prosecution insisted in bringing before the jury arrests of the Defendant upon which he was not convicted in an effort to prejudice the jury."

Upon cross-examination of the defendant, the prosecutor established felony convictions in North Carolina and in Texas. Thereafter, the following occurred:

> "Q. Isn't it true that on March 20th, 1969, also here in Albuquerque you committed a larceny?
>
> MR. PARKER: Your Honor, I think this is a bad faith question. May I approach the bench?
>
> MR. WILSON: I can prove them if you so desire.
>
> THE COURT: Let's see what Mr. Parker has to say."
>
> (A discussion was had off the record at the bench among the Court and Counsel.)

Cross-examination continued—

> "Q. Isn't it true that on March 20th, 1969, you entered into a conspiracy with Johnny Whit and others to

commit the crimes of burglary and larceny?

A. Convicted or arrested for it?

Q. Let me repeat the question. Isn't it true that on March 20th, 1969, here in Albuquerque, New Mexico, that you entered into a conspiracy with Johnny Whit and others to commit the crimes of burglary and larceny?

A. Yes, I was arrested.

Q. That still isn't responsive to my question, Mr. Sluder. Let me ask it one more time.

A. I don't understand what you're talking about.

Q. Isn't it true—

MR. PARKER: I think he has made a fair attempt to answer the question.

THE COURT: I don't think he understands the question. That is what the witness said.

Q. Isn't it true that on March 20th, 1969, you entered into an agreement and a conspiracy with Johnny Whit and others to commit the crimes of burglary and larceny?

A. No, sir.

Q. And isn't it true that here in Albuquerque, New Mexico, on or about September 15th, 1970, you and Johnny Whit stole two color televisions from the Sundowner Motel?

A. No, sir.

MR. WILSON: That's all. Thank you."

The foregoing questions asked by the prosecutor upon cross-examination were clearly an attack upon the accused's credibility. There is nothing in the record indicating the questions were asked in bad faith. See State v. Garcia, 80 N.M. 247, 453 P.2d 767 (Ct.App.1969). The bad moral character of a witness, including the accused, when a witness in his own behalf, may be shown for the purpose of attacking the credibility through securing from the witness on cross-examination admissions of specific acts of misconduct. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App. 1970). Under this rule, allowing the questions to be asked of defendant was not improper, nor an abuse of the trial court's discretion.

Defendant finally contends that the trial court erred in denying his motion for mistrial upon the ground that the District Attorney announced, in the presence of the jury, that the state wanted to give the defendant a lie detector test with the results to be given to the jury. The matter of defendant being given a lie detector test was first injected in the case by defendant's counsel, who asked defendant, upon direct examination, whether he had offered to take such a test, to which defendant answered, "Yes, sir." The question and defendant's response may have left the impression that the state had refused to give him such test. The prosecutor then offered, in the presence of the jury, to give defendant a lie detector test. Defendant clearly is in no position to complain of the statement made by the prosecutor because the matter to which he has objected was brought about by his own conduct. See State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970). The trial court further instructed the jury to disregard the testimony and statements relating to the lie detector test. No basis for reversal upon this point is shown.

Judgment of the trial court is affirmed. It is so ordered.

WOOD, J., concurs.

SUTIN, Judge (dissenting).

I dissent for the same reasons stated in the dissenting opinion filed in State v. Sanchez, 82 N.M. 585, 484 P.2d 1295 (Ct. App. May 7, 1971).

487 P.2d 187

Arnold G. PAVLOS and Catherine Pavlos, individually and as mother and next friend of Christina Pavlos, Plaintiffs and Counter-Defendants, Appellees,

v.

ALBUQUERQUE NATIONAL BANK, Executor of the Estates of Bernard Brint and Rebecca Brint, Defendant and Counter-Claimant, Appellant.

ALBUQUERQUE NATIONAL BANK, Administrator of the Estate of Claire Brint, Deceased, Plaintiff,

v.

Arnold G. PAVLOS, Defendant.

No. 612.

Court of Appeals of New Mexico.

June 18, 1971.

Eugene E. Klecan, James T. Roach, Julius M. Wollen, Albuquerque, for appellant.

Charles G. Berry, O. L. Puccini, Jr., McAtee, Marchiondo & Berry, Albuquerque, for appellees.

OPINION

WOOD, Judge.

The appeal in this automobile accident case involves (1) the exclusion of non-expert opinion testimony; (2) a directed verdict against defendant on the issue of liability; and (3) a directed verdict against the non-driver co-owner of the car who was present in the car when the accident occurred. The appeal is from the judgment in favor of Catherine Pavlos.

The Pavlos vehicle was proceeding in a southerly direction within its lane of travel. The Brint vehicle was approaching the Pavlos vehicle from the south. The Brint vehicle was observed coming across the highway until it was approximately five feet in the lane of travel of the Pavlos car. This maneuver by the Brint car was in a normal manner; that is, not erratically. The Brint vehicle then moved back into its proper lane, again in what appeared to be in a normal manner. It then swerved diagonally across the highway.

The driver of the Pavlos car had observed the Brint car when it first crossed into the lane of travel of the Pavlos car. The driver of the Pavlos car started slowing his vehicle and moved to the right. The collision between the cars occurred at, or slightly west of, the western edge of the lane of travel for southbound vehicles. The point of impact on the Pavlos car was the left front, on the Brint car the point of impact was at the doorpost between the front and back doors on the right-hand side of the car.

The accident happened in daylight. The road was straight but "hilly." The road surface was dry. All witnesses who testified on the point said it was windy.

Mr. and Mrs. Brint died from injuries suffered in the collision. Mrs. Brint was driving. It was stipulated that Mr. and Mrs. Brint were the owners of the car.

Exclusion of non-expert opinion testimony.

Defendant attempted to present evidence, through the witness Teague, that wind conditions caused the Brint vehicle to swerve across the highway into the path of the Pavlos car. No attempt was made to qualify Teague as an expert on wind conditions or as to the effect of wind on the Brint car. His opinion was asked as a non-expert.

In presenting this issue, defendant argues that non-expert testimony may be received in certain instances. We agree. State v. Cooley, 19 N.M. 91, 140 P. 1111, 52 L.R.A.,N.S., 230 (1914) holds that where descriptive language is inadequate to convey the precise facts to the jury, or the bearing of the facts on the issue, the description of the witness must of necessity be allowed to be supplemented by his opinion. See also Skala v. N. Y. Life Ins. Co., 24 N.M. 78, 172 P. 1046 (1918). As stated in Padgett v. Buxton-Smith Mercantile Company, 262 F.2d 39 (10th Cir. 1958), cert. denied 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961): "* * * all non-expert opinion and impression evidence is competent

if it is necessary or appropriate to reproduce the witness' knowledge of the pertinent facts. * * *"

Some of the New Mexico decisions applying this non-expert opinion rule are: State v. Chavez, 77 N.M. 274, 421 P.2d 796 (1966) —experienced lay witness testified as to reaction of narcotics drug users; State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966)—insanity; State v. Deming, 66 N.M. 175, 344 P.2d 481, 77 A.L.R.2d 964 (1959), and Bunton v. Hull, 51 N.M. 5, 177 P.2d 168 (1947)—speed; Skala v. N. Y. Life Ins. Co., supra—despondent mood; State v. Cooley, supra—appearance of friendly relations.

The issue here is not whether, as a general proposition, non-expert opinion may be received; the issue is whether a sufficient basis was presented to permit receipt of the non-expert opinion.

Teague, driving south about one-fourth mile behind the Pavlos vehicle, was on a downhill slope and had a view of the area where the accident occurred. He saw some of the events which took place shortly before the collision and also saw the collision. He testified the wind was blowing "strong," that there were cuts "all along there" that "* * * would cause the wind to slack up its speed anywhere in there." He also testified that at the place where the accident occurred the road was not between hills or cliffs close to the road.

Teague testified he took the "* * * ordinary precaution you take with driving with the wind on your side. * * *" "* * [T]here were dust devils all down through there." There was a dust devil "* * * coming in that area right about the time of the impact. * * *" The two cars were approaching and "* * * the northbound car was in its lane and the next moment I saw it there was an impact, * * * and dust right at that point of impact." Teague couldn't state the angle of the Brint car as he approached, but when he got to the accident scene the Brint car "* * * was straight across the road, * * * it was east and west."

After the above evidence was received, defendant tendered the following question and answer:

"Q. Mr. Teague, based upon what you observed there at the scene, and what you had experienced in the way of weather conditions and all other factors, and based upon your prior driving experience, do you have an opinion as to what caused the northbound car to go over into the southbound lane?

"A. All through that area there is these cuts, as I have described, and my opinion is as she was coming out of one of these cuts one of the gusts hit her car and caused her to swerve into that lane. That is my only conclusion. It was like an unavoidable accident as far as I am concerned."

The trial court correctly refused to permit this question and answer in evidence. In so holding we disregard the following: (1) the fact that we have no idea what was meant by "all other factors;" (2) the fact that the evidence of prior driving experience was only that Teague was familiar with the road, having "traveled" it several times; and (3) that the answer, "like an unavoidable accident" raises a question as to an inadmissible opinion on a matter of law. See Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960).

We consider only that portion of the question concerning Teague's observations at the scene and his experience "in the way of weather conditions."

In each of the New Mexico cases cited above on the non-expert opinion rule, personal observation is a key factor in permitting the opinion. 7 Wigmore, Evidence § 1928, at 24 (3rd ed. 1940), in arguing for the non-expert opinion rule which New Mexico has adopted, bases his justification for the admission of such testimony on the personal observations of the witness.

An examination of Teague's testimony reveals that he never testified that he observed a cut near the accident scene, never said a dust devil was near the accident scene or the Brint car and never testified that he ob-

served the movement of the Brint car when it left its lane of travel and moved across the highway to the point of collision. His observations as to wind conditions at the scene simply are too general. His testimony is about "anywhere in there;" "all through there;" "in that area." The evidence is that the area of visibility was up to two miles for a car driving to the south. Teague's observation testimony about wind conditions is never applied to the Brint car near the accident scene.

Specifically, on the foundation laid at the time the question and answer was tendered, Teague's opinion was speculative. Such a speculative opinion was properly excluded. See Fitzgerald v. Fitzgerald, 70 N.M. 11, 369 P.2d 398 (1962); Adamson v. Highland Corporation, 80 N.M. 4, 450 P.2d 442 (Ct. App.1969). Compare Bunton v. Hull, supra.

The only evidence as to Teague's experience as to weather conditions, apart from that included in his "observation" testimony, is that he was observing the ordinary precaution taken in driving with the wind on your side. There is no evidence as to the effects of wind on the Brint car, nor evidence of wind conditions in the vicinity of that car. Nor is there evidence as to Teague's experience with wind conditions similar to the conditions he observed immediately prior to the accident. Compare the testimony as to the plaintiff's observations of the effects of wind in Wood v. Michigan Millers Mutual Fire Insurance Co., 243 N.C. 158, 90 S.E.2d 310 (1955). Teague's "ordinary precaution" testimony is not a basis for an opinion as to the effects of wind on the Brint car because there is no testimony as to the effect of wind either on the Brint car or cars generally. Specifically, there is no testimony concerning "experience." Compare State v. Chavez, supra.

[redacted]. The trial court did not err in refusing the tendered question and answer. After this ruling, defendant then retendered a question to a state policeman concerning signs warning of gusty winds. The objection to this question was properly sustained because the question was too broadly framed. The accident happened 20 miles south of Socorro. The question was directed to signs twenty-five miles in either direction from the accident scene, and then changed to ask about signs from Socorro on the north to Truth or Consequences on the south, a distance of approximately 72 miles. With the question directed to such distances, the trial court could, in its discretion, properly refuse to permit the question absent some showing as to the relevancy of signs at those distances. Compare In re Williams' Will, 71 N.M. 39, 376 P.2d 3 (1962). Here, there is no showing of the relevancy of signs so far removed from the accident scene, and, thus, nothing on which to base a claim that the trial court abused its discretion in refusing to permit the question to be asked.

Next, defendant tendered questions to and answers of the witness Teague. A question was directed to signs "north" of the accident indicating strong winds ahead. The answer was that there "* * * are warning signs all through that area, from there on south. * * *" The next question was directed to Teague's personal knowledge and experience of "* * * strong winds in that area on frequent occasions." The answer was "[o]n frequent occasions there are. * * *"

The first question has the defect of remoteness discussed in connection with the question to the state policeman. The second question, and both answers, referring to "that area," have the defect of speculation discussed in connection with the foundation testimony in the effort to permit Teague to express his opinion. Without further showing, we cannot say the trial court erred in refusing the tender of these questions and answers. This same result, that the tendered testimony was inadmissible because speculative, also applies to the effort of defendant to introduce Teague's opinion on redirect examination.

Directed verdict as to liability.

At the close of all the evidence, the trial court directed a verdict against defendant

on the issue of liability. Defendant asserts: "The trial court was in error because it is not negligence as a matter of law to be in the left-hand lane. It is only negligence as a matter of law to be driving or traveling in the left-hand lane of traffic, not to be present in the left-hand lane of traffic at the time of the accident. * * *" Defendant argues this point on both the presence and absence of evidence and the presumption of due care of a decedent.

In answering defendant's claim, we start with Paddock v. Schuelke, 81 N.M. 759, 473 P.2d 373 (Ct.App.1970). Under that case the burden was on defendant to explain the presence of the Brint car on the wrong side of the road at the instant of the collision.

Defendant asserts there are inferences from the evidence, sufficient to raise a fact issue for the jury, which explain that the Brint car was blown sideways across the road. He relies on the Teague testimony reviewed under the first issue in this opinion, and subsequent testimony of Teague that there was "a terrific wind right in there." Defendant's reliance on this testimony is predicated on his assumption that Teague testified "* * * [o]ne of the dust devils was at the place of the impact at the time of the accident." Teague did not so testify. His reference to strong wind is in an unspecified area up to two miles. His reference to dust devils was "in that area;" his cross-examination makes clear that he "saw the dust fly" at or near the accident scene only when the cars collided. Eliminating defendant's misconception, Teague's testimony does not support an inference that the Brint car was blown across the road. There is no evidence that wind "in the area" existed near the accident scene or was in any way involved in the events resulting in the collision. All we have is speculation which does not support an inference. Bolt v. Davis, 70 N.M. 449, 374 P.2d 648 (1962).

Defendant's argument concerning an absence of evidence is based on § 64-18-8, N.M.S.A.1953 (Repl. Vol. 9, pt. 2). With exceptions not involved here, § 64-18-8, supra, provides that vehicles are to be driven on the right-half of the roadway. Although there is evidence that the Brint car was on the wrong side of the road at the moment of the collision, defendant asserts there is no evidence that Mrs. Brint drove it there. In support of this contention, defendant relies on White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942), and the evidence that the Brint car "swerved severely" across the highway to the point of collision.

In White v. Montoya, supra, the motorcyclist who recovered judgment was apparently on the wrong side of the street when the collision occurred. However, there were inferences from the evidence explaining why the cyclist was across the center line. With this explanation the New Mexico Supreme Court stated it was immaterial that the impact occurred across the center line of the street and "* * * [i]t does not follow that he had been travelling on the left side of the street."

White v. Montoya, supra, does not require a holding that the directed verdict of liability was improper because here there was evidence of driving or traveling on the wrong side of the road. This evidence involves more than the selected portion on which defendant relies—the severe swerve. The evidence is that the Brint car crossed over the centerline into the southbound lane in a normal manner, returned to the northbound lane in the same manner, then crossed again into the southbound lane "* * * at a slight diagonal, slight angle. * * *" The uninterrupted skid marks of the Brint vehicle verify this description; the skid marks start in the southbound lane, return to the northbound lane and then on a curve return to the southbound lane up to the impact point. This is evidence that Mrs. Brint was driving or traveling on the wrong side of the road. This evidence invoked the rule applied in Paddock v. Schuelke, supra—the

burden was on defendant to explain the presence of the Brint car on the wrong side of the road. Since there was no explanation, the directed verdict of liability was proper. Paddock v. Schuelke, supra.

Defendant also argues that there was a presumption of due care on the part of Mrs. Brint. It recognizes that Hartford Fire Insurance Company v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959) states:

> "* * * the presumption operates to protect or shield a person in whose favor it is invoked until credible and substantial evidence which would support a finding is introduced to the contrary, and that it then vanishes as though it had never existed. * * *"

Compare Payne v. Tuozzoli, 80 N.M. 214, 453 P.2d 384 (Ct.App.1969).

Defendant claims the presumption of due care remained in the case, and was sufficient to prevent a directed verdict of liability, because "* * * there is no evidence of a lack of due care on the part of the decedents prior to the time of the accident. * * *" We disagree. The evidence of the path the Brint car traveled—from the wrong side of the road, back to the right side, and then across to the wrong side again—is evidence of lack of due care. With this evidence, the presumption of due care had vanished.

The trial court did not err in directing a verdict on the question of liability.

Directed verdict against the non-driver co-owner who was present.

Although the trial court proceeded properly in directing a verdict of liability against the estate of Mrs. Brint, should a verdict have been directed against the estate of Mr. Brint? Mr. Brint was not the driver. There is no evidence of negligence on his part.

The trial court directed the verdict against the estate of Mr. Brint on the basis that the wife's negligence "* * * was also imputed to her husband who was a co-owner of the motor vehicle and was riding beside her in the car."

The fact that the Brints were husband and wife is not, in itself, a basis for imputing the wife's negligence to the husband. "* * * In order to impute the negligence of one person to another, a relation of master or superior and servant or subordinate must exist between them. * * *" Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966). Here, there is no evidence of a master-servant or principal-agent relationship between the spouses. Compare Holloway v. Evans, 55 N.M. 601, 238 P.2d 457 (1951). "* * * No presumption arises from the mere fact of the marital relationship that the husband or wife is acting as the agent of the other * * *" Rushing v. Polk, 258 N.C. 256, 128 S.E.2d 675 (1962). Compare Trefzer v. Stiles, 56 N.M. 296, 243 P.2d 605 (1952); McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949); § 21-6-6, N.M.S.A.1953 (Repl. Vol. 4).

It was stipulated that "* * * Mr. and Mrs. Brint were owners of the automobile, * * *" The nature of this co-ownership was not identified—we do not know whether it was community property, joint tenancy or tenancy in common. Section 57-3-2, N.M.S.A.1953 (Repl. Vol. 8, pt. 2).

Parker v. McCartney, 216 Or. 283, 338 P.2d 371 (1959) states:

> "* * * [C]o-ownership itself refutes agency. * * * Co-ownership is actually the antithesis of an employer-employe or principal and agent relationship. * * *"

See also Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958). There was no basis for imputing the wife's negligence to the husband on the basis of a joint tenancy or a tenancy in common.

Nor is there any such basis because the co-ownership may have been community property. 1 de Funiak, Principles of Community Property § 181 (1943) reviews principles of community property law and states:

> "* * * [S]he [the wife] could be held responsible for her own wrongful

acts and compensation recovered therefor from her own property or property interests. No property of the husband, either his separate property or his share of the community property could be made liable for the wife's delict."

In 1 de Funiak, supra, § 182, it is stated:

"The doctrine of *respondeat superior* has sometimes been invoked in an effort to fix liability on the husband for the tortious act of the wife, usually in cases where the tortious act results from the wife's driving of the family automobile or the husband's automobile by his authorization. * * * It should be apparent, under the principle of the community property system that each spouse is a separate person in his or her own right, that the wife is acting as an individual in driving the automobile just as much as the husband would be in driving it. He should no more be liable for her tort than she should be for his. * * * Even if the husband has requested or ordered her to proceed to do a certain thing, in the course of which she commits a tortious act, their relation is not one of master and servant. * * *"

The third element in the trial court's ruling is the presence of the husband in the car. Where a non-owner is driving, and the owner is present in the car, a presumption exists that the driver is the agent of the owner. State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967). See Payne v. Tuozzoli, supra. This presumption is based on the theory that the owner, present in the car, has the right to control the driver. See Annot., 50 A.L.R.2d 1281 (1956). No such theory is applicable where one co-owner is driving and the other co-owner is a passenger. It is inapplicable because the co-owners are equal in status and ownership; the co-ownership refutes agency. Parker v. McCartney, supra. Since, as between co-owners, presence is an insufficient basis for a presumption of agency, we do not reach the reality of a "right to control" a car speeding down the highway. See Parker v. McCartney, supra; Sherman v. Korff, supra.

Neither the marital relationship, the co-ownership of the car, nor the presence of a co-owner passenger when another co-owner is driving, considered individually, raises a presumption that the wife driver was an agent of the husband passenger. Nor did these items, considered collectively, raise such a presumption. Compare Valencia v. Strayer, 73 N.M. 252, 387 P.2d 456 (1963). On the grounds stated in the trial court's ruling, the directed verdict against the estate of Mr. Brint was erroneous.

It is asserted, however, that the trial court reached the correct result because of the family purpose doctrine. While that doctrine was argued to the trial court, there was no basis in the evidence for applying this doctrine. The basis of the family purpose doctrine, as applied to automobiles, is that the car involved is maintained by its owner for the general use and convenience of his or her family. Boes v. Howell, 24 N.M. 142, 173 P. 966, L.R.A.1918F, 288 (1918); N.M.U.J.I. 4.9. There is no evidence that the Brint car was so used; all we know is that Mr. and Mrs. Brint, and their daughter, were occupants of the car when the accident occurred.

Two additional arguments are presented in the appeal in support of the directed verdict. One is the joint venture or common purpose theory. Silva v. Waldie, 42 N.M. 514, 82 P.2d 282 (1938); Knudson v. Boren, 261 F.2d 15 (10th Cir. 1958). There is no direct evidence in this case of a joint prosecution or of a common purpose. It is doubtful that a common purpose could be inferred here when we have no more evidence than the presence of the Brints and their daughter in the car. Compare 2 Restatement, Torts § 491, comment (f) (1934) with 2 Restatement, Torts 2d § 491, comment (h) (1965).

The other argument is based on § 57-4-3, N.M.S.A.1953 (Repl. Vol. 8, pt. 2). This statute places in the husband "* * * the management and control of the person-

al property of the community, * * *" Plaintiff would have us hold, under the community property presumption as to the nature of the co-ownership, and under § 57-4-3, supra, that the wife was driving the car as the agent of the manager of the community. It is doubtful that this theory is valid. See 1 de Funiak, supra, § 182.

The applicability of the two theories is not before us for decision. Heretofore we have discussed the matters presented to the trial court for decision. Apart from the matters presented to the trial court, we know plaintiff's theory concerning the Brint car from the amended complaint and a proposed trial amendment to the pleadings. Neither the trial court's ruling, the matters presented to the trial court in argument, nor plaintiff's pleadings presented the question of a joint venture or common purpose apart from the family purpose doctrine or the question of agency based on the husband's management and control of community property. Plaintiff, in asking us to consider these two arguments, seeks to change her theory of the case on appeal. She may not do so. Board of Education, etc. v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App. 1968). See New Mexico Digest, Appeal and Error, ⚷171(1) for numerous decisions on this point.

The directed verdict against the estate of Mr. Brint cannot be sustained either on grounds stated in the trial court's rulings or on grounds presented to the trial court. The directed verdict must be reversed.

There remains for consideration the question of whether a directed verdict should have been granted in favor of the estate of Mr. Brint. Defendant so moved, and this motion was before the trial court when the erroneous verdict was directed. Defendant's motion was that there was no evidence of negligence on the part of Mr. Brint and that there were no inferences in the case sufficient for the jury to impute Mrs. Brint's negligence to Mr. Brint. Defendant's motion should have been granted. There is no evidence that Mr. Brint was negligent. As previously discussed herein, there was no basis for imputing the negligence of Mrs. Brint on any of the theories presented to the trial court.

The judgment against defendant as the executor of the estate of Rebecca Brint is affirmed. The judgment against defendant as the executor of the estate of Bernard Brint is reversed. The cause is remanded with instructions to vacate the present judgment insofar as it applies to Catherine Pavlos, and enter a new judgment against defendant as executor of the estate of Rebecca Brint and in favor of defendant as executor of the estate of Bernard Brint.

It is so ordered.

SPIESS, C. J., concurs.

SUTIN, Judge (dissenting).

I concur that negligence of Mrs. Brint cannot be imputed to Mr. Brint. I dissent on the point that the trial court correctly entered a directed verdict on the question of liability of the estate of Mrs. Brint. The reasons are, (1) that Teague's nonexpert opinions should have been admitted in evidence, and (2) the evidence was sufficient to create an issue of fact of Mrs. Brint's negligence.

Directed verdicts, like summary judgments, must be cautiously and sparingly used. "Where the burden is upon the moving party and he seeks to sustain it by the testimony of witnesses, a directed verdict will seldom be granted." McMullen v. Ursuline Order of Sisters, 56 N.M. 570, 246 P.2d 1052, 1056 (1952).

Was there an issue of fact on the question of Mrs. Brint's liability?

The Brints died. The two witnesses who contributed to the issue were Pavlos and Teague. They both saw the accident.

The most favorable testimony and reasonable inferences in their strongest light which favor Mrs. Brint, including opinions of Mr. Teague which were not admitted, are as follows:

Mrs. Brint was 60 or 61 years of age, a normal person in reasonably good health.

She was driving her husband and retarded child northward toward Socorro. There was a clear view on this straight highway, and each operator could see vehicles travelling on either lane. At the time and place of the accident, the wind was blowing strong and terrific, and created dust devils. Right about the time of impact, there was a dust devil. Mrs. Brint's car came out of one of the cuts in the hills and one of the gusts of wind hit her car. When she was 75 or 50 feet in front of Pavlos' car in the opposite lane, the dust devil caused Mrs. Brint to swerve severely to the left into and across the wrong lane directly in the path of Pavlos. The wind was blowing strong all the way in through there, and anybody could have lost control of a car. It was all like an unavoidable accident.

There is no testimony that Mrs. Brint willfully, wantonly, recklessly, deliberately or inadvertently made a severe swerve from the right-hand side of her lane to the left across the wrong lane directly in front of Pavlos' automobile to cause three deaths in her car.

A "dust devil" appears to be a matter of common knowledge in the southwest. It is a product of hot and dry desert country. The Random House Dictionary of the English Language defines "dust devil" as follows:

> "[A] small whirlwind 10–100 feet in diameter and from several hundred to 1000 feet high, common in dry regions on hot, calm afternoons and made visible by the dust, debris and sand it picks up from the ground."

A "whirlwind" is defined as:

> "1. any of several small masses of air rotating rapidly around a more or less vertical axis and advancing simultaneously over land and sea, as a dust devil, tornado or waterspout.
>
> "2. anything resembling a whirlwind, as in violent action, destructive force, etc."

The term "dust devil" should be construed in its popular sense as referring to any character of a windstorm, distinguished by its concentrated force and violence, so resistless as to make it especially destructive in its narrow pathway; as a small whirlwind or a violent and destructive windstorm.

When Teague was asked what his observation was about the location of the dust devil, he said: "At that time I would say there was one coming in that area *right about the time of the impact.*" [Emphasis added.] When he offered testimony that "* * * one of the gusts hit her car and caused her to swerve * * *", a reasonable inference is that he meant the "dust devil."

The lay opinions of Teague were admissible in evidence. He was a school teacher, impartial, and actuated by a desire to tell the truth. He was not a hired and generally biased expert. The "'ordinary witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced. To allow less may deprive a party of important and valuable evidence that can be got at in no other way.'" Territory v. McNabb, 16 N.M. 625, 636, 120 P. 907, 910 (1911). Without Teague's opinion, the jury would not be able to form an intelligent decision on the fact that her car suddenly swerved to the left. The rule is settled that "'Where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion in order to put the jury in position to make the final decision of the fact' * * *." State v. Cooley, 19 N.M. 91, 109–10, 140 P. 1111, 1117, 52 L.R.A.,N.S., 230 (1914); Skala v. New York Life Ins. Co., 24 N.M. 78, 83, 172 P. 1046 (1918). See § 21–1–1(43) (a), N.M. S.A.1953 (Repl. Vol. 4).

It is wise to remember that the trend in American jurisprudence is toward the greater admissibility of evidence. We must

not "close any reasonable avenues to the truth in the investigation of questions of fact. In doubtful cases the doubt should be resolved in favor of its admissibility." Brown v. General Insurance Company of America, 70 N.M. 46, 53, 54, 369 P.2d 968, 973 (1962); Lopez v. Heesen, 69 N.M. 206, 214, 365 P.2d 448 (1961). Even though a broad discretion is allowed the trial court in passing on the admissibility of evidence, its discretion is not absolute and may not be exercised so as to impede either party in adequately presenting his case. The trial court failed to distinguish between the admissibility of Teague's evidence and the weight or credibility attached thereto. City of Santa Fe v. Gonzales, 80 N.M. 401, 456 P.2d 875 (1969).

When Teague judged that the impact was "like an unavoidable accident * *", he was speaking in layman's language not in legal language. He was not giving an opinion on a matter of law, but on a matter of ultimate fact. By "unavoidable accident," Teague probably meant he did not see Mrs. Brint or Pavlos do anything wrong. See Ferguson v. Hale, 66 N.M. 190, 344 P.2d 703 (1959); Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960). His testimony was not speculation or conjecture in the sense of "guess." "Speculation" is the act of theorizing about a matter as to which evidence is not sufficient for certain knowledge. LeGrand v. U-Drive-It Co., 247 S.W.2d 706, 712 (Mo.1952). Teague saw both the vehicles. He relied on facts such as the dust devil hitting the Brint car, climatic conditions, the movement of the vehicles, the topography. These facts and inferences do not make his opinions inherently improbable, but, if some doubt should exist, the determination is for the jury, not the courts. The jury weighs the evidence and determines the credibility of witnesses, not the courts. Teague did not theorize.

A rule has developed in New Mexico called "The Burden of Explanation." What it means is, that when the undisputed evidence puts the operation of defendant's vehicle in the wrong lane, the defendant has the burden of going forward with the evidence to explain in order to avoid negligence per se.

The rule began with Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952). The court said the defendant had a duty to explain her presence on the wrong side of the road without her negligence. *Frei* relied on Purdie v. Brunswick, 20 Wash.2d 292, 146 P.2d 809 (1944). That case speaks in terms of "travelling" on the wrong side, not severely swerving across the wrong lane. Perhaps, under normal circumstancets, travelling or swerving both constitute statutory or common law negligence per se. Both can be excused if the party on the wrong side goes forward with the evidence to explain why the event occurred.

In Martinez v. Scott, 70 N.M. 354, 374 P.2d 117 (1962), the court said:

> "* * * [T]here is a total absence of proof or permissible inference * * * to excuse or explain the presence of decedent's car in the wrong lane."

In Paddock v. Schuelke, 81 N.M. 759, 473 P.2d 393 (Ct.App.1970), the court said, "* * * there is no explanation." Hartford Fire Insurance Co. v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959), appears to hold that the decedent travelling on the wrong side is negligent as a matter of law when there is "no evidence tending to explain" a violation of statutes. State v. Rice, 58 N.M. 205, 269 P.2d 751 (1954), seems to say that the evidence must show that a party is travelling or driving in the wrong lane without explanation.

What is sufficient to avoid a directed verdict? How much proof or permissible inference is necessary to excuse or explain the presence of Brint's car in the wrong lane? If the evidence or inference appears, if an explanation is made, does this mean Mrs. Brint was not negligent as a matter of law, or does it mean it created an issue of fact for the jury? To me, it should create an issue of fact under all of

the facts, circumstances, inferences and presumptions of the case.

The Supreme Court has held that where a driver is confronted with a sudden emergency, it is a sufficient explanation for leaving his lane of travel. Burkhart v. Corn, 59 N.M. 343, 284 P.2d 226 (1955). Under this circumstance, it follows that the driver had not been travelling on the left side. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942), so that where the driver suddenly turns into the wrong lane, negligence and proximate cause are questions for the trier of the facts in the light of all the facts, circumstances and presumptions presented by the evidence. McDonald v. Linick, 58 N.M. 65, 265 P.2d 676 (1954). See Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961).

From all of the foregoing, I conclude:

1. The lay opinions of Teague were admissible in evidence.

2. Mrs. Brint was not "travelling" on the wrong side of the road. The presumption of due care operates to protect her because there is no credible and substantial evidence which would support a finding to the contrary. We cannot read Mrs. Brint's mind, nor define her control of the car so as to declare her negligent as a matter of law. Negligence and causation are questions of fact for the jury in the light of all the facts, circumstances, inferences and presumptions presented by the evidence.

3. If the "burden of explanation" doctrine applies, there is evidence and reasonable inferences which tend to explain or excuse the presence of her car in the wrong lane. The issue of reasonable care under the circumstances is a question of fact for the jury. The jury had the right to believe or disbelieve Teague and the right to find Mrs. Brint negligent or free of negligence.

The trial court erred in disallowing Teague's opinion testimony, in declaring Mrs. Brint negligent as a matter of law, and in directing a verdict for plaintiffs on the question of liability.

For these reasons, I dissent.

487 P.2d 197

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnnie Morris WATSON, Defendant-Appellant.

No. 613.

Court of Appeals of New Mexico.

July 2, 1971.

Anthony F. Avallone, Las Cruces, for defendant-appellant.

David L. Norvell, Atty. Gen., Richard J. Smith, John A. Darden, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Watson was convicted of burglary and criminal contempt of court. He appeals.

We reverse.

Watson claims, (1) his confession to a detective should have been suppressed as a matter of law, and (2) it was error to hold Watson in criminal contempt of court.

A. *Should Watson's Confession be Suppressed as a Matter of Law?*

After a hearing on Watson's motion to suppress, the trial court ruled that the written confession given to the police was voluntary and not in violation of Watson's constitutional rights, and entered an order that the motion to suppress be denied. The confession was admitted in evidence during the trial.

The ruling of the trial court was in effect a denial of Watson's claim that the confession was not voluntary because it was given after an implied promise of leniency and threat of coercion.

On the morning the confession was given, Watson called the police to report a stolen car. When the car was found, a police officer came to Watson's home and advised him to come to the police station to answer some questions about the car. He and his mother went to the police station around 7:00 a.m. After questioning by an officer concerning the allegedly stolen car, he was taken to a detective. After being advised of his constitutional rights and interrogation by the detective, Watson confessed the burglary.

Watson's claim of an implied promise of leniency and threat of coercion were the following statements by the detective to Watson during interrogations:

> Now, look, John, we can go to trial with one state witness and one defendant or two defendants. * * * Now, look, you can go ahead and talk to me here or [I] book you and I will go home and relax and eat a big dinner and watch some television and it won't bother me in the least.

The first part of the statement could have been understood to mean that if Watson would confess, he would be a state's witness and not a defendant. He would be immune. If he did not confess, he would be charged.

The second part of the statement could have been understood to mean that Watson must confess or the detective would book him on the charge. The detective did not deny the statements made. Watson did not know if he was free to leave the police station at this time, and made his confession.

In State v. Turnbow, 67 N.M. 241, 253–254, 354 P.2d 533, 89 A.L.R.2d 461 (1960), the court said:

> Before a confession may be introduced into evidence as such it must be established to have been voluntarily made and not to have been extracted from an accused through fear, *coercion,* hope of reward *or other improper inducements.* Until a prima facie showing is made as to these matters, a confession cannot be received in evidence because it is untrustworthy. [Emphasis added].

During the hearing on the motion to suppress the confession, the detective was silent on any implied promise of leniency coupled with a threat of coercion. A prima facie case for admission is made where the officers testify that the confession was obtained without threat or coercion or promise of immunity. If the accused confesses because he was induced by the promise that his punishment will not be so severe as it otherwise might be, the confession is not admissible because it was not voluntary. State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938).

Brady v. United States, 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), arose out of a New Mexico indictment for kidnapping. With reference to confession, the Court said:

> To be admissible, a confession must be "free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

See also State v. Nelson, 63 N.M. 428, 321 P.2d 202 (1958), cert. den. 361 U.S. 877, 80 S.Ct. 142, 4 L.Ed.2d 115 (1959), which involved a promise of leniency; State v. Dena, 28 N.M. 479, 214 P. 583 (1923).

This confession is inadmissible even though the Miranda warnings were given, Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), cert. den. 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484 (1967), [involving a New Mexico conviction], whether the confession is true or false, or there is ample evidence aside from the confession to support the conviction. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), [footnote 33 of the Court's opinion].

We hold the confession inadmissible, because Watson's claim stands undisputed. The claimed wordage was asserted by Watson. The state did not question the detective on the wordage, nor on the questions of threat, coercion, inducement, or promise of immunity. The state failed to make a prima facie showing of an absence of coercion or improper inducements. State v. Turnbow, supra.

The trial court erred in failing to suppress the confession. Watson is entitled to a new trial free of his confession. We do not decide what effect this confession has on subsequent statements or admissions of Watson.

B. *Can Criminal Contempt Committed in the Presence of the Trial Court be appealed to the Court of Appeals?*

In an independent, separate trial entitled "State v. Lucas, No. 12200," the trial court held Watson in criminal contempt. The reason was Watson's deliberate and premeditated refusal as a witness to answer two questions ordered by the court, after the court had given him an opportunity to purge himself of contempt, and after Watson conferred with his attorney. The questions were:

> (1) Isn't it true that on March 1, 1970, you saw Merlin David Lucas, the Defendant in this action, seated in this court room, in Johnson's Steak House?
>
> (2) Now, Mr. Watson, I want to give you one more opportunity. You can answer yes or no. Isn't it a fact that on the

first day of March, 1970, you witnessed —you saw the Defendant in this action, Merlin David Lucas, in Johnson's Steak House at approximately 6:30 or before, earlier in the morning?

Watson answered, "I refuse to answer any questions on the grounds it may tend to incriminate me in a subsequent or related trial of larceny which I have not been prosecuted for." The trial judge could not understand how the answer to the question would incriminate him. The district attorney stated that "under no consideration would he file any other charges" against Watson growing out of this burglary. The district judge also indicated this.

Lucas was found not guilty.

The issue is, Can Watson appeal from a conviction of criminal contempt committed in the presence of the court? Supreme Court Rule 5(2) § 21-2-1(5) div. 2, N.M.S.A.1953 (Repl. Vol. 4), provides in part:

> * * * [A]ny person convicted of criminal contempt, except contempt committed in the presence of the court, shall have an appeal from such * * * conviction to the Supreme Court. * * *

This rule is no longer effective.

In 1965, Article VI, Section 2 of the New Mexico Constitution pertaining to Supreme Court's appellate jurisdiction was amended to read as follows:

> Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In *all* other cases, *criminal and civil*, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; *provided that an aggrieved party shall have an absolute right to one appeal.* [Emphasis added].

Section 16-7-14(A), N.M.S.A.1953 (Repl. Vol. 4) provides:

> The appellate jurisdiction of the Supreme Court is coextensive with the state and extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals.

Article VI, Section 29 of the New Mexico Constitution provides in part:

> The court of appeals shall have no original jurisdiction. * * * In all other cases, it shall exercise appellate jurisdiction as may be provided by law.

Section 16-7-8(C), N.M.S.A.1953 (Repl. Vol. 4) provides that the court of appeals has jurisdiction to review on appeal:

> C. criminal actions except those in which a judgment of the district court imposes a sentence of death or life imprisonment.

Section 16-7-10 provides in part:

> * * * Whenever either court determines it has jurisdiction in a case filed in that court and proceeds to decide the matter, that determination of jurisdiction is final. * * *

In both constitutional provisions, the Supreme Court and the court of appeals shall exercise appellate jurisdiction as may be "provided by law." This phrase generally means "provided by statutes." Lawson v. Kanawha County Court, 80 W.Va. 612, 92 S.E. 786 (1917), cited on other grounds in Mann v. City of Artesia, 42 N.M. 224, 76 P.2d 941 (1938).

Under the New Mexico Constitution, as amended, supra, the Supreme Court can no longer deny to an aggrieved party the right to appeal. Watson is an aggrieved party. Supreme Court Rule 5(2), supra, lost its effect in 1965.

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, 528 (1968), said:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.

The Court further held that "convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same."

We, therefore, hold Watson had the right to appeal his conviction for criminal contempt, and this court has jurisdiction.

C. *Was Watson Guilty of Criminal Contempt?*

Article II, Section 15 of the New Mexico Constitution provides in part that "No person shall be compelled to testify against himself in a criminal proceeding, * * *"

Since 1880, § 20-1-10, N.M.S.A.1953 (Repl. Vol. 4) has been in existence. It provides:

> Nothing herein contained shall render any person compellable to answer any question to criminate himself or to subject him to prosecution for any penalty or crime.

The only case in which this statute was mentioned is Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427 (1949). Here, the petitioners sought release by habeas corpus after being adjudged in contempt. Petitioners, during examination in the trial of one Sedillo, were asked questions, the answers to which would place them in the town of Las Cruces, the place of the offense charged in the indictment of Sedillo, at or near the date thereof. All refused to answer the question propounded on the ground it would tend to incriminate them. The district attorney, with the acquiescence and approval of the court, offered each witness immunity from prosecution. When the petitioners refused to answer questions, they were adjudged in contempt.

With reference to the above statute, the court said:

> The effect of the quoted provisions is to give immunity to a witness against testifying to facts having a tendency to criminate or subject him to prosecution for any crime or imposition of a penalty. * * * If the district attorney and the district court were authorized to extend the immunity offered, there can be no question but that complete and absolute immunity is available to the witness.

The Supreme Court held that the district attorney and the district judge had no authority to grant immunity; that the petitioners had a constitutional privilege to remain silent, and the court discharged the petitioners.

By way of dictum, the court delved into the question of privilege on the witness stand in order to avoid a lid of secrecy as to all inquiry. But it made no effort to say just what questions may or may not be asked. The court said:

> The question of privilege is primarily for the trial court but for reexamination by us whenever material so to do on the hearing before us.

However, in International Minerals & Chemical Corp. v. Local 177, United Stone and Allied Products Workers, 74 N.M. 195, 199, 392 P.2d 343 (1964), the court said:

> The general rule is that an accused in a criminal contempt proceeding is presumed innocent until found guilty beyond a reasonable doubt by evidence introduced and a defendant in a criminal contempt proceeding cannot be compelled to testify against himself.
>
> * * * * * *
>
> It should be kept in mind that the authority or power of contempt should be used cautiously and sparingly.

In Territory v. Torres, 16 N.M. 615, 121 P. 27 (1911), the court held that to compel an accused, over his protest to testify before a grand jury to matters tending to incriminate himself, violated his constitutional rights.

Lucas was charged with burglary. Watson's presence at the scene of the burglary, which from the record before us appears to have included larceny could tend to incriminate him and subject him to prosecution for larceny. We, therefore, hold, (1) the district court could not properly require Watson to answer the two questions in the light of self-incrimination claim, and (2) Watson's refusal to answer did not constitute criminal contempt.

The conviction for criminal contempt is reversed and vacated, and Watson discharged.

The conviction and sentence of Watson for burglary is reversed, and Watson is

granted a new trial on the charge of burglary.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

487 P.2d 202

Joe I. MONTOYA, Plaintiff-Appellant,

v.

ZIA COMPANY, employer, and United States Fidelity and Guaranty Company, insurer, Defendants-Appellees.

No. 658.

Court of Appeals of New Mexico.

July 2, 1971.

James A. Scarborough, Espanola, for plaintiff-appellant.

Frank Andrews, Owen Lopez, Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal from a summary judgment for defendants in a workmen's compensation case. Montoya's motion for summary judgment was denied.

We affirm.

The issues raised on appeal are: (1) Did the defendants fail to pay workmen's compensation installments within the provisions of § 59–10–13.5, N.M.S.A.1953 (Repl. Vol. 9, pt. 1); and (2) Was Montoya entitled to summary judgment as a matter of law?

In his complaint filed May 12, 1970, Montoya alleged "That the Defendant has failed *and* refused to pay *an* installment of compensation to which the Plaintiff workman was and is entitled." [Emphasis added]. The defendants denied this allegation, and, by way of further answer thereto, stated that the plaintiff had been paid compensation to date (i. e., May 26, 1970), and that there was no intention on the part of the defendant insurer to stop making the compensation payments at that time. The first defense was that the action was premature.

The record affirmatively shows that the payments were made. So far as the theory of the complaint is concerned, summary judgment was properly granted.

On appeal, Montoya left the theory of the complaint and relied solely on failure to make timely payments during the months of March, April, and May, 1970. The record does show a failure to pay installments within the required sixteen day interval on two occasions—one in April and one in May. See § 59–10–13.5, supra. The record also shows that these two installments, although paid late, were nevertheless paid. Thus, defendants, on two occasions, were in technical default. While such a default is not condoned, see Moody v. Hastings, 72 N.M. 132, 381 P.2d 207 (1963), the workmen's compensation claim based on this default is moot because liability for those installments was extinguished by the payment. Cromer v. J. W. Jones Construction Company, 79 N.M. 179, 441 P.2d 219 (Ct.App.1968). There being no contention that medical benefits are involved, the only other aspect of the claim is that of attorney fees. As to these, the record affirmatively shows defendants paid the installment payments in issue voluntarily and that the check for the second delinquent installment (the one in May) was issued the day before the complaint was filed. Thus, there is no issue as to attorney fees in connection with the two technically delinquent installments. See § 59–10–25(D), N.M.S.A.1953 (Repl.Vol. 9, pt. 1).

As far as we know, defendants are still making installment payments and making them timely. At any time defendants may be in default under our Workmen's Compensation statute, plaintiff is free to file a claim based on that default. The issue in this appeal, at most, involved compensation installments during March, April and a portion of May, 1970.

Montoya's motion for summary judgment was properly denied.

Defendants' answer brief raised an additional defense which they assert was considered by the trial court in the hearing for summary judgment—the failure of Montoya to appear for his deposition. See § 21–1–1(37) (d), N.M.S.A.1953 (Repl.Vol. 4), Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963). In his reply brief, Montoya did not mention this defense. This court has the right to take defendants' statements as true. 5 C.J.S. Appeal and Error § 1345. Inasmuch as we have decided this case on other grounds, we do not find it necessary to determine this interesting question.

Plaintiff sought a summary judgment against defendants on three grounds —failure to pay an installment of compensation, lack of timeliness in the payments, and on the basis that he was permanently and totally disabled. The first two of these grounds have been disposed of by our previous discussion.

The claim of total and permanent disability is based on plaintiff's affidavit and a medical report. But the extent of the disability is an issue of fact to be determined at a trial if defendants discontinue their payment of maximum compensation installments. See George v. Miller & Smith, 54 N.M. 210, 219 P.2d 285 (1950); Goolsby v. Pucci Distributing Company, 80 N.M. 59, 451 P.2d 308 (Ct.App.1969).

Defendants' summary judgment is affirmed. The denial of Montoya's summary judgment is affirmed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

487 P.2d 478

Lloyd SCOTT and J. K. Scott, individually and Lloyd Scott, d/b/a Scott Brothers Drilling Company, Plaintiffs-Appellants and Cross-Appellees,

v.

McWOOD CORPORATION, Defendant-Appellee and Cross-Appellant.

No. 9186.

Supreme Court of New Mexico.

June 21, 1971.

Rehearing Denied Aug. 3, 1971.

Paul A. Phillips, Rodey, Dickason, Sloan, Akin & Robb, James C. Ritchie, Albuquerque, for appellants.

White & Caton, Farmington, Keleher & McLeod, William K. Stratvert, Ranne B. Miller, Albuquerque, for appellee.

OPINION

COMPTON, Chief Justice.

This is the second time this case has been before this court. Scott v. Murphy Corporation, 79 N.M. 697, 448 P.2d 803. The first trial resulted in a jury verdict for the appellee. Upon appeal, this court reversed the judgment due to an erroneous instruction and remanded the cause for a new trial.

The action was brought in San Juan County to recover damages for personal injury and property damage sustained as a result of an oil field fire. The jury returned a verdict for appellants in the amount of $128,000.00, however, a judgment notwithstanding the verdict was entered. The plaintiffs have appealed, and the defendant has cross-appealed.

The main question is whether appellants, J. K. Scott and Scott Brothers Drilling Company, were contributorily negligent as a matter of law. In granting judgment notwithstanding the verdict, the trial court held:

> "* * * that the employees of Scott Brothers Drilling Company, while acting in the course and scope of their employment, were contributorily negligent as a matter of law and their contributory negligence is imputed to J. K. Scott, individually, as a matter of law and that J. K. Scott, individually, was contributorily negligent as a matter of law; therefore all plaintiffs are barred from recovery."

In testing the propriety of a judgment notwithstanding the verdict, the evidence favorable to the successful party, together with all inferences as may be reasonably drawn therefrom, will be accepted as true and all evidence to the contrary will be disregarded. Zanolini v. Ferguson-Steere Motor Company, 58 N.M. 96, 265 P.2d 983.

We stated in Mozert v. Noeding, 76 N. M. 396, 415 P.2d 364, that:

> "Ordinarily, the question of contributory negligence is a fact question to be determined by the jury. * * * The question of contributory negligence is properly taken from the jury only when reasonable minds cannot differ on the question and readily reach the conclusion that plaintiff's conduct falls below the standard to which he should have conformed for his own protection, and that this negligent conduct on his part proximately contributed with the negligence of the defendant in causing the injury. * * *"

See also Wood v. Southwestern Public Service Company, 80 N.M. 164, 452 P.2d 692 (Ct.App.).

In May, 1963, J. K. Scott and Lloyd W. Scott, d/b/a Scott Brothers Drilling Company, entered into a contract to drill an oil well for Murphy Corporation to be located in a boxed canyon approximately 100 feet wide. On June 3, 1963, following the taking of a core sample, the well was to be circulated with crude oil in order to remove cuttings and waste materials from the drill hole. As a part of this process, employees of Scott Brothers had dug a sump approximately 8 feet from the drill hole and placed a metal tank into it to hold the oil. The sump was located close to the drilling rig that was being operated by Scott Brothers. Shortly before the fire broke out, a tank truck, owned by appellee, arrived loaded with approximately 100 barrels of crude oil to be used as the circulation medium. It was parked approximately 8 feet from the drill hole on the opposite side from the sump tank. J. K. Scott was

in charge of the drilling crews and immediately under him were Scott Brothers' employees Hahn and Johnston, the actual drillers.

It was discovered that the appellee's driver, Warren, did not have enough hose on the truck to reach from the truck's location to the sump tank. A discussion was had between Hahn, Johnston and Warren and it was decided to pump the oil through an open ditch to the sump. Warren opened the vent hatches on the tanker truck and began pumping oil by use of the pump on the truck operated by the truck's engine. The truck was not grounded at any time by Warren. After approximately 5 barrels were in the sump, Hahn began operating the suction pump run by the motor on the drilling rig, to draw oil into the well head. Shortly after this process had begun, the well head "belched" indicating that circulation had been obtained and Hahn cut down the pump to let the oil settle in the hole. When the hole "belched" again, the pump was stopped. Suddenly, there was a whoosh and a flash and the whole area was afire. J. K. Scott had arrived on the scene only 2 or 3 minutes before the fire and was severely burned. The evidence indicates that the fire may have occurred from static electricity which ignited the highly volatile crude oil vapors and fumes which had accumulated in the narrow canyon surrounding the well location during the circulation process; nevertheless, the evidence was in conflict as to where the fire started and what started it.

Appellants' initial contention is that any causal connection between Scott's and/or Scott Brothers' conduct and the resulting injury and damages was a jury question. We must agree; whether the contributory negligence of the appellants contributed as a proximate cause of the injury complained of was an issue of fact. Compare White v. Montoya, 46 N.M. 241, 126 P.2d 471; Maryland Casualty Company v. Jolly, 67 N.M. 101, 352 P.2d 1013.

All parties agree that the ignition of crude oil fumes caused the fire and the resulting injury. There is no evidence which as a matter of law would lead to the conclusion that fumes allowed to escape by appellants or their employees were the proximate cause of the explosion. Actually vapors were being emitted from sources under control of the appellee's employee, the truck, and from sources under control of appellants' employees, the open ditch, the sump and the well head. Thus, there was an issue of fact to be determined. This case is similar to Adamson v. Highland Corporation, 80 N.M. 4, 450 P.2d 442 (Ct. App.), where there were vapors from more than one source.

The cross-appeal requires consideration. Appellee first contends that the trial court erred in granting a new trial solely on the issue of contributory negligence. There is no basis for this contention. The mandate did not require a retrial of appellee's negligence. Appellee's primary negligence had been determined by properly submitted interrogatories. Where a general verdict is set aside due to some legal error there is no need to relitigate other issues already decided. Pritchard v. Liggett & Myers Tobacco Company, 370 F.2d 95 (3d Cir.); Green v. American Tobacco Co., 325 F.2d 673 (5th Cir.), cert. denied, 377 U.S. 943, 84 S.Ct. 1349, 12 L. Ed.2d 306; and see 2B Barron & Holtzoff, Federal Practice & Procedure, § 1058.

Appellee next contends that the trial court erred in instructing the jury that it was its duty to determine whether employees of Scott Brothers were acting within the scope of their employment when they committed negligence, if they did, which proximately caused the fire. Stated otherwise, appellee asserts that the court should have instructed the jury that Scott Brothers' employees, as a matter of law, were acting within the scope of their employment at the time of the accident. This contention is without merit. There were many acts of the employees which may or may not have determined negligence. Whether any of those acts were committed within the scope of employment was prop-

erly a jury question. The basic rule is that the question of scope of employment is within the province of the jury. 57 C.J.S. Master and Servant § 537b(1).

Appellee next contends that the trial court erred in allowing into evidence the testimony of the witness, C. M. Hardy, concerning an experiment conducted by him prior to the trial. It is claimed that the experiment was not conducted under the same or similar circumstances that existed at the time of the accident. There is no substantial basis for this contention. Hardy's experiment dealt with whether sparks from a generator of the type that had been mounted on appellants' rig could have ignited "combustible materials." Appellee had attempted to show that a spark from appellants' rig had ignited the oil fumes. Hardy's testimony was offered in rebuttal. The admission of evidence of an experiment is a matter within the sound discretion of the trial court and the ruling of the court should not be disturbed unless there is an abuse of discretion. Hodgkins v. Christopher, 58 N.M. 637, 274 P.2d 153. No abuse of discretion is shown. See La France v. New York, New Haven & Hartford R. R. Co., 292 F.2d 649 (2d Cir.) and 76 A.L.R.2d 402. Compare Thomas v. Central Greyhound Lines, Inc., 6 A.D.2d 649, 180 N.Y.S.2d 461.

Appellee claims that the trial court erred in failing to rule on its motion for a new trial on the basis that it was mandatorily required by § 21-1-1(50) (c) (1) N. M.S.A.1953. This claim is without merit. Since the trial court failed to rule on the motion within thirty days, it was denied as a matter of law. See Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399.

The judgment should be reversed. The cause is remanded to the trial court with directions to reinstate the judgment on the verdict of the jury.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

487 P.2d 481

Frances HENSLEY (Formerly Frances Head Zarges), Plaintiff-Appellant,

v.

Henry W. ZARGES, Defendant-Appellee.

No. 9216.

Supreme Court of New Mexico.

July 26, 1971.

Adams & Foley, Albuquerque, for appellant.

Wright & Kastler, Raton, for appellee.

OPINION

OMAN, Justice.

The parties to this cause were formerly husband and wife, and are the same parties named in Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968). The case now before us was filed pursuant to § 22-7-2, N.M.S.A.1953, for the purpose of having the property rights of the parties determined. The trial court affirmed, and adopted as the court's own division and distribution of the community property, an oral agreement for division of their property entered into between the parties prior to the filing by plaintiff of a divorce action in April 1965. Plaintiff has appealed. We affirm.

Plaintiff relies upon three points for reversal. The first is:

"The verbal agreement between the parties for division of their property entered into prior to their divorce was invalid, because:

"(a) In making such agreement, plaintiff did not have competent and independent legal advice;

"(b) Defendant failed to sustain the burden of showing that the plaintiff received adequate consideration;

"(c) The defendant failed to sustain the burden of showing that prior to the divorce of April 27, 1965, he made full disclosure to the plaintiff as to her rights and the value and extent of the community property."

The pertinent facts found by the trial court and which are not challenged are:

(1) Plaintiff was advised by the attorney representing her in the divorce action that the parties must make full disclosure to each other concerning all their property;

(2) Prior to the institution of the divorce action her attorney made inquiry concerning the agreement to divide the property, but she refused to disclose the terms thereof;

(3) She did tell her attorney she was satisfied with the agreement and that the property had already been divided in accordance therewith; and

(4) She testified in the divorce proceedings that she and her husband had agreed on a division of her property, the agreement was satisfactory to her, and the property had been divided accordingly.

The pertinent facts found by the trial court which are challenged are:

(1) The parties, prior to the filing of the divorce action, did make full and complete disclosure each to the other of all their property;

(2) The agreement entered into between them as to the division of their property was fair and equitable;

(3) As a part of the agreement defendant assumed and agreed to pay a community indebtedness in the amount of $8,500.00;

(4) The agreement between the parties was free of fraud or undue influence on the part of defendant;

(5) Under the agreement each party received property of approximately equal val-

ue, considering the community indebtedness assumed by defendant;

(6) There exists no additional property which the court should divide or distribute; and

(7) The court "* * * now approves, confirms and ratifies the agreement previously made and entered into by and between the parties concerning a division and distribution of their community property and adopts the same as the Court's own division and distribution."

It would serve no useful purpose to detail the lengthy testimony and other evidence which substantially supports the foregoing findings, insofar as they are findings of fact. We are convinced from a reading of the entire record that they are so supported. The other findings, which are in effect conclusions, are supported by the findings of fact and the record.

Plaintiff also attacks two other findings concerning consultations with her attorney. She claims these two findings are immaterial to the issues, that one of them is not supported by substantial evidence, and that the other suggests the attorney was acting solely as her attorney, whereas the fact is the attorney was employed and consulted by both plaintiff and defendant. These findings as made are supported by substantial evidence. Regardless of the inference plaintiff draws from the one finding, neither this inference nor the findings themselves are of any significance in a determination of the issues presented on this appeal. The facts are that the attorney was employed by and advised with both of them at times, but he did represent plaintiff in the divorce action. The extent of his advice concerning the community property is as shown by the above findings of the trial court.

As to the question of plaintiff having competent and independent legal advice, she apparently takes the position that because the attorney was employed by both her and defendant and did advise to some extent with both of them, she is thereby automatically and without question entitled to have the agreement vacated. She relies upon Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919); Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944); Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968). The principles announced in those cases fail to support plaintiff's contention or her position under the facts of this case. In order to avoid any misunderstanding of our reference to the opinion in Primus v. Clark, supra, in which only the author thereof and one other Justice concurred, we do not intend to suggest that we either agree or disagree with the opinion in that case. We intend only an answer to plaintiff's reliance thereon.

In addition to the foregoing recited facts, the evidence is that plaintiff was aware of all the property, and was better informed than defendant as to the value of most of the personal property which she received. She knew what had been paid for the real estate received by defendant, and was familiar with and knew the approximate costs of the improvements they had placed thereon. The parties made their home for some time on this property after making the improvements. After the settlement had been effected and the property divided thereunder, plaintiff remarked that she was happy about it, and had gotten "the best of the deal."

She also asserts she was threatened by and afraid of her husband. Her testimony as to the claimed threat and fear was at best equivocal and confusing, and, though not directly rebutted by the testimony of defendant, his answers to the questions asked of him clearly implied a rebuttal thereof. In any event, her testimony was not free from reasonable doubts. Under these circumstances the trial court was not bound to accept her testimony as true. Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct. App.1970).

The result reached by the trial court was not dependent upon an affirmance or ratification of the agreement between the parties. The entire matter was litigated, and the trial court, both by a finding as above

shown and by a conclusion, adopted the agreement of division as the court's division of the property. As already stated, the fairness of this division is supported by substantial evidence and other findings of the court. No direct attack is made upon the finding or conclusion of the court concerning the adoption as its own of the division and distribution theretofore made by the parties. In the statement of proceedings a parenthetical reference is made to the finding as being attacked under Point 1, but no reference is made thereto in the argument under this point. Thus, we assume plaintiff has abandoned her attack on this finding. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct.App.1970).

Plaintiff also urges error on the part of the trial court in refusing a number of requested findings which are inconsistent with the findings made by the trial court. Since the trial court's findings are supported by substantial evidence, the denial of plaintiff's contrary findings did not constitute error. Powers v. Campbell, 79 N.M. 302, 442 P.2d 792 (1968); Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967).

By her second point, plaintiff urges the trial court erred in admitting into evidence an oral statement by the court in the divorce proceedings that the agreement of the parties as to the distribution of their property was ratified and approved, and further erred in making a finding to this effect.

We agree this evidence and the finding were immaterial to any issue in the case now before us. The trial court in the divorce proceeding did not pass upon the property rights of the parties. Zarges v. Zarges, supra. However, in our opinion the admission of this evidence and the making of this finding did not affect the result, and, therefore, plaintiff was not prejudiced. Prude v. Lewis, 78 N.M. 256, 430 P.2d 753 (1967); Wright v. Brem, 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

As her third point, plaintiff urges error on the part of the trial court in finding defendant contributed $8,250.00 from his separate property to the community property acquisitions. Although the evidence in support of this finding is somewhat confusing, we believe it to be substantial. However, we need not predicate our disposition of this issue upon the question of the substantiality of the evidence to support the finding. The findings and conclusions to the effect that the parties received property of approximately equal value, the distribution of their property between them was fair and equitable, and this distribution was also the court's distribution, are supported by substantial evidence, are consistent with the applicable law, and are in no way dependent upon the finding that defendant contributed $8,250.00 to the property. Therefore, a correction of this finding, even if it be in error, would not change the result. Consequently, it is not our function to correct it. Prude v. Lewis, supra; Wright v. Brem, supra.

The judgment should be affirmed.

It is so ordered.

COMPTON C. J., and McMANUS, J., concur.

487 P.2d 484

STATE of New Mexico, Plaintiff-Appellee,

v.

Melvin BETSELLIE, Defendant-Appellant.

No. 9200.

Supreme Court of New Mexico.

July 26, 1971.

[redacted]

[redacted]

David L. Norvell, Atty. Gen., Ray H. Shollenbarger, Jr., Sp. Asst. Atty. Gen., Albuquerque, for appellee.

Thomas J. Hynes, Farmington, for appellant.

OPINION

OMAN, Justice.

Defendant was convicted of first degree murder and sentenced to life imprisonment. He has appealed. We affirm.

The first issue to be decided arises upon a motion for remand of the case to the trial court for the purpose of passing on a motion for a new trial. Subsequent to the perfection of his appeal, defendant, through the diligence of his court-appointed attorney, secured affidavits of recantation from the two witnesses who had placed decedent and defendant together at or near the death scene and had testified to matters otherwise linking defendant with the killing of decedent.

One of these witnesses, Nora, who was 18 years of age, identified defendant in open court. She testified positively on more than one occasion, during both the direct and cross-examination of her, that she saw defendant push decedent off a cliff into some rocks. She also testified defendant tried to push her, Nora, over the cliff; she was afraid of defendant, but not while in the courtroom; and she was telling the truth as to what happened and what she saw.

It is apparent from a reading of her testimony and her affidavit, that the language of the affidavit, at least in part, is not her language, but that of someone else. By this observation we do not mean to suggest that she did not sign the affidavit, or that she may not have in effect said what is contained in the affidavit. However, the language used is not consistent with her manner and ability of expression, and there is doubt as to her ability to understand some of this language. In the affidavit she states in part:

> "I testified to having seen the defendant push the decedent from the cliff after having been told by various members of the San Juan County Sheriff's Department that they would put me in jail if I did not so testify.
>
> "During the course of the trial I attempted to tell the truth and relate to the Court the true events of the evening in question. The Assistant District Attorney requested a recess and during the recess threatened me with jail unless I testified that I saw Melvin Bitsellie push Arlene Etcitty from the cliff. Upon returning to the Court I testified as I had been instructed.
>
> "I wish now to tell the truth about the events of the evening in question and to make it clear that at no time did I see Melvin Bitsellie or anyone else push Arlene Etcitty from a cliff.
>
> "I make this statement of my own free will without duress or threat of any kind and do so with a desire to see that justice is done."

Her affidavit is not only inconsistent with her sworn testimony in court but is positively refuted by the record in at least one important part. The Assistant District Attorney did not request a recess, and no recess was requested by anyone or taken by the court during the time she was testifying. The record does support her claim of attempt "* * * to tell the truth about the events of the evening in question * * *" and it also clearly suggests to us that this is what she did. In any event, the jury heard her testimony and observed her demeanor while testifying, and they

apparently accepted it as being substantially, if not entirely, consistent with the truth.

The other of the two witnesses who gave an affidavit is Anita, who was also 18 years of age. Her testimony supported that of Nora as to their presence and the presence of defendant, decedent, and another young woman near the death scene, the dragging or forcing of decedent by defendant after they left defendant's automobile, the absence of Nora, defendant, and decedent from the automobile for some time, the return to the automobile of Nora quite some time before the return of defendant, and the failure of decedent to return to the automobile.

On cross-examination by defendant's attorney, she first repeated her testimony as to the events leading to her presence on the "bluffs," the death scene. Upon being reminded by defense counsel that she had told him she "* * * had nothing to do with that night," she promptly denied she was present, denied having seen defendant that day, and stated she had made "the story up."

On re-direct examination she was asked why she was changing her story, and her answer was: "Because Nora told me to say that."

Upon the conclusion of her testimony the court recessed for noon. After the noon recess the court announced that during the recess counsel had talked to Anita, and that she had then approached the court and requested an opportunity to tell her story. The court then asked her to tell the jury "* * * what, if anything, you know about what happened on December 27, 1969, all during that day and evening."

She thereupon told the same story she had originally told on direct examination. The court asked her if this was the truth, and she replied in the affirmative. She was asked why she had not told the truth earlier and her reply was: "Because I was scared of Melvin Betsellie." When asked if there was a reason for her being scared of him, she answered: "He said he might beat up my face." This threat was made by defendant right after the preliminary hearing at which she had testified. She also said she was still afraid of defendant.

In her affidavit she stated her testimony "* * * to the effect that [she] witnessed Melvin Betsellie push Iliene Atcitty off of a hill on December 27, 1969," was false, and that she "* * * did not witness any of the acts which [she] testified to." She gave as her reason for so testifying that she "* * * was threatened by the Sheriff's Department of San Juan County with one year in prison if [she] did not testify against Melvin Betsellie." She also stated she "* * * did not see nor talk to Melvin Betsellie * * *" on December 27, 1969.

Defendant relies upon State v. Fuentes, 66 N.M. 52, 342 P.2d 1080 (1959) as supporting his motion for remand of the case to the trial court.

We very much agree that a defendant should be granted a new trial if perjury of a material witness against him is later discovered. However, we also realize and agree courts must act with great reluctance and with special care and caution before accepting the truth of a claim of perjury, and should properly require the evidence to affirmatively establish the perjury in such clear and convincing manner as to leave no room for reasonable doubt that perjury was committed. We are not satisfied as to the truth of the affidavits here presented. The circumstances are such as to impel us to a belief in the truth of the testimony given by the witnesses at trial that defendant was at the death scene and did behave toward decedent in the manner described by the witnesses. Under the circumstances we are of the opinion we cannot properly remand the case to the trial court for hearing on a motion for a new trial.

Defendant's first point relied upon for reversal of his conviction is his claim that the conviction is not supported by substantial evidence. This claim is predicated primarily upon the fact that no witness saw defendant push or otherwise cause

decedent to fall from the cliff at the base of which her body was found, or saw defendant and decedent in the immediate vicinity of the top of that cliff. However, the following are some of the facts which are supported by substantial evidence: (1) the body was found about 12 or 15 feet downhill and away from the base of a 120 foot vertical cliff; (2) it is about 160 feet up a gentle incline from the top of this cliff to another vertical cliff 16 feet in height; (3) at the base of this smaller cliff are some large rocks; (4) defendant was seen to push decedent from the top of this smaller cliff, and she landed on her head in these rocks; (5) she sustained a fractured neck and skull which were compatible with this fall, and from which injuries she would have died; (6) at this time the witness left the scene and returned to defendant's automobile where Anita and the other young woman were waiting; (7) decedent was not then dead; (8) defendant at that time was at the top of the cliff from which he had pushed decedent; (9) the investigating officers found a set of tracks leading from the top of the cliff to the place where decedent was lying, and two sets of tracks in that area; (10) defendant returned alone to the automobile some 30 or 40 minutes later; (11) when asked about decedent, defendant stated she had decided to walk to town; (12) decedent was wearing trousers and the pockets therein were turned inside out when her body was found; (13) in addition to the fractured neck and skull, decedent had also sustained fractures of both ankles and left femur, and massive fractures of the chest; (14) the fractures of her ankles, femur and chest were compatible with a fall of 120 feet; (15) she was still alive when she fell from the 120 foot cliff; (16) decedent's body had landed a few feet away from the base of the 120 foot vertical cliff, which was inconsistent with an accidental fall over the edge of this cliff.

Defendant suggests that under these circumstances, it is mere surmise or conjecture to find him responsible for the death. We disagree. In passing on the question of whether there was substantial evidence to support a verdict of conviction, we view the evidence in the light most favorable to the State, resolving all conflicts therein and indulging all reasonable inferences therefrom in favor of the verdict. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968); State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969).

Defendant next contends his conviction was based on circumstantial evidence which did not point unerringly to his guilt and which did not exclude every reasonable hypothesis other than his guilt. He relies upon the case of State v. Ford, 80 N.M. 649, 459 P.2d 353 (Ct.App.1969).

Defendant must fail in this contention. The State did not rely upon circumstances alone. As shown above, there were witnesses to his being with decedent in the close vicinity of the place where she met her death, and an eye-witness to his pushing her off the first cliff. Because the medical evidence was to the effect that she was still alive when she landed at the foot of the second cliff, and no one saw defendant shove or throw her off this cliff, defendant contends this makes the evidence of the death entirely circumstantial, and that other reasonable hypotheses as to how her body reached that point are: (1) "* * * the victim, unharmed after she was allegedly pushed over the first incline by the defendant, arose and wandered off of the second cliff;" or (2) "* * * a third and unknown party happened upon the victim and that that party was responsible for pushing the victim off of the second cliff."

As already stated, the evidence clearly is not entirely circumstantial. The following evidence is such as to make the first suggested hypothesis unreasonable: (1) defendant became angered with decedent and was dragging her before they reached the top of the first cliff; (2) decedent was pushed or thrown by defendant from this first cliff; (3) although she did not die immediately of the injuries sustained by

her in this fall, she did sustain injuries compatible with this fall which would, and perhaps did, cause her death; (4) the distance her body landed from the foot of the second cliff was inconsistent with her wandering and falling off that cliff; (5) the pockets of her trousers were turned inside out; (6) a set of tracks led from the area on top of the first cliff from which defendant pushed decedent to the area where she landed in the rocks; (7) defendant did not return to his vehicle for 30 or 40 minutes; (8) when he did return, decedent was not with him; and (9) when asked about decedent, defendant stated she had decided to walk to town.

The second suggested hypothesis is at least equally unsupported by reason. This hypothesis is dependent upon a chance discovery of decedent in her injured condition in a somewhat remote and isolated area by some unknown person, who, for no known reason, assisted her to the top of the second cliff solely for the purpose of pushing her to her death.

Defendant finally urges that the trial court "* * * in examining Anita * * * subsequent to her original testimony, adopted her as the court's witness and unduly prejudiced the jury against defendant." He relies upon the following language from State v. Sedillo, 76 N.M. 273, 414 P.2d 500 (1966):

> "A trial judge must at all times be judicious. He must not, by undue participation in the examination of witnesses, or by other conduct, convey to the jury that he favors one side or the other, and must not convey to the jury what he thinks the verdict should be. Because of his power and influence, and because of the tendency of the jury to place great emphasis upon what he says and does, the trial judge must be most careful not to say or do anything which would add to a party's burdens of proof, or detract from the presumptions to which a person charged with crime is entitled."

We reaffirm this statement as to the attitude and course of conduct a trial court must adopt and follow, but we also reaffirm the following, which is also contained in our opinion in the Sedillo case:

> "A trial judge is more than a mere umpire or moderator, and he may properly propound questions to the witnesses, so long as he keeps the same within the bounds demanded of him by his position as trial judge, and so long as he displays no bias against or favor for either of the litigants. * * *"

Here the parties stipulated that Anita could be called to the witness stand and questioned. No objection was made to any of the court's questions, which were as above indicated. In any event, we are unable to find anything done or said by the court in questioning the witness which indicates any impropriety on the part of the trial court or which displayed any bias against defendant or favor for the State or its position.

The judgment and sentence should be affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

487 P.2d 489

Robert J. BUDAGHER, Plaintiff-Appellee.

v.

The NEW MEXICO STATE POLICE BOARD et al., Defendants-Appellants.

No. 9196.

Supreme Court of New Mexico.

July 26, 1971.

David L. Norvell, Atty. Gen., Joyce Blalock, Sp. Asst. Atty. Gen., Santa Fe, for defendants-appellants.

Matteucci, Franchini, Calkins & Michael, Albuquerque, for plaintiff-appellee.

OPINION

COMPTON, Chief Justice.

This is an appeal by the New Mexico State Police Board from an order reinstating appellee as a senior patrolman in the State Police Department.

Appellee was commissioned as an officer of the New Mexico State Police in 1949. On January 26, 1960, he sustained injuries in an automobile accident while on duty. Injuries from that accident forced appellee to use all his available sick leave.

On July 5, 1960, after having used all his available sick leave, appellee requested, in writing, a leave of absence until such time as his physical condition would permit him to perform the duties of a highway patrolman.

Answering appellee's request for leave of absence, Chief A. P. Winston, Jr., of the New Mexico State Police, then stated:

> "You are advised, therefore, that effective July 1st you have exhausted your accumulative sick leave and your employment has been terminated from this department."

On April 9, 1968, appellee applied for reinstatement which was refused. The cause was then tried to the court and from the order reinstating appellee, the Board has appealed.

We think the trial court misconstrued the force of the pertinent statute and the regulatory rule promulgated by the State Police Board. Section 7 of the rule filed with the Librarian of the New Mexico Supreme Court on November 30, 1959, pursuant to § 39–2–21, N.M.S.A.1953, referring to leaves of absence, states:

> "No member of the department will be granted a leave with or without pay. Member must re-qualify after any leave from the department before re-employment."

It is clear that under no circumstances could such leave of absence from the police department be granted.

We therefore conclude that appellee's request for leave of absence which could not be authorized and his physical inability to perform the functions of his job as a senior patrolman, constituted a voluntary resignation, not a termination governed by § 39–2–11, N.M.S.A.1953, as found by the trial court.

This court has considered all points raised by appellee and they are not persuasive. The order appealed from should be reversed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

487 P.2d 491

FORREST CURRELL LUMBER COMPANY, Inc., Plaintiff-Appellee,

v.

Sam THOMAS and Beatrice B. Thomas, Defendants-Appellees and Cross-Appellants,

v.

STANDARD LIFE AND ACCIDENT INSURANCE COMPANY, Intervenor-Appellant and Cross-Appellee.

No. 9203.

Supreme Court of New Mexico.

July 26, 1971.

Eugene E. Brockman, Tucumcari, for appellant.

Emmett C. Hart, Tucumcari, for Sam and Beatrice Thomas.

OPINION

McMANUS, Justice.

The parties to this action were involved in a previous appeal, Forrest Currell Lumber Company v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970), in which this court upheld a judgment in favor of the lumber company and intervenor, Standard Life and Accident Insurance Company in the amount of $129,952.05. The cause was remanded to the Quay County District Court ordering said court to enter judgment in the sum of $13,000 on the Thomas' counterclaim against Standard because of certain illegal acts of Standard.

After the mandate was received by the Quay County court, a motion was filed by the defendants Thomas, praying that an attorney's charging lien on behalf of Emmett C. Hart, Esq., in the amount of $6,500, be paid out of the $13,000 recovery and declared as a superior lien to any claim of Standard. The trial court declared that an attorney's charging lien be fixed in favor of attorney Hart against Standard, not subject to a set-off by Standard on its judgment against the defendants Thomas. From this judgment Standard appeals.

The parties agree that attorney Hart was employed by the Thomases on a contingency arrangement which provided for 50% of any recovery, as attorney fees, if the matter was determined in the Supreme Court. However, Standard claims error in the trial court's findings of fact Nos. 4 and

5 which granted attorney Hart a charging lien and in holding that such lien was superior to the rights of Standard who claimed the entire $13,000 as a set-off on their judgment against the Thomases.

■ To be determined is whether this jurisdiction recognizes such an equitable concept as an attorney's charging lien; and, if so, whether such lien takes priority over the set-off under the facts and circumstances of this case. A basic difference between the attorney's charging lien and the often-encountered attorney's retaining lien, is that in the former, possession of the object against which the lien is assessed is not essential. See Prichard v. Fulmer, 22 N.M. 134, 159 P. 39 (1916).

■ The cases on the subject of priority between set-off and an attorney's charging lien are certainly not completely in accord, but the modern trend is to protect the attorney against such a set-off by holding his charging lien to be superior. We must agree with the federal court applying concepts of New Mexico law in Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371 (10th Cir. 1962), which held:

> "The attorneys' lien claimed in this case is a charging lien, and is an equitable right of an attorney to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit. The enforceability of the lien is sustained upon the theory that the fund or judgment is the product of the services and skill of the attorney. Such liens are recognized as valid by the law of New Mexico. It is necessary, however, to the existence of the lien that there be a valid contract for fees, either express or implied, entered into between the attorney and his client. The lien of an attorney for services rendered in an action relates back to, and takes effect from, the time of the commencement of the services, when it attaches to a judgment, it is superior to the claim of a creditor in whose favor execution has been levied, or to a subsequent attachment, garnishment, or trustee process, or other liens on the money or property involved, subsequent in point of time.
>
> "With these rules of law in mind, appellees clearly had an attorney's equitable lien upon the judgment fund for their fees. * * *"

■ In the case at bar, the judgments of all parties accrued at the same time and in the same cause of action, as in the case quoted from above. The judgment obtained by the Thomases on their counterclaim came about as a result of their attorney's efforts. The counterclaim judgment was awarded on the basis of fraud on the part of Standard. Based on all of these facts, the trial judge properly allowed the priority of the attorney's lien. Compare 51 A.L.R. 1278, at 1282; 121 A.L.R. 478, at 491.

■ The remaining point to be disposed of concerns the cross-appeal of the defendants Thomas regarding defendants' set-off against plaintiffs. When mutual claims of parties have passed into judgments, one judgment may be set off against the other. We consider this to be an absolute right. See Scholle v. Pino, 9 N.M. 393, at 395, 396, 54 P. 335 (1898); 121 A.L.R. 478, at 480, and § 21-8-25, N.M.S.A. (1953 Comp.)

We are of the opinion that a proper disposition of the remaining $6,500, after our above recognition of a $6,500 charging lien, would be a set-off aimed at reducing the deficiency judgment against Thomas.

We affirm. It is so ordered.

OMAN and STEPHENSON, JJ., concur.

487 P.2d 493

STATE of New Mexico, Plaintiff-Appellee,

v.

John Wesley PAUL, Defendant-Appellant.

No. 565.

Court of Appeals of New Mexico.

July 9, 1971.

Jack L. Love, John V. Coan, Albuquerque, for appellant.

James A. Maloney, Atty. Gen., Santa Fe, Leila Andrews, Asst. Atty. Gen., for appellee.

OPINION

HENDLEY, Judge.

On December 13, 1968, after a plea of guilty to burglary, defendant received a deferred sentence for a period of five years and placed on probation pursuant to a probation agreement signed by the defendant. On April 13, 1970 defendant was convicted of robbery while armed with a deadly weapon. On April 22, 1970 the district attorney filed a motion to have the defendant sentenced under the burglary charge on the grounds of the violation of the terms of the deferred sentence by reason of the April 13, 1970 conviction. Defendant's attorney on the same date filed a motion for a continuance. On April 23, 1970 the court held a hearing and found that defendant had violated the terms of his deferred sentence and accordingly granted the motion of the district attorney invoking the sentence one to five years and giving credit for the time spent on probation.

At oral argument defendant asked that we decide the appeal of the armed robbery before deciding this appeal. The armed robbery conviction, State v. Paul, (Ct.App.), 82 N.M. 619, 485 P.2d 375, decided April 2, 1971, was decided adversely to the defend-

ant; rehearing denied May 5, 1971 and cert. denied May 19, 1971, 82 N.M. 601, 485 P.2d 357.

Defendant asserts four points in this appeal which relate to (1) a motion for continuance, (2) who is the proper officer to institute revocation proceedings, (3) a jury trial on the question of identity and (4) finality of conviction of appeal.

We affirm.

MOTION FOR CONTINUANCE.

Defendant contends a continuance should have been granted since he was facing prosecution under the Habitual Criminal Act. We do not discuss this contention because it is not sustained by the record. State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct. App.1971). The issue is whether the trial court exercised its discretion, under the circumstances, in denying a motion for a continuance.

The granting or denying of a motion for continuance rests in the sound discretion of the court and unless such discretion is abused we will not reverse. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App.1969). The sole issue involved at the hearing before the trial court was whether or not, by the fact of his subsequent armed robbery conviction, defendant violated the terms of the deferred sentence. Consequently a motion for continuance of the hearing to enable counsel to be better prepared was properly denied since there was no claim that defendant had not been convicted of the crime of armed robbery. Compare Territory v. Price, 14 N.M. 262, 91 P. 733 (1907).

WHO IS THE PROPER OFFICER TO INSTITUTE REVOCATION PROCEEDINGS.

It is defendant's contention that the district attorney has no authority to institute probation revocation proceedings, as the decision to invoke a deferred sentence is a discretionary matter vested in the probation officer. Defendant asserts that § 41–17–36, N.M.S.A.1953 (Repl.Vol.1964) delegates supervision of probationers to the director of probations and accordingly the director of probations is the only one that can properly institute probation revocation proceedings. Defendant asserts this on the grounds that not every violation of a probation will cause a revocation of probation and thus it is discretionary and the discretion must lie with the director of probations. In support of this cont[illegible], defendant points out that § 40A–29–20, N.M.S.A.1953 (Repl.Vol.1964), which specifically authorized district attorneys to seek the imposition of a deferred sentence, has been repealed. See Laws 1965, ch. 220, § 1.

Although the specific procedural authority of § 40A–29–20, supra, has been repealed, the district attorney still is the chief law officer of his district. He is empowered to "* * * [p]rosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested;" § 17–1–11, N.M.S.A.1953 (Repl. Vol.1970). A violation of the conditions of a deferred sentence, by virtue of a subsequent felony conviction, is certainly within the concept of "prosecute * * * cases * * * in which the state * * * may be interested." Compare State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912). Section 41–17–28.1, N.M.S.A.1953 (Repl. Vol.1964) does not limit the power of the district attorney to prosecute either expressly or by necessary implication.

JURY TRIAL ON THE QUESTION OF IDENTITY.

Defendant contends that he was entitled to a jury trial in revocation proceedings but recognizes that the right to a jury trial is limited to the question of identity. State v. Holland, 78 N.M. 324, 431 P.2d 57 (1967); State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct.App.1967). Although defendant recognizes that *Raines* and *Holland* were revocations in suspended sentence cases he contends that State v. Brusenhan,

78 N.M. 764, 438 P.2d 174 (Ct.App.1968) contains language which would indicate that one is also entitled to a jury trial on the question of identity in a deferred sentence case.

We feel that the *Raines* case is dispositive of this issue when it stated:

> "* * * In such a determination the defendant is not entitled to a jury trial any more than upon the allocution at the time of the original sentence, except in case he pleads want of identity of himself and the person originally sentenced, a state of affairs rarely arising. * * *"

Having failed to raise the question of want of identity defendant waives his right to a trial by jury on that issue. State v. Brusenhan, supra.

FINALITY OF CONVICTION ON APPEAL.

It is defendant's contention that conviction of a crime, which has been appealed, may not be the basis for invoking a deferred sentence until the conviction has been affirmed on appeal. Defendant cites cases from Texas and North Carolina for the proposition that where the defendant has appealed from both the order invoking the deferred sentence and from the conviction, which was the basis of the order, the hearing on appeal of the order invoking sentence should be held in abeyance until the final determination of the conviction. Defendant also cites cases which hold that a conviction is not final until affirmed on appeal.

We do not consider whether a conviction is final pending outcome on appeal because the applicable rule is stated in State v. Guffey, 253 N.C. 43, 116 S.E.2d 148 (1960) and People v. Collins, 345 P.2d 484 (Cal. App.1959). Those cases indicate that when two appeals, as hereinabove stated, are taken, the appeal from the order invoking the deferred sentence should await the outcome of the appeal of the conviction.

The conviction of defendant of armed robbery having been affirmed, the invocation of defendant's deferred sentence on the basis of the conviction is also affirmed.

It is so ordered.

WOOD, J., and DEE C. BLYTHE, District Judge, concur.

487 P.2d 495

Thomas J. O'NEIL, Plaintiff-Appellant,

v.

FURR'S, INC., and Bellas Hess Super Stores, Inc., Defendants-Appellees.

No. 564.

Court of Appeals of New Mexico.
June 18, 1971.
Certiorari Issued July 21, 1971.

Lewis R. Sutin, Sutin, Thayer & Browne, Irwin S. Moise, Albuquerque, for plaintiff-appellant.

Ranne B. Miller, Keleher & McLeod, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff, O'Neil, a salesman, sold bakery products to defendant, Furr's Inc. It was plaintiff's obligation to keep the assigned shelf space in defendant's grocery store replenished. Because there was no guarantee that plaintiff would be able to make delivery on short notice, it was to his advantage to keep a "backup" supply of bakery products at the store in addition to those on the display shelf. Defendant's manager directed plaintiff to keep this "backup" supply on top of a walk-in cooler which was eight feet high. Other bakery salesmen also kept their "backup" supplies on top of the cooler. One day when plaintiff was on top of the cooler he slipped on some peas, fell and was injured.

Defendants' motion for summary judgment was denied. The case was tried to

a jury. Motions for a directed verdict on the theory of contributory negligence and assumption of risk at the end of plaintiff's case and at the close of all the evidence were denied. However, the jury was unable to arrive at a verdict and was discharged. Thereafter, defendants again made a motion for a directed verdict pursuant to § 21-1-1(50) N.M.S.A.1953 (Repl. Vol.1970). The court granted the motion ruling that defendants were not negligent and that plaintiff was guilty of contributory negligence and assumption of risk.

On appeal plaintiff asserts that there were questions of fact on the issue of defendants' negligence and plaintiff's contributory negligence and assumption of risk, and it was therefore error to take these issues away from the jury.

We affirm.

Our opinion will be limited to the negligence of defendants, proximate cause and assumption of risk. The issue of assumption of risk and proximate cause in those areas where defendants could have been found negligent is dispositive of the issues on appeal and we will not discuss plaintiff's contributory negligence. Williamson v. Smith (Ct.App.) 82 N.M. 517, 484 P.2d 359, decided March 26, 1971.

Plaintiff would have us rule that there were issues of fact to be determined by the jury regarding defendants' failure to provide a safe place for plaintiff to work. The allegations center around three factual circumstances: the presence of loose peas on top the porcelain cooler; defendants' not providing a ladder for plaintiff thus making it necessary for him to climb on boxes and then on top the cooler to store his "backup" supplies; and not providing a rail on top of the cooler.

NEGLIGENCE OF DEFENDANTS.

The mere presence of the peas on top the cooler with no other evidence from which negligence may have been inferred did not present a question of fact to be determined by the jury. Williamson v. Piggly Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P.2d 843 (Ct.App.1969). Plaintiff asserts, and we agree, that he was a business visitor. Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966). In order to find one negligent towards his business invitees it is necessary that the evidence or reasonable inferences therefrom establish a dangerous condition which either is known or should have been known to the proprietor; that the dangerous condition is such that the owner realizes that his invitees would not discover the danger for themselves; and with such knowledge the proprietor fails to exercise reasonable care to protect his invitees. Williamson v. Piggly Wiggly Shop Rite Foods, Inc., supra.

The evidence in this case is that the peas were seen on the cooler for the first time on the day of the accident, and that plaintiff was the only person who saw them. There was neither evidence nor speculation as to how the peas got there. The proprietor and his employees had no likelihood of seeing loose peas on the cooler for only salesmen of bakery products went on top the cooler. The evidence adduced at trial leads only to the conclusions that defendants had no reason to suspect that there would be any peas on top the cooler. They could not be charged with knowledge of the dangerous situation. Hence, as a matter of law, they were not negligent on this issue to their business invitees. Williamson v. Piggly Wiggly Shop Rite Foods, Inc., supra.

SAFE PLACE TO WORK.

We shall assume for purposes of this discussion that defendants in fact had a duty to provide plaintiff with a safe place for work. We shall further assume that the absence of a ladder and a rail constituted negligence by defendants.

Considering the evidence on these two issues we find that the trial court properly disposed of them as a matter of law. For the doctrine of assumption of risk to apply, it must be shown that a dangerous situation existed; that the plaintiff knew of the dangerous situation; and that the

plaintiff voluntarily exposed himself to the danger and was injured thereby. Williamson v. Smith, supra; Francis v. Johnson, 81 N.M. 648, 471 P.2d 682 (Ct.App.1970).

Generally the defense of assumption of risk is a question to be determined by the trier of fact but it becomes a question of law when all the evidence will support but one legitimate inference. Stewart v. Barnes, 80 N.M. 102, 451 P.2d 1006 (Ct. App.1969); Williamson v. Smith, supra. At trial the undisputed evidence was that plaintiff knew of the dangerous situation on which he predicates defendants' negligence. He admitted that it was dangerous stacking goods on top the cooler without a ladder. He requested a ladder and none was provided. He appreciated the danger of falling from the cooler. He knew that the porcelain surface of the cooler was more slippery than concrete and was dangerous since it did not have a protective rail around the top. This evidence leads to but one conclusion, that the plaintiff knew and appreciated the danger.

Plaintiff urges us, however, that he did not voluntarily assume the risk. He contends that he "was ordered, in effect coerced, into working on top the box." In light of the testimony that plaintiff had to please the store manager or lose his shelf space and since he was paid on commission, plaintiff's contention approaches the "economic coercion" argument. However, this court has recently reiterated its stand that "economic coercion" does not negate voluntariness. Williamson v. Smith, supra. Under the facts of this case, as a matter of law, plaintiff voluntarily assumed the risk of the absence of a rail on the top of the box.

Williamson v. Smith, supra, also refers to the view that a servant does not assume the risk if there is an assurance by the master that a condition, about which the servant has complained, will be remedied. Under this view, it is doubtful that plaintiff may be held, as a matter of law, to have assumed a risk arising from the absence of a ladder under the evidence. Even if assumption of risk is not applicable to the absence of a ladder, the undisputed evidence is that the ladder simply had nothing to do with the accident. There is evidence that the peas caused the fall and that the guard rail would have prevented the fall to the floor. There is only speculation that the absence of the ladder had anything to do with the fall. The absence of the ladder, insofar as it supports a theory of an unsafe place to work, simply is not a causal element in plaintiff's accident.

Affirmed.

It is so ordered.

SPIESS, C. J., and WOOD, J., concur.

487 P.2d 906

STATE of New Mexico ex rel. STATE HIGHWAY DEPARTMENT of New Mexico, Petitioner-Appellee,

v.

INTERTRIBAL INDIAN CEREMONIAL ASSOCIATION, Inc., a New Mexico Corporation, Defendant-Appellee,

v.

Elizabeth C. DENNY, Trustee under the Last Will and Testament of Gretchen D. H. Lyon, Deceased, et al., Defendants-Appellants.

No. 9191.

Supreme Court of New Mexico.

Aug. 2, 1971.

Grantham, Spann, Sanchez & Rager, Albuquerque, Denny, Glascock & McKim, Gallup, for appellants.

John E. Perry, Gallup, for appellee.

OPINION

McMANUS, Justice.

This action was brought in the District Court of McKinley County, New Mexico, by the State Highway Department to condemn certain land for highway purposes. The appellants and appellee were named as defendants and both claimed the proceeds from the condemnation. The appellees, Intertribal Indian Ceremonial Association, Inc., a New Mexico corporation, claimed title in fee simple to said property under a deed from McKinley County, New Mexico. Appellants, likewise, claimed a fee simple title under a possibility of reverter in a prior deed. The district court granted appellee's motion for summary judgment from which this appeal is taken.

As background, the record reflects a deed from the Santa Fe Pacific Railroad to one Gregory Page of Gallup, New Mexico. The deed was dated March 23, 1921 and filed of record in McKinley County on April 22, 1921. The deed covered 93.53 acres, more or less, and contained the following language:

> "TO HAVE AND TO HOLD the said premises above described, with the appurtenances, unto the said party of the second part, and his heirs and assigns forever, upon the following conditions, limitations and restrictions:
>
> "That the above described premises shall at all times be kept and maintained

as a public park, fairgrounds or place of recreation and amusement, for the use of all the residents of said County of McKinley, and shall at all times be known and designated as 'The Lyon Memorial Park,' in memory of Albert Edward Lyon, and of the residents of said County of McKinley who lost their lives in the late war with Germany and her Allies; and no use of said premises or any part thereof shall be permitted for any purpose or purposes whatsoever other than the purposes hereinabove stated.

"That the said party of the second part accepts the foregoing conveyance of said described premises upon the conditions, limitations and restrictions hereinabove set forth. In the event said premises or any part thereof shall at any time hereafter be devoted to any uses or purposes other than those hereinabove stated, then the title to the above described premises shall immediately revert to and vest in the said party of the first part, its successors or assigns.

"Provided, however, that nothing herein contained shall be held to prohibit said party of the second part from conveying and dedicating said premises to the County of McKinley, State of New Mexico, upon the conditions, limitations and restrictions hereinabove set forth, which shall, by the terms of any instrument of conveyance or dedication, be made binding upon said County of McKinley."

Following this conveyance, Gregory Page conveyed this same land to McKinley County by deed dated April 23, 1921, and recorded April 25, 1921. The deed retained substantially the same language as quoted above in the prior deed, but called for reversion to Page from the county, although it also contained language verifying the fact that it was subject to the conditions of the original conveyance from the railroad to Page.

Subsequently, on November 21, 1950, the railroad executed a deed to McKinley County, stating:

"NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars and other good and valuable consideration, in hand paid to the party of the first part, receipt whereof is hereby acknowledged, the said party of the first part does hereby remise, release and quitclaim unto the said party of the second part, its successors or assigns, any and all rights or title which the party of the first part may have reserved to itself in the above-quoted reservation and exception."

By deed recorded March 15, 1962, the county conveyed approximately 53 acres of the land to the appellee, Intertribal Indian Ceremonial Association, Inc. This tract was the subject of the condemnation procedure causing this lawsuit.

By deed dated October 13, 1965, the county conveyed 2.468 acres to the New Mexico State Armory Board. By a subsequent deed dated September 21, 1966, the county deeded 2.664 acres to the State Highway Department. These two tracts were part of the original 93.53 acre tract, but not within the land conveyed to the Ceremonial Association.

On January 5, 1970, the State of New Mexico began condemnation proceedings in McKinley County, including as defendants both the appellants and the appellee. The acreage herein was included in the suit.

The appellants claim their title through Gregory Page, now deceased. One Gretchen D. Lyon was the heir, devisee and legatee of the estate of Gregory Page. Mrs. Lyon died, and her will named Elizabeth C. Denny as trustee. The other appellants are beneficiaries under the will of Mrs. Lyon. Appellants claim that the title to the condemned acreage reverted to them when the county breached the conditions of the deed by conveying certain acreage for non-park purposes con-

trary to the conditions of the conveyance from Page to the county. Appellee would agree that the conditions were breached but claims title under the prior deed from the railroad to Page, the railroad having quitclaimed such rights to appellee. At the hearing, both parties stipulated that the 50.32 acre tract was appraised at $1,-800 per acre, which was its highest and best use as residential property and not as a park.

Inasmuch as the matters of concern in this case were disposed of by summary judgment the transcript gives no real guidance to the intent of any of the parties to the various conveyances involved herein. In our opinion there are several questions of fact which were not answered for the record. Some of the unanswered questions presented would be the effect and intent of the conveyances from the railroad to Page, Page to McKinley County, and the quitclaim deed from the railroad to McKinley County. Further, nothing in the record reflects the effect of the conveyances by McKinley County to the Armory Board and the State Highway Department. In Zengerle v. Commonwealth Insurance Co. of N. Y., 60 N.M. 379, 291 P.2d 1099 (1955), Justice Lujan wrote:

> "A summary judgment can be granted only where the record shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try an issue of fact but rather to determine whether there is an issue of fact. The method is necessarily inquisitorial. If there is a material issue of fact, it must be submitted to the jury, unless a jury trial is waived. * * *"

Also, see Southern Pacific Company v. Timberlake, 81 N.M. 250, 466 P.2d 96 (1970); Johnson v. Primm, 74 N.M. 597, 396 P.2d 426 (1964).

In light of the foregoing, we have determined that the summary judgment granted was in error. The cause is remanded to the District Court of McKinley County, New Mexico, for a full trial and eventually appropriate findings of fact and conclusions of law.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

487 P.2d 908

HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff-Appellant,

v.

C AND H CONSTRUCTION AND PAVING COMPANY, Inc., Defendant-Appellee.

No. 9213.

Supreme Court of New Mexico.

Aug. 2, 1971.

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

Toulouse, Moore & Walters, Albuquerque, for defendant-appellee.

OPINION

McMANUS, Justice.

Plaintiff sued in the District Court of Bernalillo County to recover premiums alleged due upon a liability policy issued by it to defendant. After trial without a jury, judgment was entered for only part of the sums claimed, and plaintiff appeals.

Plaintiff issued a liability policy to defendant, the premium for which was to be based on defendant's expenditures for wages and rental of equipment from others, and also on receipts from rental of its own equipment to others. These items were estimated in advance by defendant. At the end of the policy period plaintiff audited defendant's records and determined that the actual earned premium was $6,-725.00 greater than that estimated and paid in advance by plaintiff. Defendant denied any additional indebtedness and alleged that it was entitled to a reduced premium on the vehicles it leased from others because of a clause in the policy which provided for a premium of only 5% of the normal premium under certain conditions.

The problem revolves around the meaning and application of a provision of the policy which reads, as follows:

> "The rates for each $100.00 of 'cost of hire' shall be 5% of the applicable hired automobile rates, provided the owner of such hired automobile has purchased automobile Bodily Injury Liability and Property Damage Liability covering the interest of the named insured on a direct primary basis as respects such automobile and submits evidence of such insurance to the named insured."

Defendant had obtained "Certificates of Insurance" from the owners of vehicles it had leased. A certificate of insurance is merely a statement from an insurer that a particular vehicle leased to lessee is covered by a policy of insurance. Defendant was not shown as an insured in any of these certificates. Defendant contends that the policies of insurance referred to in the certificates were adequate to qualify it for the reduced premium. Plaintiff insists that the defendant could qualify for the reduced rate only by producing either policies or certificates of insurance in which the defendant is specifically named as an insured and with maximum limits of liability which are as great as those in the policy issued by plaintiff to defendant. It was shown that some of the policies referred to by the certificates were lower than the limits issued by the plaintiff.

After a careful reading of the transcript, it is obvious that the trial judge decided that the interpretation of the above-quoted policy provision was ambiguous. An ambiguity arises in the provision under consideration since it is fairly susceptible of two different constructions by reasonably intelligent men on reading it. Reasonably intelligent men could honestly differ as to the meaning thereof. See East and West Ins. Co. of New Haven, Conn. v. Fidel, 49 F.2d 35 (10th Cir. 1931).

Thus, the trial court was correct in resolving it against appellant. Foundation Reserve Ins. Co. v. McCarthy, 77 N.M. 118, 419 P.2d 963 (1966). In arriving at his decision the court considered the "omnibus clause" in the insurance contracts involved. All the policies had equivalent provisions, as follows:

> "Each of the following is an insured under this insurance to the extent set forth below:
>
> (a) The named insured;
>
> * * * * * *
>
> (c) Any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be insured only if he is: (1) a lessee or borrower of the automobile; (2) an employee of the named insured or such lessee or borrower."

The trial court found that the certificate of insurance met the requirement of the policy that the owner of the leased truck purchased automobile insurance covering the interest of the defendant on a direct primary basis, and we think this is correct. See Continental Cas. Co. v. American Fidelity and Casualty Co., 275 F.2d 381 (7th Cir. 1960).

Appellant contends that the words "covering the interest" of plaintiff meant a coverage to the extent of $100,000 for each person and $300,000 for each accident, which was the coverage provided in the policy issued by plaintiff to defendant. These words, too, were considered ambiguous by the trial court. The language of the plaintiff's policy did not help in this regard. Again, when a provision is susceptible of two different constructions an ambiguity does arise. Therefore, the trial court must resolve the problem and we will not challenge his decision. See East and West Ins. Co. of New Haven, Conn. v. Fidel, supra, and Foundation Reserve Ins. Co. v. McCarthy, supra.

It is further a general rule that the "coverage of a liability policy will extend not only to the named insured, but to all persons or classes of persons specifically listed in the policy's omnibus clause," Lazarus v. Manufacturers Casualty Ins. Co., 105 App.D.C. 357, 267 F.2d 634 (1959).

Our disposition of the above point makes it unnecessary to consider the second point concerning the trial court's finding that plaintiff was estopped to refuse defendant a reduced rate.

We affirm. It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

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